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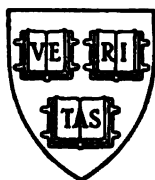
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ALL THE CURRENT DECISIONS

OF THE

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CASES REPORTED.

	Page		Page
Ackerly, Brooks v. (N. Y.).....	412	Behrensmeyer, Kreitz v. (Ill.).....	232
Adams v. Babcock (N. Y.).....	871	Belk v. People (Ill.).....	744
Adams v. Messenger (Mass.).....	491	Bell, Colwell v. (N. Y.).....	870
Alexander v. Town of New Castle (Ind.).....	200	Belton v. Hatch (N. Y.).....	225
Alkire v. Kahla (Ill.).....	693	Bemis, Holmes v. (Ill.).....	42
Allen, Linton v. (Mass.).....	523	Bemis, Ogden v. (Ill.).....	55
Allen, Shepard v. (Ill.).....	756	Bennett v. Leeds Manuf'g Co. (N. Y.).....	669
Alsdorf v. Reed (Ohio).....	73	Benson v. Goodwin (Mass.).....	517
Alvey v. Reed (Ind.).....	265	Benson, Russell & Allison Drainage Dist. v. (Ill.).....	814
American Fire Ins. Co. v. Brighton Cotton Manuf'g Co. (Ill.).....	771	Berdell v. Egan (Ill.).....	709
Anderson v. Scholey (Ind.).....	125	Berkowitz, Lester v. (Ill.).....	706
Anderson, In re (N. Y.).....	209	Bernard v. Barney Myroleum Co. (Mass.).....	887
Angle, People v. (N. Y.).....	413	Bernhamer v. Miller (Ind.).....	115
Appleton, Badger v. (N. Y.).....	874	Beste v. Burger (N. Y.).....	734
Atlantic Cotton-Mills v. Indian Or- chard Mills (Mass.).....	496	Bigelow, Hammons v. (Ind.).....	192
August v. National Park Bank of N. Y. (N. Y.).....	874	Black, Brace v. (Ill.).....	66
Au Sable Quarry Co., Hughes v. (Ill.)	486	Blackmer v. Home Ins. Co. (Ind.)...	588
		Blackmer v. Royal Ins. Co. (Ind.)...	580
Babcock, Adams v. (N. Y.).....	871	Blair, Meyer v. (N. Y.).....	228
Babcock, Rochester, H. & L. R. Co. v. (N. Y.).....	678	Blaiser v. New York, L. E. & W. R. Co. (N. Y.).....	692
Badger v. Appleton (N. Y.).....	874	Blanchard v. Cooke (Mass.).....	313
Bailey v. Hemenway (Mass.).....	645	Bly, Richey v. (Ind.).....	296
Baker, Minot v. (Mass.).....	839	Board of Com'rs v. Dailey (Ind.)...	619
Baldwin v. Ratcliff (Ill.).....	794	Board of Com'rs v. State (Ind.)...	855
Ballard, Cutsinger v. (Ind.).....	206	Board of Sup'rs of Greene County, People v. (N. Y.).....	874
Ball, Leake v. (Ind.).....	918	Board of Sup'rs, People v. (Ill.)...	147
Bank of Metropolis v. Klinker (N. Y.).....	874	Board of Sup'rs, People v. (Ill.)...	802
Bank of Montreal v. Recknagel (N. Y.).....	217	Bolten, Wells County v. (Ind.).....	294
Bannon v. Thayer (Ill.).....	54	Born v. Schrenkeisen (N. Y.).....	389
Barker, Ohio & M. Ry. Co. v. (Ill.)	797	Boston Disinfecting Co., Paper Stock Disinfecting Co. v. (Mass.)	554
Barkley, Pollard v. (Ind.).....	294	Bourland v. Gibson (Ill.).....	319
Barnard v. Brower (N. Y.).....	376	Bowen v. Pope (Ill.).....	64
Barnes, King v. (N. Y.).....	870	Bowen, Outland v. (Ind.).....	281
Barney Myroleum Co., Bernard v. (Mass.).....	887	Boyd v. Fullerton (Ill.).....	319
Barry v. Hamburg-Bremen Fire Ins. Co. (N. Y.).....	405	Brace v. Black (Ill.).....	66
Bass F. & M. Works v. Parke County (Ind.).....	598	Bradley, Syfers v. (Ind.).....	619
Batcheller, Hecht v. (Mass.).....	651	Bradshaw, Sawyer v. (Ill.).....	812
Bates v. Old Colony R. Co. (Mass.)	638	Brake, Centralia & C. R. Co. v. (Ill.)	820
Baughn v. Baughn (Ind.).....	181	Branch v. Faust (Ind.).....	898
Baylis v. Stimson (N. Y.).....	144	Brannen v. Kokomo, G. & J. G. R. Co. (Ind.).....	202
Beach, Rogers v. (Ind.).....	609	Bravard v. Cincinnati, H. & I. R. Co. (Ind.).....	183
Becker, Schneider v. (Ill.).....	31	Brigham v. Hubbard (Ind.).....	920
Bedgood v. State (Ind.).....	621	Brighton Cotton Manuf'g Co., Amer- ican Fire Ins. Co. v. (Ill.).....	771
		Britton v. State (Ind.).....	254

(iii)

	Page		Page
Brooklyn Life Ins. Co., Carter v. (N. Y.).....	896	City of Logansport v. Dykeman (Ind.).....	587
Brooks v. Ackerly (N. Y.).....	412	City of Rochester, Weaver v. (N. Y.).....	871
Brower, Barnard v. (N. Y.).....	876	City of Sterling v. Merrill (Ill.).....	6
Brown v. Purdy (N. Y.).....	872	Cleveland, C., C. & I. Ry. Co. v. Schneider (Ohio).....	821
Brown, First African M. E. Church v. (Mass.).....	549	Cleveland, C., C. & I. Ry. Co. v. Wy- nant (Ind.).....	118
Brown, Gage v. (Ill.).....	754	Cloud v. Greasley (Ill.).....	826
Bryson v. James (N. Y.).....	871	Coal Run Coal Co. v. Finlen (Ill.)..	11
Buchart v. Burger (Ind.).....	125	Coar, Purdy v. (N. Y.).....	352
Burdon v. Massachusetts Safety- Fund Ass'n (Mass.).....	874	Coe, Walton v. (N. Y.).....	676
Burger, Beste v. (N. Y.).....	734	Coffin v. Lester (N. Y.).....	878
Burger, Buchart v. (Ind.).....	125	Cohen, Doran v. (Mass.).....	647
Burke v. Railway Co. (Ohio).....	557	Cole v. Cole (N. Y.).....	682
Burnett, In re (N. Y.).....	872	Cole, Proctor v. (Ind.).....	189
Burton, Perry v. (Ill.).....	762	Cole, Smith v. (N. Y.).....	356
Burton, Root v. (Ind.).....	194	Colwell v. Bell (N. Y.).....	870
Buttenuth v. St. Louis Bridge Co. (Ill.).....	489	Commons v. Commons (Ind.).....	271
Byrne v. Matthews (N. Y.).....	868	Commonwealth v. Carey (Mass.)...	97
Caldwell, State v. (Ind.).....	185	Commonwealth v. Houle (Mass.)...	896
Calman, Lienkauf v. (N. Y.).....	389	Commonwealth v. Welch (Mass.)...	895
Campbell v. Mandeville (N. Y.)....	866	Commonwealth v. Whalen (Mass.)..	881
Cannon, White v. (Ill.).....	758	Conant, Turner v. (N. Y.).....	872
Caraher, Gage v. (Ill.).....	777	Cook v. People (Ill.).....	849
Carey, Commonwealth v. (Mass.)...	97	Cook County v. Sennott (Ill.).....	791
Carpenter v. Cool (Ind.).....	266	Cook, Fisher v. (Ill.).....	763
Carpenter, Singer v. (Ill.).....	761	Cooke, Blanchard v. (Mass.).....	313
Carr v. Providence-Washington Ins. Co. (N. Y.).....	869	Cool, Carpenter v. (Ind.).....	266
Carr v. Security Ins. Co. (N. Y.)....	869	Cooper v. Cooper (Mass.).....	892
Carter v. Brooklyn Life Ins. Co. (N. Y.).....	896	Cooper, Herdman v. (Ill.).....	826
Carter, Harris v. (Mass.).....	649	Cornell v. Donovan (N. Y.).....	869
Carter, People v. (N. Y.).....	222	Costello v. Costello (N. Y.).....	868
Centralla & C. R. Co. v. Brake (Ill.)	820	Cunningham v. State (Ind.).....	904
Chicago, B. & Q. R. Co. v. Perkins (Ill.).....	1	Cushman, Willis v. (Ind.).....	168
Chicago, B. & Q. R. Co. v. Sullivan (Ill.).....	460	Cutsinger v. Ballard (Ind.).....	206
Chicago, M. & St. P. R. Co. v. Krue- ger (Ill.).....	52	Dailey, Board of Com'rs v. (Ind.)...	619
Chicago, M. & St. P. Ry. Co. v. West (Ill.).....	738	Daubenspeck, Home Ins. Co. v. (Ind.).....	601
Chicago, R. I. & P. Ry. Co. v. Fel- ton (Ill.).....	765	Davis v. New York, L. E. & W. R. Co. (N. Y.).....	733
Chicago, S. F. & C. Ry. Co. v. Phelps (Ill.).....	769	Davis v. Rupe (Ind.).....	163
Chicago & A. Ry. Co., Roushlanga v. (Ind.).....	196	Dawson, In re (N. Y.).....	668
Childs v. Seabury (N. Y.).....	870	De Graff v. Wyckoff (N. Y.).....	869
Christgau, Millman v. (N. Y.).....	870	Dehority v. Paxson (Ind.).....	259
Christin v. Erwin (Ill.).....	707	Delaware & H. Canal Co., Wheaton v. (N. Y.).....	873
Cignarale, People v. (N. Y.).....	135	Denison v. Taylor (N. Y.).....	869
Cincinnati, H. & I. R. Co., Bravard v. (Ind.).....	183	Dewitt v. Van Schoyk (N. Y.).....	425
Cincinnati, I. St. L. & C. Ry. Co., Reibel v. (Ind.).....	107	Dexter v. Inches (Mass.).....	551
City of Chicago v. Hill (Ill.).....	46	Doane, New York, C. & St. L. Ry. Co. v. (Ind.).....	913
City of Chicago v. Stinson (Ill.)....	43	Dodge v. Zimmer (N. Y.).....	399
City of Chicago, People v. (Ill.)....	56	Donley v. Scanlon (Ind.).....	156
City of East St. Louis v. People (Ill.)	447	Donovan, Cornell v. (N. Y.).....	869
City of La Fayette, Gaylord v. (Ind.)	899	Doran v. Cohen (Mass.).....	647
		Doran, Wilson v. (N. Y.).....	686
		Douglass, Holcraft v. (Ind.).....	275
		Douglass, Jenkins v. (N. Y.).....	869
		Drainage Com'rs, Samuels v. (Ill.)..	829
		Duesterberg v. State (Ind.).....	634
		Duesterberg v. Swartzel (Ind.)....	155
		Duffy v. State (Ind.).....	615
		Dunz, Taubenhan v. (Ill.).....	456

CASES REPORTED.

V

	Page		Page
Durham v. State (Ind.).....	689	Greasley, Cloud v. (Ill.).....	826
Dykeman, City of Logansport v. (Ind.).....	587	Gregory, Elliott v. (Ind.).....	196
Eaton, Wells County v. (Ind.).....	294	Grewes, Heckle v. (Ill.).....	487
Egan, Berdel v. (Ill.).....	709	Griffin v. Griffin (Ill.).....	782
Einstein v. Haskell (Ill.).....	59	Grimshaw, Jansen v. (Ill.).....	850
Elliott v. Gregory (Ind.).....	196	Grimsey v. State (Ind.).....	928
Ellis v. Rock Island & M. C. R. Co. (Ill.).....	62	Grosvenor v. Sickle (N. Y.).....	869
Ellsworth v. Miner T. Ames Co. (Ill.).....	467	Grote, Rank v. (N. Y.).....	665
Emmons, McCabe v. (N. Y.).....	869	Gruver, Wells County v. (Ind.).....	290
Ender, Marshall v. (Ill.).....	464	Gundlich v. Hensler (N. Y.).....	868
English v. Leman (Ill.).....	758	Gunsaulus v. Pettit (Ohio).....	281
Erwin, Christin v. (Ill.).....	707	Gurney, McKeown v. (Mass.).....	812
Evansville & T. H. R. Co. v. Guyton (Ind.).....	101	Guyton, Evansville & T. H. R. Co. v. (Ind.).....	101
Evansville & T. H. R. Co. v. Mosier (Ind.).....	109	Hale v. Hale (Ill.).....	470
Everingham v. National City Bank of Ottawa (Ill.).....	26	Hallorn v. Trum (Ill.).....	828
Fairbank Canning Co. v. Innes (Ill.).....	720	Hamburg-Bremen Fire Ins. Co., Barry v. (N. Y.).....	405
Faust, Branch v. (Ind.).....	898	Hamill, People v. (Ill.).....	799
Feig, Mayer v. (Ind.).....	159	Hamilton v. Smith (N. Y.).....	740
Fellows, Stewart v. (Ill.).....	476	Hammons v. Bigelow (Ind.).....	192
Felton, Chicago, R. I. & P. Ry. Co. v. (Ill.).....	765	Handy v. Sibley (Ohio).....	839
Fiester v. People (Ill.).....	748	Hanover Fire Ins. Co. v. Germania Fire Ins. Co. (N. Y.).....	868
Finlen v. Howard (Ill.).....	785	Hansen v. Schlesinger (Ill.).....	718
Finlen, Coal Run Coal Co. v. (Ill.).....	11	Harding v. Gibbs (Ill.).....	60
First African M. E. Church v. Brown (Mass.).....	549	Harris v. Carter (Mass.).....	649
Fisher v. Cook (Ill.).....	768	Hartford, Tower v. (Ind.).....	281
Fitzgerald v. Quann (N. Y.).....	854	Hartlep, Mitchell v. (Ind.).....	606
Fowler, Hunt v. (Ill.).....	491	Haskell, Einstein v. (Ill.).....	51
Franks, Lower v. (Ind.).....	680	Haskins, Wingate v. (N. Y.).....	877
French, People v. (N. Y.).....	878	Hatch, Belton v. (N. Y.).....	22F
Fullerton, Boyd v. (Ill.).....	819	Hawes v. People (Ill.).....	13
Gage v. Brown (Ill.).....	754	Hawkins, People v. (N. Y.).....	871
Gage v. Caraher (Ill.).....	777	Hayt, Reid v. (N. Y.).....	418
Gage v. Pirtle (Ill.).....	84	Hecht v. Batcheller (Mass.).....	651
Gage, Martin v. (Mass.).....	810	Hecht, Ohio & M. Ry. Co. v. (Ind.).....	297
Galt, Moriarity v. (Ill.).....	714	Heckle v. Grewes (Ill.).....	487
Gardiner v. Schwab (N. Y.).....	732	Hemenway, Bailey v. (Mass.).....	645
Gaylord v. City of La Fayette (Ind.).....	899	Henderson v. People (Ill.).....	68
Germania Fire Ins. Co. v. Hick (Ill.).....	792	Hensler, Gundlich v. (N. Y.).....	868
Germania Fire Ins. Co., Hanover Fire Ins. Co. v. (N. Y.).....	868	Herdman v. Cooper (Ill.).....	826
Gibbs, Harding v. (Ill.).....	60	Herrington v. Village of Lansingburgh (N. Y.).....	728
Gibson, Bourland v. (Ill.).....	819	Hessian v. State (Ind.).....	614
Gibson, Kernodle v. (Ind.).....	99	Heth Township v. Lewis (Ind.).....	118
Gieseke v. Johnson (Ind.).....	578	Houston v. Simpson (Ind.).....	261
Gillson, People v. (N. Y.).....	843	Hick, Germania Fire Ins. Co. v. (Ill.).....	792
Givens, Mulcahy v. (Ind.).....	598	Hier v. New York, W. S. & B. R. Co. (N. Y.).....	867
Goddard, Moors v. (Mass.).....	582	Hiett v. Nebergall (Ohio).....	558
Goepfer, Jaynes v. (Mass.).....	881	Hill, City of Chicago v. (Ill.).....	46
Goldschmidt v. Union Life Ins. Co. (N. Y.).....	871	Hillyer v. Vandewater (N. Y.).....	872
Goodwin, Benson v. (Mass.).....	517	Hirsch v. Norton (Ind.).....	612
Gould v. Slater Woolen Co. (Mass.).....	581	Hodgdon, Mansfield v. (Mass.).....	544
Grand Trunk Junction Ry. Co., Steele v. (Ill.).....	488	Hodge v. Sloan (N. Y.).....	885
		Hollcraft v. Douglass (Ind.).....	275
		Holmes v. Bemis (Ill.).....	42
		Holmes v. Parker (Ill.).....	759
		Holsclaw v. State (Ind.).....	112
		Home Ins. Co. v. Daubenspeck (Ind.).....	601
		Home Ins. Co., Blackmer v. (Ind.).....	588
		Hope v. Troy & L. R. Co. (N. Y.).....	873
		Hopkins v. Ratliff (Ind.).....	288

	Page		Page
Hornbostel v. Kinney (N. Y.).....	666	Lathers v. Keogh (N. Y.).....	181
Houle, Commonwealth v. (Mass.)...	896	Latimore, Wells County v. (Ind.)...	294
Howard, Finlen v. (Ill.).....	785	Lazarus v. Swan (Mass.).....	655
Hubbard, Brigham v. (Ind.).....	920	Leake v. Ball (Ind.).....	918
Hudson v. Ocean S. S. Co. (N. Y.)..	842	Leeds Manuf'g Co., Bennett v. (N. Y.).....	689
Hudson, Miller v. (Ind.).....	122	Leman, English v. (Ill.).....	758
Hudson, Price v. (Ill.).....	817	Le Page, Russia Cement Co. v. (Mass.).....	804
Huffman, Wells County v. (Ind.)...	294	Lesster, Coffin v. (N. Y.).....	873
Hughes v. Au Sable Quarry Co. (Ill.)	486	Lester v. Berkowitz (Ill.).....	706
Hulse v. Mershon (Ill.).....	50	Lewis, Beth Township v. (Ind.)...	118
Hunt v. Fowler (Ill.).....	491	Lewis, Morgan v. (Ohio).....	558
Illinois Starch Co. v. Ottawa Hy-		Lewis, Williams v. (Ind.).....	262
draulic Co. (Ill.).....	486	Lienkauf v. Calman (N. Y.)....	889
Inches, Dexter v. (Mass.).....	551	Lindley v. Wells (Ind.).....	611
Indiana, B. & W. Ry. Co. v. Wheeler		Linton v. Allen (Mass.).....	523
(Ind.).....	568	Louisville, N. A. & C. R. Co. v.	
Indian Orchard Mills, Atlantic Cot-		Wright (Ind.).....	584
ton Mills v. (Mass.).....	496	Louisville, N. A. & C. Ry. Co., Sher-	
Inglehart v. Thousand Island Hotel		lock v. (Ind.).....	171
Co (N. Y.).....	858	Lovejoy, Steele v. (Ill.).....	711
Innes, Fairbank Canning Co. v. (Ill.)	720	Lower v. Franks (Ind.).....	630
Insurance Co., State v. (Ind.).....	574	Ludlow v. Mead (N. Y.).....	870
Jackman v. Nelson (Mass.).....	539	Ludlow, Wood v. (N. Y.).....	726
Jackson v. Suydam (N. Y.).....	863	Lynch v. Pfeiffer (N. Y.).....	402
Jackson v. Suydam (N. Y.).....	872	Lynch, Pfeiffer v. (N. Y.).....	403
James, Bryson v. (N. Y.).....	871	Lyons, People v. (N. Y.).....	391
Jamison, Wells County v. (Ind.)...	294	MacFall, People v. (Ill.).....	63
Jansen v. Grimshaw (Ill.).....	850	Mack v. Mills (N. Y.).....	870
Jarrard v. State (Ind.).....	912	MacKellar v. Rogers (N. Y.)....	350
Jaynes v. Goepfer (Mass.).....	831	Mandeville, Campbell v. (N. Y.)...	860
Jenkins v. Douglass (N. Y.).....	889	Manhattan Co. v. Phillips (N. Y.)...	129
Jenkins, Mead v. (N. Y.).....	868	Mannix v. State (Ind.).....	565
Johnson v. Johnson (Ind.).....	111	Mansfield v. Hodgdon (Mass.)...	544
Johnson, Gleeske v. (Ind.).....	573	Marsh v. Pierce (N. Y.).....	729
Johnson, People v. (N. Y.).....	624	Marshall v. Ender (Ill.).....	464
Johnson, State v. (Ind.).....	910	Martin v. Gage (Mass.).....	310
Kahla, Alkire v. (Ill.).....	693	Mason, Nantasket Beach R. Co. v.	
Kaufmann v. Village of Hillsboro		(Mass.).....	640
(Ohio).....	557	Massachusetts Safety-Fund Ass'n.	
Kearney, People v. (N. Y.).....	738	Burdon v. (Mass.).....	874
Keister v. Myers (Ind.).....	161	Matthews, Byrne v. (N. Y.).....	868
Kempff, Moulder v. (Ind.).....	906	Mayer v. Feig (Ind.).....	159
Kennedy v. Porter (N. Y.).....	426	McCabe v. Emmons (N. Y.).....	869
Keogh, Lathers v. (N. Y.).....	181	McCann v. Randall (Mass.).....	75
Kernodle v. Gibson (Ind.).....	90	McCoy, People v. (Ill.).....	724
King v. Barnes (N. Y.).....	870	McDougall v. State (N. Y.).....	871
King v. Post (N. Y.).....	870	McGann v. Osgood (Mass.).....	222
Kinney, Hornbostel v. (N. Y.).....	666	McGann, Osgood v. (Mass.).....	222
Kirchoff v. Union Mut. Life Ins. Co.		McKeown v. Gurney (Mass.)...	312
(Ill.).....	716	McLean v. Prentice (N. Y.).....	299
Klinker, Bank of Metropolis v. (N.		McNider, Mee v. (N. Y.).....	424
Y.).....	574	Mead v. Jenkins (N. Y.).....	260
Knobloch v. Mueller (Ill.).....	626	Mead, Ludlow v. (N. Y.).....	870
Kokomo, G. & J. G. R. Co., Bran-		Meadows v. State (Ind.).....	122
nen v. (Ind.).....	922	Mee v. McNider (N. Y.).....	424
Kreitz v. Behrensmeier (Ill.).....	222	Mercer v. Mercer (Ind.).....	122
Kroll v. Wood (N. Y.).....	221	Merrill, City of Sterling v. (Ill.)...	4
Krueger, Chicago, M. & St. P. R. Co.		Mershon, Halse v. (Ill.).....	72
v. (Ill.).....	22	Merwin, People v. (N. Y.).....	222
Lake, People v. (N. Y.).....	142	Messenger, Adams v. (Mass.)...	422
Lanter v. Wallace (Ind.).....	923	Meyer v. Blair (N. Y.).....	222
		Michals, Ruth v. (Ill.).....	222

	Page		Page
Miller v. Hudson (Ind.)	122	Ohio & M. Ry. Co. v. Barker (Ill.)	797
Miller, Bernhamer v. (Ind.)	115	Ohio & M. Ry. Co. v. Hecht (Ind.)	297
Milliman v. Christgau (N. Y.)	870	Ohio & M. Ry. Co., Reed v. (Ill.)	807
Mills, Mack v. (N. Y.)	870	Old Colony R. Co. v. Tripp (Mass.)	89
Miner T. Ames Co., Ellsworth v. (Ill.)	467	Old Colony R. Co., Bates v. (Mass.)	633
Minot v. Baker (Mass.)	839	Oleson, Thor v. (Ill.)	780
Mitchell v. Hartlep (Ind.)	609	O'Melia v. Mullarky (Ill.)	36
Monnett v. Monnett (Ohio)	659	Osgood v. McGann (Mass.)	521
Moors v. Goddard (Mass.)	532	Osgood, McGann v. (Mass.)	521
Moors v. Washburn (Mass.)	884	Ottawa Hydraulic Co., Illinois Starch Co. v. (Ill.)	496
Morgan v. Lewis (Ohio)	558	Outland v. Bowen (Ind.)	281
Moriarity v. Galt (Ill.)	714	Page, Russell v. (Mass.)	536
Morris v. State (Ind.)	598	Palmer, People v. (N. Y.)	218
Mosier, Evansville & T. H. R. Co. v. (Ind.)	109	PaperStock Disinfecting Co. v. Boston Disinfecting Co. (Mass.)	554
Moulder v. Kempff (Ind.)	906	Parke County, Bass F. & M. Works v. (Ind.)	598
Mounsey, Wells County v. (Ind.)	294	Parker, Holmes v. (Ill.)	759
Moyer v. Swygart (Ill.)	450	Parr, Silver v. (Ind.)	114
Mueler, Knobloch v. (Ill.)	696	Paxson, Dehority v. (Ind.)	259
Mulcahy v. Givens (Ind.)	598	Peaslee v. Peaslee (Mass.)	506
Mullarky, O'Melia v. (Ill.)	36	Peck v. Peck (N. Y.)	888
Myers, Keister v. (Ind.)	161	Pehlman v. State (Ind.)	270
Nantasket Beach R. Co. v. Mason (Mass.)	640	Pennsylvania Co. v. Sloan (Ill.)	37
Nantasket Beach R. Co. v. Ransom, two cases, (Mass.)	640	People v. Angle (N. Y.)	418
National City Bank of Ottawa, Everingham v. (Ill.)	26	People v. Board of Sup'rs (Ill.)	147
National Park Bank of N. Y., August v. (N. Y.)	874	People v. Board of Sup'rs of Greene County (N. Y.)	874
Nebergall, Hiett v. (Ohio)	558	People v. Carter (N. Y.)	222
Neff, Smyth v. (Ill.)	702	People v. Cignarale (N. Y.)	135
Nelson v. Welch (Ind.)	589	People v. City of Chicago (Ill.)	56
Nelson, Jackman v. (Mass.)	529	People v. French (N. Y.)	873
Nelson, Smith v. (N. Y.)	871	People v. Gillson (N. Y.)	843
New York Cent. & H. R. R. Co., Thompson v. (N. Y.)	690	People v. Hamill (Ill.)	799
New York Cent. & H. R. R. Co., Waite v. (N. Y.)	780	People v. Hawkins (N. Y.)	871
New York, C. & St. L. Ry. Co. v. Doane (Ind.)	918	People v. Johnson (N. Y.)	684
New York, L. E. & W. R. Co., Blaiser v. (N. Y.)	692	People v. Kearney (N. Y.)	736
New York, L. E. & W. R. Co., Davis v. (N. Y.)	733	People v. Lake (N. Y.)	146
New York, L. E. & W. R. Co., Robinson v. (N. Y.)	867	People v. Lyons (N. Y.)	391
New York, L. E. & W. R. Co., Rochester, H. & L. R. Co. v. (N. Y.)	680	People v. MacFall (Ill.)	63
New York Life Ins. Co., Uhlman v. (N. Y.)	368	People v. McCoy (Ill.)	786
New York State Monitor Milk-Pan Co. v. Remington (N. Y.)	872	People v. Merwin (N. Y.)	872
New York, W. S. & B. R. Co., Hier v. (N. Y.)	867	People v. Palmer (N. Y.)	213
Nichols v. Sargent (Ill.)	475	People v. Walsh (N. Y.)	871
Northrup, Stillman v. (N. Y.)	879	People, Belk v. (Ill.)	744
Norton, Hirsch v. (Ind.)	612	People, City of East St. Louis v. (Ill.)	447
Ocean S. S. Co., Hudson v. (N. Y.)	843	People, Cook v. (Ill.)	849
Ogden v. Bemis (Ill.)	55	People, Fiester v. (Ill.)	743
O'Haleran v. O'Haleran (Ind.)	917	People, Hawes v. (Ill.)	13
		People, Henderson v. (Ill.)	63
		People, St. Louis Bridge Co. v. (Ill.)	468
		People, Spies v. (Ill.)	898
		People, Thompson v. (Ill.)	749
		People's Bank v. St. Anthony's Roman Catholic Church (N. Y.)	408
		People's S., L. & B. Ass'n v. Spears (Ind.)	570
		Perkins, Chicago, B. & Q. R. Co. v. (Ill.)	1
		Perkins, Sherry v. (Mass.)	807
		Perry v. Burton (Ill.)	763
		Pettit, Gunsaulus v. (Ohio)	281

	Page		Page
Pfeiffer v. Lynch (N. Y.).....	402	Royal Exch. Shipping Co., Tarbell v. (N. Y.).....	721
Pfeiffer, Lynch v. (N. Y.).....	402	Royal Ins. Co., Blackmer v. (Ind.)..	580
Phelps v. Smith (Ind.).....	602	Rupe, Davis v. (Ind.).....	168
Phelps, Chicago, S. F. & C. Ry. Co. v. (Ill.).....	769	Russell v. Page (Mass.).....	586
Phillips, Manhattan Co. v. (N. Y.)..	129	Russell & Allison Drainage Dist. v. Benson (Ill.).....	814
Pierce, Marsh v. (N. Y.).....	729	Russia Cement Co. v. Le Page (Mass.).....	804
Piper, Webber v. (N. Y.).....	216	St. Anthony's Roman Catholic Church, People's Bank v. (N. Y.)	408
Pirtle, Gage v. (Ill.).....	84	St. Louis Bridge Co., Bittenuth v. (Ill.).....	489
Platt v. Platt (N. Y.).....	868	St. Louis Bridge Co. v. People (Ill.)	468
Platt v. Platt, three cases, (N. Y.)..	878	Saltmarsh v. Spaulding (Mass.)....	816
Plunkett v. Plunkett (Ind.).....	562	Samuels v. Drainage Com'rs (Ill.)..	829
Pollard v. Barkley (Ind.).....	294	Sargent, Nichols v. (Ill.).....	475
Pope, Bowen v. (Ill.).....	64	Sawyer v. Bradshaw (Ill.).....	812
Popejoy, Wells County v. (Ind.)....	294	Sawyer, Todd v. (Mass.).....	527
Porter, Kennedy v. (N. Y.).....	426	Scanlon, Donley v. (Ind.).....	158
Post, King v. (N. Y.).....	870	Schlesinger, Hansen v. (Ill.).....	715
Pratt v. Town of Weymouth (Mass.)	588	Schneider v. Becker (Ill.).....	81
Prentice, McLean v. (N. Y.).....	869	Schneider, Cleveland, C. & I. Ry. Co. v. (Ohio).....	821
Price v. Hudson (Ill.).....	817	Schneider, Wilson v. (Ill.).....	8
Proctor v. Cole (Ind.).....	189	Scholey, Anderson v. (Ind.).....	125
Providence-Washington Ins. Co., Carr v. (N. Y.).....	869	Schrenkeisen, Born v. (N. Y.).....	339
Purdy, Brown v. (N. Y.).....	872	Schwab, Gardiner v. (N. Y.).....	732
Purdy v. Coar (N. Y.).....	853	Scutt v. Robertson (Ill.).....	14
Quann, Fitzgerald v. (N. Y.).....	854	Seabury, Childs v. (N. Y.).....	870
Railway Co., Burke v. (Ohio).....	557	Searing v. Village of Saratoga Springs (N. Y.).....	878
Randall, McCann v. (Mass.).....	75	Second Nat. Bank of Richmond v. Townsend (Ind.).....	116
Randall, Willard v. (Mass.).....	75	Security Ins. Co., Carr v. (N. Y.)...	869
Rank v. Grote (N. Y.).....	665	Sennott, Cook County v. (Ill.).....	791
Ransom, Nantasket Beach R. Co. v., two cases, (Mass.).....	640	Shepard v. Allen (Ill.).....	756
Ratcliff, Baldwin v. (Ill.).....	794	Sherlock v. Louisville, N. A. & C. Ry. Co. (Ind.).....	171
Ratliff, Hopkins v. (Ind.).....	288	Sherry v. Perkins (Mass.).....	807
Recknagel, Bank of Montreal v. (N. Y.).....	217	Sibley, Handy v. (Ohio).....	329
Reed v. Hayt (N. Y.).....	418	Sickle, Grosvenor v. (N. Y.).....	869
Reed v. Ohio & M. Ry. Co. (Ill.)...	807	Silver v. Parr (Ind.).....	114
Reed, Alsdorf v. (Ohio).....	73	Simpson, Heuston v. (Ind.).....	261
Reed, Alvey v. (Ind.).....	265	Singer v. Carpenter (Ill.).....	761
Reibel v. Cincinnati, I., St. L. & C. Ry. Co. (Ind.).....	107	Singer v. Steele (Ill.).....	751
Remington, New York State Monitor Milk-Pan Co. v. (N. Y.).....	872	Slater Woolen Co., Gould v. (Mass.)	531
Reynolds v. State (Ind.).....	909	Sloan, Hodge v. (N. Y.).....	335
Richey v. Bly (Ind.).....	298	Sloan, Pennsylvania Co. v. (Ill.)...	87
Robertson, Scutt v. (Ill.).....	14	Smith v. Cole (N. Y.).....	856
Robinson v. New York, L. E. & W. R. Co. (N. Y.).....	867	Smith v. Nelson (N. Y.).....	871
Robinson v. Roosa (Mass.).....	874	Smitha, Spurgeon v. (Ind.).....	105
Rochester, H. & L. R. Co. v. Babcock (N. Y.).....	678	Smith, Hamilton v. (N. Y.).....	740
Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co. (N. Y.)..	680	Smith, Phelps v. (Ind.).....	602
Rock Island & M. C. R. Co., Ellis v. (Ill.).....	62	Smith, Throop Grain Cleaner Co. v. (N. Y.).....	671
Rogers v. Beach (Ind.).....	609	Smyth v. Neff (Ill.).....	702
Rogers, MacKellar v. (N. Y.).....	350	Spaulding, Saltmarsh v. (Mass.)....	816
Roosa, Robinson v. (Mass.).....	874	Spear v. Whitsett (Ind.).....	268
Root v. Burton (Ind.).....	194	Spears, People's S. L. & B. Ass'n v. (Ind.).....	570
Roth v. Michalis (Ill.).....	809	Spies v. People (Ill.).....	898
Roushange v. Chicago & A. Ry. Co. (Ind.).....	198	Spurgeon v. Smitha (Ind.).....	105
		State v. Caldwell (Ind.).....	185

	Page		Page
State v. Insurance Co. (Ind.).....	574	Town of Weymouth, Pratt v. (Mass.)	538
State v. Johnson (Ind.).....	910	Townsend, Second Nat. Bank of	
State v. Wabash Ry. Co. (Ind.).....	909	Richmond v. (Ind.).....	116
State, Bedgood v. (Ind.).....	621	Tripp, Old Colony R. Co. v. (Mass.)	89
State, Board of Com'rs v. (Ind.).....	855	Troyer v. State (Ind.).....	569
State, Britton v. (Ind.).....	254	Troy & L. R. Co., Hope v. (N. Y.)..	873
State, Cunningham v. (Ind.).....	904	Trum, Hallorn v. (Ill.).....	823
State, Duesterberg v. (Ind.).....	624	Turner v. Conant (N. Y.).....	872
State, Duffy v. (Ind.).....	615	Uhlman v. New York Life Ins. Co.	
State, Durham v. (Ind.).....	629	(N. Y.).....	863
State, Grimsley v. (Ind.).....	928	Union Mut. Life Ins. Co., Gold-	
State, Hessian v. (Ind.).....	614	schmidt v. (N. Y.).....	871
State, Holsclaw v. (Ind.).....	112	Union Mut. Life Ins. Co., Kirchoff	
State, Jarrard v. (Ind.).....	912	v. (Ill.).....	716
State, Mannix v. (Ind.).....	565	Van Camp, Wells County v. (Ind.)..	294
State, McDougall v. (N. Y.).....	870	Vandewater, Hillyer v. (N. Y.).....	872
State, Meadows v. (Ind.).....	121	Van Schoyk, Dewitt v. (N. Y.).....	425
State, Morris v. (Ind.).....	598	Village of Hillsboro, Kaufman v.	
State, Pehlman v. (Ind.).....	270	(Ohio).....	557
State, Reynolds v. (Ind.).....	909	Village of Lansingburgh, Herring-	
State, Stolte v. (Ind.).....	258	ton v. (N. Y.).....	728
State, Torr v. (Ind.).....	286	Village of Saratoga Springs, Searing	
State, Troyer v. (Ind.).....	569	v. (N. Y.).....	873
State, Zimmerman v. (Ind.).....	258	Wabash Ry. Co., State v. (Ind.)....	909
Staten Island Rapid Transit Co., In		Wainwright, Stone v. (Mass.).....	801
re (N. Y.).....	878	Waite v. New York Cent. & H. R.	
Steele v. Grand Trunk Junction Ry.		R. Co. (N. Y.).....	730
Co. (Ill.).....	488	Wallace, Lanier v. (Ind.).....	923
Steele v. Lovejoy (Ill.).....	711	Walsh, People v. (N. Y.).....	871
Steele, Singer v. (Ill.).....	751	Waltermire v. Waltermire (N. Y.)..	739
Stewart v. Fellows (Ill.).....	476	Walton v. Coe (N. Y.).....	676
Stillman v. Northrup (N. Y.).....	879	Ward, Wulschner v. (Ind.).....	278
Stimson, Baylis v. (N. Y.).....	144	Washburn, Moors v. (Mass.).....	884
Stinson, City of Chicago v. (Ill.)...	43	Weaver v. City of Rochester (N.	
Stolte v. State (Ind.).....	268	Y.).....	871
Stone v. Wainwright (Mass.).....	801	Webber v. Piper (N. Y.).....	216
Sullivan, Chicago, B. & Q. R. Co. v.		Welch, Commonwealth v. (Mass.)..	895
(Ill.).....	460	Welch, Nelson v. (Ind.).....	569
Suydam, Jackson v. (N. Y.).....	868	Wells County v. Bolten (Ind.).....	294
Suydam, Jackson v. (N. Y.).....	872	Wells County v. Eaton (Ind.).....	294
Swan, Lazarus v. (Mass.).....	655	Wells County v. Gruver (Ind.).....	290
Swartzel, Duesterberg v. (Ind.).....	155	Wells County v. Huffman (Ind.)....	294
Swygart, Moyer v. (Ill.).....	450	Wells County v. Jamison (Ind.)....	294
Syfers v. Bradley (Ind.).....	619	Wells County v. Latimore (Ind.)....	294
Tarbell v. Royal Exch. Shipping		Wells County v. Mounsey (Ind.)....	294
Co. (N. Y.).....	721	Wells County v. Popejoy (Ind.)....	294
Taubenhan v. Dunz (Ill.).....	456	Wells County v. Van Camp (Ind.)...	294
Taylor v. Taylor (N. Y.).....	869	Wells, Lindley v. (Ind.).....	611
Taylor, Denison v. (N. Y.).....	869	West, Chicago, M. & St. P. Ry. Co.	
Thayer, Bannon v. (Ill.).....	54	v. (Ill.).....	788
Thompson v. New York Cent. & H.		Whalen, Commonwealth v. (Mass.)	881
R. R. Co. (N. Y.).....	690	Wheaton v. Delaware & H. Canal	
Thompson v. People (Ill.).....	749	Co. (N. Y.).....	873
Thor v. Oleson (Ill.).....	780	Wheeler, Indiana, B. & W. Ry. Co.	
Thousand Island Hotel Co., Ingle-		v. (Ind.).....	563
hart v. (N. Y.).....	858	Whippen v. Whippen (Mass.).....	644
Throop Grain Cleaner Co. v. Smith		White v. Cannon (Ill.).....	753
(N. Y.).....	671	White v. White (N. Y.).....	872
Tobin v. Young (Ind.).....	625	Whitsett, Spear v. (Ind.).....	268
Todd v. Sawyer (Mass.).....	527	Willard v. Randall (Mass.).....	75
Torr v. State (Ind.).....	286	Williams v. Lewis (Ind.).....	262
Tower v. Hartford (Ind.).....	281	Wills v. Cushman (Ind.).....	168
Town of New Castle, Alexander v.			
(Ind.).....	200		

	Page		Page
Will of Soule, In re (N. Y.).....	868	Wulschner v. Ward (Ind.).....	273
Wilson v. Doran (N. Y.).....	688	Wyckoff, De Graff v. (N. Y.).....	869
Wilson v. Schneider (Ill.).....	8	Wynant, Cleveland, C., C. & L Ry.	
Winemiller v. Winemiller (Ind.)....	123	Co. v. (Ind.).....	118
Wingate v. Haskins (N. Y.).....	871		
Wood v. Ludlow (N. Y.).....	726	Young, Tobin v. (Ind.).....	625
Wood, Kroll v. (N. Y.).....	871		
Wright, Louisville, N. A. & C. R.		Zimmer, Dodge v. (N. Y.).....	899
Co. v. (Ind.).....	584	Zimmerman v. State (Ind.).....	258

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CHICAGO, B. & Q. R. Co. v. PERKINS.

(*Supreme Court of Illinois. May 9, 1898.*)

1. VENUE IN CIVIL CASES—CHANGE OF VENUE—PREJUDICE.

In a circuit where there are three judges it is not error to refuse a change of venue asked for on the ground that one judge is prejudiced, and another had been counsel in the case, where it appears that the third judge is present, and will, so far as is shown, grant a fair trial.

2. JURY—COMPETENCY OF JURORS.

In an action for damages for an accident causing death, it was not error to overrule a challenge of a juror for cause, where he stated that he had heard of the killing at the time, and had heard people talk about it, but had no opinion in the case.¹

3. SAME—OPINION.

A juror who, when called, answers that he had an opinion as to which one of the parties ought to succeed in the case, is not impartial, and either party can challenge him for cause.¹

4. TRIAL—ARGUMENT OF COUNSEL.

In an action against a railroad company for an accident causing death, the use of the words by plaintiff's attorney, in stating the case to the jury, "Now, \$5,000 is all this lady [plaintiff] can recover; that is fixed by law. Railroad companies have somehow or other fixed, by an act of the legislature, a limit beyond which jurors cannot go,"—was not such an appeal to prejudice and abuse of the latitude allowed attorneys in arguing cases as to make it error to refuse to set aside a verdict for plaintiff.²

5. SAME—INSTRUCTIONS.

Where no instructions were given for plaintiff, and many requests were made by defendant, it was not error in the court to refuse some, and modify others, if those given fully embraced the law as to defendant's interests.

6. RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—FLAG-MEN.

Starr & C. St. Ill. c. 114, § 99, providing that, where the municipal authorities give notice to that effect, railroads shall provide flag-men at street crossings, does not relieve the company from liability for injuries at such crossing, in the absence of notice, since the company is bound, independently of statute, to the exercise of ordinary care.³

Appeal from appellate court, Second district.

Bernard Dougherty was killed September 7, 1881, at Columbus-Street crossing, in the city of Ottawa, by a passenger train of the Chicago, Burlington & Quincy Railroad Company, and shortly thereafter this action was commenced

¹See note at end of case.

²On the general subject of misconduct of counsel in argument as a ground for new trial, see *Railway Co. v. Cooper*, (Tex.) 8 S. W. Rep. 68, and note.

³As to the duty of railroad companies at crossings, see *Railroad Co. v. Schuster*, (Ky.) 7 S. W. Rep. 874, and note.

by Bridget Dougherty, then administratrix. The declaration alleged the misconduct on the part of the company to be the running of the train at an improper rate of speed, the failure to ring the bell and sound the whistle, and the failure to keep a flag-man stationed at the crossing. The fourth count of the declaration, also, after setting forth an ordinance of the city of Ottawa, passed November 5, 1867, by which the Ottawa, Oswego & Fox River Valley Railroad Company, lessor of defendant, secured the privilege of using for its right of way certain streets of the city, and which limited the speed of its trains to five miles per hour, alleged the running of the train at too great a speed, the failure to ring the bell, and other omissions. The cause was tried at the March term, 1882, of the La Salle circuit court, resulting in a verdict and judgment in favor of plaintiff for \$4,000. From this judgment an appeal was taken to the appellate court, and at the December term, 1882, the judgment was reversed, and the cause remanded. It was again tried at the March term, 1883, of the circuit court, and the result was a verdict and judgment for \$5,000 in favor of plaintiff, which judgment, upon appeal, was affirmed by the appellate court at the December term, 1883. Thereupon the cause was removed by appeal to the supreme court, where, May 19, 1884, the judgment was reversed, and the cause remanded. *Railroad Co. v. Dougherty*, 110 Ill. 521. Upon the remandment of the cause to the circuit court, (Noah C. Perkins, administrator *de bonis non*, having in the mean time been substituted as plaintiff,) defendant, on January 16, 1885, filed a petition for a change of venue, on the ground that GEORGE W. STIPP, one of the judges of the circuit, was prejudiced against it, and that the presiding judge, CHARLES BLANCHARD, had been of counsel for plaintiff. This motion was overruled, on the ground that the other circuit judge, JOSIAH MCROBERTS, was then holding a branch court, and was not alleged to be prejudiced against defendant, and it could have a fair trial before him, and the removal of the cause to another county was unnecessary. Defendant excepted. On February 21, 1887, the cause was called for trial before DORRANCE DIBELL, then presiding judge, and submitted to a jury, and the result was a verdict and judgment in favor of plaintiff for \$5,000. Defendant appeals to the appellate court, and thence to the supreme court. Defendant's other exceptions, so far as need be stated, were as follows: "(1) Defendant challenged the juror Fry for cause shown by the following examination: 'My name is Samuel Fry. I am on the regular panel. Lived in Ottawa at the time of the accident. I heard about it at the time. I didn't pay much attention to it. Of course I heard folks talk of it in the saloon. Parties who I talked to told how it happened. I didn't form any opinion at all as to how it happened. I keep a saloon in Ottawa, east of the court-house.' *The Court*. 'If you are taken as a juror, the court will instruct you that it will be your duty not to let anybody talk in your hearing.' *Answer*. 'I can't stop all of them, you know.' The challenge was disallowed, and defendant excepted. The juror was then excused peremptorily. (2) George Pool stated: 'I am a farmer. Have read about the case in a newspaper. I did not form or express an opinion relating to the merits of the case. I think I read a newspaper account of the accident about the time it occurred. From what I read I formed some opinion. I have that still, some. I don't know as that opinion would have much, if any, influence upon me sitting as a juror. I think I could try the case as fairly and impartially as if I had heard nothing, and had formed no opinion. I have no feelings or prejudice against a railroad company. I have no acquaintance with Mr. Dougherty.' The juror was accepted by defendant, and was turned over to plaintiff for examination, and testified as follows: 'I am acquainted with Richolson & Gentleman. Have employed them. They have business in hand for me now. Mr. R. has been my attorney for four or five years. That would not make any difference with me at all if taken as a juror. It would not embarrass me at all to find a verdict against a company that Mr. Richolson represents. I

have no prejudice against suits of this nature. I read an account in the newspaper of the killing of Dougherty, and at that time I made up my mind the company was liable. Nothing whatever, by reason of talking with any person or that has been said to me from any source, has changed my mind, for I don't think I have talked with anybody about it. I think I could stand in the same light as a juror that I would if I never had read or heard anything on the subject.' The juror was challenged by plaintiff for cause, and allowed by the court, against defendant's objection. (3) Attorney for plaintiff, in stating the case to the jury, made the following remark: 'Now, \$5,000 is all this lady can recover. That is fixed by law. Railroad companies have somehow or other fixed, by an act of the legislature, a limit beyond which jurors cannot go.' Objection interposed. 'Of course you do. I expected you to take an exception long before. It is not the first time of this excepting business.' "

Samuel Richolson and O. F. Price, for appellant.

On the question of a change of venue, the court below held that the statute under which it was asked was passed before the present law giving three judges to a circuit; and under the present law there is no reason for the change, and the former statute was thus modified by the latter. To show a contrary doctrine, the following authorities were cited: *Fuller v. Bates*, 96 Ill. 133; *Cooley, Const. Lim.* 159; *Chicago v. Quimby*, 38 Ill. 278; *Foley v. People*, Breese, 58; *Holbrook v. Nichol*, 36 Ill. 167; *Young v. Stearns*, 91 Ill. 222; *Frye v. Railroad Co.*, 73 Ill. 403; *Fowler v. Perkins*, 77 Ill. 273; *Wragg v. Penn Tp.*, 94 Ill. 11; *Ottawa v. La Salle Co.*, 12 Ill. 341; *People v. Barr*, 44 Ill. 198; *Supervisors v. Campbell*, 42 Ill. 492; *Hume v. Gossett*, 43 Ill. 299; *Perteet v. People*, 65 Ill. 230; *Card v. McCaleb*, 69 Ill. 314; *Coal Co. v. Taylor*, 81 Ill. 592; *Covington v. East St. Louis*, 78 Ill. 552. The cases of *Mapes v. Scott*, 94 Ill. 382; *Insurance Co. v. Tolman*, 80 Ill. 106; *Walsh v. Ray*, 38 Ill. 30; *Ensminger v. People*, 47 Ill. 384; and *Myers v. Walker*, 31 Ill. 353,—as well as many others in this court, lay down the doctrine that the statute in relation to a change of venue, is mandatory. The legislature has provided that railroad companies, "where the public authorities, having charge of any street, shall notify any agent of the corporation that a flag-man is necessary," shall place and retain a flag-man at such crossing. It follows as a natural and unavoidable conclusion that the company cannot be accused of a want of ordinary care in not placing a flag-man at that particular crossing, when the notice provided for by the statute had not been given. *Damerell's Case*, 81 Ill. 451; *Railroad Co. v. Siltman*, 67 Ill. 74; *Railway Co. v. Clark*, 70 Ill. 276; *Railroad Co. v. Harwood*, 80 Ill. 90; *Same v. Henks*, 91 Ill. 411; *Same v. Grable*, 88 Ill. 443; *Volk v. Roche*, 70 Ill. 299; *Railroad Co. v. Murray*, 62 Ill. 326.

Duncan, O'Connor & Gilbert, for appellee.

Did the court err in refusing a change of venue? Two complaints are made under this head: *First*, that the court below erred in overruling the motion for a change of venue; and, *second*, that it erred in overruling defendant's motion to strike the cause from the docket. In neither complaint is there any merit. *Curran v. Beach*, 20 Ill. 259; *Myers v. Walker*, 31 Ill. 363. But there is another fatal objection to this application for a change of venue, and that is that the affidavit in support of the petition is not made by any officer of the corporation, but by one who is at best but a mere hired man. The statute does not, in terms, allow a change of venue to a corporation, but the supreme court has very properly held that corporations are included within the spirit of the statute. *Insurance Co. v. Mehlman*, 48 Ill. 317. That a flag-man was necessary for the safety of the public at this crossing is conclusively shown. Such being the evidence, it is plain that the jury were not merely

authorized to find defendant guilty of negligence in failing to station a flag-man at the crossing, but they were absolutely required so to find. Whether it was convenient or inconvenient for defendant to provide a flag-man was not a question to be considered. *Railway Co. v. Knutson*, 69 Ill. 103; *Shaber v. Railway Co.*, 28 Minn. 107, 9 N. W. Rep. 575; 2 Shear. & R. Neg. § 484; Whart. Neg. § 799; *Railway Co. v. Henks*, 91 Ill. 412; *Railway Co. v. McElwee*, 67 Pa. St. 311; *O'Leary v. Mankato*, 21 Minn. 65; *Phelps v. Mankato*, 23 Minn. 277. To the complaint that the court refused to allow defendant's challenge of the juror Fry there are two good answers: *First*. There was no sufficient cause for challenge. *Second*. It does not appear that defendant exhausted its peremptory challenges, as is required by the ruling in *Robinson v. Randall*, 82 Ill. 522; *Mingia v. People*, 54 Ill. 277.

CRAIG, J. This cause was before us at a former term, and the judgment was reversed, and the cause remanded, for the reason that an erroneous instruction had been given for the plaintiff. *Railroad Co. v. Dougherty*, 110 Ill. 523. After the remanding order had been filed at the June term, 1885, of the circuit court of La Salle county, and on the 16th day of January, the defendant filed a petition for a change of venue. The ground relied upon in the petition for a change of venue was that GEORGE W. STIPP, one of the judges of said court, was prejudiced against the defendant; and CHARLES BLANCHARD, another of said judges, had been counsel for the plaintiff in regard to the matters in controversy. The court overruled the petition for a change of venue, on the ground that another circuit judge of the circuit, JOSIAH MCROBERTS, was then holding a branch court in La Salle county, and, as he was not alleged in the petition to be prejudiced against defendant, it could have a fair trial before him, which would obviate the necessity of sending the cause to another county. No trial was had at this term of court, but at a subsequent term, February 21, 1887, a trial of the cause was had before Judge DIBELL, who had succeeded Judge MCROBERTS, and the jury returned a verdict in favor of the plaintiff, upon which the court entered judgment. It is first claimed that the court erred in denying a change of venue. It appears from the bill of exceptions that the application was predicated on the fact that one of the circuit judges was prejudiced against the defendant, and another of the judges of the circuit had been counsel for the plaintiff; but the bill of exceptions also shows that the third judge of the circuit was at the time of the application present in the county holding court, and no complaint is made that he is prejudiced or in any manner incapacitated from trying the cause. It is quite apparent that the object of the statute allowing a change of venue on account of the prejudice of the judge was to secure a trial before a judge who was unprejudiced. If the object intended can be obtained as well by not sending the cause to another county as by doing so, the useless expense of the transfer ought to be avoided. Under our present statute three judges are elected in each circuit. If one is prejudiced, and if another has been counsel in the cause, if the third judge is unprejudiced, and present holding court when the application is made, no reason occurs to us why the case under such circumstances should be sent to another county. The statute must receive a reasonable construction; one that will promote the ends of justice; one which will carry out the end intended; that is, a party should not be compelled to submit to a trial before a prejudiced tribunal. We think the decision of the circuit court in the motion of change of venue of the cause was right and in harmony with the ruling of this court, as held in the following cases, where a similar question was involved: *Curran v. Beach*, 20 Ill. 259; *Myers v. Walker*, 31 Ill. 356.

In the selection of the jury the defendant challenged for cause the juror Fry, but the court overruled the challenge, and the defendant excused him peremptorily. The ruling is relied upon as error. The juror had heard of the

accident at the time deceased was killed, and had heard people talk about the matter, but he stated that he had no opinion in the case from what he had read, or otherwise. From this statement we perceive no error in the ruling of the court. The defendant accepted the juror Pool, and plaintiff challenged him for cause, and the court sustained the challenge. The juror, in reply to a question asked by the court, said he had an opinion in regard to which one of the parties ought to succeed in the case. Under this statement he was not an impartial juror, and either party might, if they saw proper, challenge him for cause. Objection is made to remarks of counsel for plaintiff, in opening the case to the jury, that an appeal was made to the prejudices of the jury. In the statement or argument of a case to a jury counsel should be confined to the facts in the case, but at the same time it is impossible to lay down any general rule as to what shall or shall not be said. Much latitude is always allowed in the argument of a cause before a jury, and so far as appears nothing was said here which can be regarded as error. Section 99, c. 114, Star & C. St. Ill., provides: "In all cases where the public authorities, having charge of any street over which there shall be a railroad crossing, shall notify any agent of the corporation owning, using, or operating such railroad that a flag-man is necessary at such crossing, it shall be the duty of such railroad company, within sixty days thereafter, to place and retain a flag-man at such crossing, who shall perform the duties usually required of a flag-man," etc. It does not appear that the railroad company was ever notified that a flag-man was necessary at the crossing where the accident occurred, and it is claimed that the court erred in allowing the plaintiff to prove that no flag-man had been stationed at the crossing. If a railroad company, in the running of its trains, had no duty to perform except what the legislature might prescribe, the position of counsel might be well taken; but such is not the case. A railroad company, in the running of its trains, is required to use ordinary care and prudence to guard against injury to the person or property of those who may be traveling upon the public highways, and are required to cross its tracks, whether required by the statute or not. The fact that the statute may provide one precaution does not relieve the company from adopting such others as public safety and common prudence may dictate. *Shaber v. Railway Co.*, 28 Minn. 107, 9 N. W. Rep. 575. Other rulings of the court in regard to the admission and exclusion of evidence have been criticised, but we perceive no substantial error in this regard. It is also insisted that the court erred in its rulings in the instructions. No instructions were asked or given on behalf of the plaintiff. The defendant requested the court to give 24 instructions. Nineteen were given. Some of them were, however, modified. Whether all the modifications were entirely accurate or not it will not be necessary to inquire. As it is apparent that all the law involved in the case, so far as the rights of the defendant were involved, were fully given to the jury by the instructions, the judgment of the appellate court will be affirmed.

NOTE.

JUROR—COMPETENCY—OPINION. A juror is not ineligible because of having formed an opinion, if he states that that opinion is not so strong as to prevent his giving a true verdict according to the evidence. *Railroad Co. v. Moynahan*, (Colo.) 5 Pac. Rep. 811.

Where a juror stated that, if he had any sympathy, it would be with the "young man that lost his limb," and that he "would have no sympathy for the railroad," yet he did not "know as there was any reason why" he could not "try the case fairly and impartially," and that, notwithstanding his sympathy, he would not violate his oath, and would "endeavor to do justice between the parties," held competent. *Railroad Co. v. Bingenheimer*, (Ill.) 4 N. E. Rep. 840.

Where, on the trial of an action for damages against a railroad, a juror challenged for cause answers to a question whether, if, in his opinion, when he heard the evidence, it were equally balanced, he would find against the defendant, that he would so find; but, in answer to further questions by the court, answers that he has not formed or expressed any opinion as to the rights of the parties; that he has no prejudice against defendant, and will determine the cause according to the evidence, and instructions of the

court,—the court is justified in disallowing, in its discretion, the challenge of such juror for cause. *Montgomery v. Railway Co.*, (Mo.) 2 S. W. Rep. 409.

In an action to recover damages for causing the death of a person, the competency of a juror who testified that he had no prejudice against this particular case, but that he was opposed to personal damage cases generally, but that, if the evidence showed that the plaintiffs were entitled to damages, then he would be in favor of awarding them, is a question for the court to try, and the findings of the court upon it will not be disturbed. *McCarthy v. Railway Co.*, (Mo.) 4 S. W. Rep. 516.

See, also, on the subject of the competency of a juror, *Hall v. Com.*, (Pa.) 12 Atl. Rep. 168, and note.

(124 Ill. 522)

CITY OF STERLING v. MERRILL.

(*Supreme Court of Illinois. May 9, 1888.*)

1. MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—NOTICE.

In an action against a city for injury caused by a defective sidewalk, an instruction stating that if "the sidewalk in question was repaired and placed in good condition by the city, within a reasonable time prior to this alleged accident, and if said walk afterwards became out of repair without actual notice to the city, then plaintiff cannot recover," is properly refused, as obscure and misleading, since actual notice by the city of the defect is not essential to plaintiff's recovery if the defect had existed for such a length of time that the city officers, by the use of reasonable diligence, might have discovered it before the accident.¹

2. TRIAL—INSTRUCTIONS—REPETITION.

An instruction which merely repeats principles of law that are embodied in the instructions already given is properly refused.

3. SAME—BASIS OF EVIDENCE.

Instructions that have no evidence to support them should be refused.

4. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

In an action against a city for injury caused by a defective sidewalk, a new trial should not be granted because of newly-discovered evidence which merely goes to show that plaintiff was not injured, and that the accident was caused by her own carelessness, when such evidence is merely cumulative, and not conclusive in its character.

Appeal from appellate court, Second district.

The affidavit by defendant's attorney in support of the motion for a new trial states that he expects to show, if a new trial is granted, that plaintiff was not injured; that the sidewalk where the opening existed at the time of the fall was so clearly illuminated by gas-lamps that plaintiff, in the exercise of ordinary care and prudence, should not have stepped into the opening, and that the injury, if any, resulted from her own gross carelessness; that plaintiff has been since said fall feigning that she could not use her arm, and that the reverse was true; and that the abdominal injuries complained of could not have resulted from the fall.

A. A. Wolfersperger, (*J. E. McPherran*, of counsel,) for appellant. *W. & W. D. Barge*, for appellee.

MAGRUDER, J. This is an action brought by Lucy A. Merrill against the city of Sterling, in the circuit court of Whiteside county, to recover damages for a personal injury. About 6 o'clock in the evening on November 14, 1884, the plaintiff was walking north on the east side of B street in Sterling, when she stepped into a hole in the sidewalk, and was thereby thrown to the ground, receiving the injury complained of. The trial resulted in a judgment in her favor for \$2,000, which has been affirmed by the appellate court, and is now brought, by appeal, to this court. All the questions of fact are settled by the judgment of the appellate court. No points are made in regard to the admission or exclusion of evidence. The main ground insisted upon for a reversal of the judgment is the refusal of the trial court to give three instructions asked by the defendant. By the first of these refused instruc-

¹On the subject of constructive notice, see *Springer v. City of Philadelphia*, (Pa.) 12 Atl. Rep. 490, and note; *Miller v. City of St. Paul*, (Minn.) 36 N. W. Rep. 271; *Turner v. City of Newburgh*, (N. Y.) 16 N. E. Rep. 343.

tions it was said that if the jury should believe from the evidence "that the plaintiff might, in the exercise of ordinary care and caution, have avoided the opening in the sidewalk, and that her omission so to do was the direct cause of the injury complained of, then she was guilty of such negligence as will prevent a recovery in this case." Correctly expressed, the idea of this instruction is simply that the plaintiff, in walking along the sidewalk of the city, as she had a lawful right to do, was required to exercise ordinary care and caution. This idea was very clearly embodied in the third instruction given for the defendant, and in several instructions which were given for the plaintiff. Its repetition in a further instruction was therefore unnecessary. The second of the refused instructions referred to is as follows: "If the jury believe from the evidence that the sidewalk in question, where the plaintiff claims to have received her injury, was repaired and placed in good condition by the city within a reasonable time prior to this alleged accident, and if the jury believe from the evidence that said walk afterwards became out of repair, without actual notice to the city, then the plaintiff cannot recover." This instruction is obscure, and calculated to mislead. It is not essential to a recovery, in a case of this character, that the evidence should show actual notice to the city. *City of Chicago v. Dalle*, 115 Ill. 386, 5 N. E. Rep. 578. If the opening in the sidewalk had existed for such a length of time before the accident as that the city authorities might have discovered it by the use of reasonable diligence, then the city will be presumed to have had notice of it. This principle was announced in the fourth instruction given for the plaintiff and in the second instruction given for the defendant. The latter told the jury that the plaintiff could not recover unless it was "proven that the sidewalk in question was unsafe, and that the defendant had actual notice of the defect, * * * or that such defect was of such long continuance that the defendant, by the use of ordinary care and prudence, ought to have discovered the defect," etc. This was a correct statement of the law, and contained all that was material or essential in the second refused instruction. Instructions must be based on evidence. There was no evidence that the defendant had at any time repaired the sidewalk at the point where plaintiff was injured. It is undisputed that there was a defect at that point, and the question to be determined was whether such fact had existed a sufficient length of time to affect the city with notice of its existence. It is not clear what is meant by the expression "within a reasonable time prior to this alleged accident." The city was bound to exercise reasonable prudence and diligence in the construction and maintenance of its sidewalks. But just what period of time between the alleged repair of the sidewalk and the happening of the accident should be regarded as reasonable, and for what purposes it should be regarded as reasonable, is not apparent under the circumstances of this case. Instructions should not be obscure and misleading, but should be expressed in clear and precise language. *Trish v. Newell*, 62 Ill. 196; *Society v. Hubble*, Id. 161. The third refused instruction was to the effect that if the jury should believe from the evidence that the plaintiff, by the ordinary exercise of will on her part, could have used her arm for the ordinary purposes of life at or shortly after the injury complained of, and that she refused or neglected, without cause, so to do, then the disability or impairment of her arm since then, resulting from such neglect and refusal, was not an element of damage for which recovery could be had, and that, under the law, a person injured should, in good faith and in the exercise of all reasonable means, strive not to augment, but to cure or mitigate, a physical disability incurred. Whether or not this instruction laid down a correct proposition of law is a question which it is unnecessary to discuss. There was no error in refusing it, for two reasons. In the first place, there was no evidence to support it. Appellant introduced certain medical testimony to show that refusal to use or exercise an arm that had been injured in the way in which

plaintiff's arm was injured tended to make it useless and stiff in the joints and wanting in flexibility, etc. But there was no proof to show that plaintiff purposely failed to use her arm, or neglected to exercise it in a proper way, so far as she was able to do so. In the second place, the substance of this instruction was embodied in the seventh instruction given for the defendant. On the motion for new trial appellant read certain affidavits setting up the discovery of what was claimed to be new evidence. It is contended that the court erred in not granting the motion for the reasons stated in the affidavits. The newly-discovered evidence is merely cumulative, and not conclusive in its character. A verdict will not be set aside to permit such evidence to be introduced. *Kendall v. Limberg*, 69 Ill. 355.

We are of the opinion that the trial court committed no error either in refusing the instructions complained of or in overruling the motion for new trial. The judgment of the appellate court is affirmed.

(124 Ill. 628)

WILSON *et al.* v. SCHNEIDER.

(*Supreme Court of Illinois.* May 9, 1888.)

EXECUTION—AGAINST ESTATES OF DECEDENTS—TIME FOR ISSUING.

Under Rev. St. Ill. c. 77, § 6, which provides that no execution shall issue on any judgment after seven years from the time the same becomes a lien unless the judgment be revived, a creditor who has his claim allowed against the estate of his deceased debtor, and who, by the provisions of Rev. St. Ill. c. 77, § 27, is considered a judgment creditor for the purposes of redemption from a sale of the real estate of the debtor, must issue the special execution provided for therein as an essential requirement in the proceeding for redemption within seven years from the date of the allowance of his claim, or his right to redeem is gone.

Error to circuit court, Iroquois county; ALFRED SAMPLE, Judge.
Payson & Ragmond, for appellants. *Kay & Evans*, for appellees.

MAGRUDER, J. John Arends, now deceased, executed a mortgage in his life-time to Charles A. Wilson and Luppe I. Arends upon E. $\frac{1}{4}$ S. W. $\frac{1}{4}$ section 28, township 28 N., range 10 E. of third P. M., in Iroquois county. After his decease a bill to foreclose was filed by the mortgagees in the circuit court of said county against his heirs and the administrator of his estate and certain parties in possession, named Marie Schneider and Antoine Schneider, and others. It does not appear that any of the creditors, whose claims were allowed against the estate, were made defendants to the bill. Decree of sale was entered in the foreclosure suit on February 24, 1886, and, in pursuance thereof, the premises were sold on May 10, 1886, to Joseph Evans. The usual certificate of purchase was issued to Evans, and the master's report of sale was confirmed. The 15 months for redemption expired on August 10, 1887, and the master's deed was executed and delivered to the purchaser on August 29, 1887. The estate of Arends proved to be insolvent. On January 19, 1880, Comstock & Co. procured the allowance of a claim against the estate in the probate court of Iroquois county. On August 9, 1887, 7 years 6 months and 20 days after the allowance of the claim, Comstock & Co. caused a special execution to be issued by the clerk of the probate court to the sheriff of the county for the purpose of redeeming from the foreclosure sale. The execution came into the sheriff's hands on the same day, and Comstock & Co. at once paid him the amount necessary to redeem. The certificate of redemption was executed and recorded on said 9th day of August, 1887, and, after being duly advertised, the premises were sold on September 9, 1887, to Comstock & Co., who then paid to the sheriff the redemption money and interest, and received from him the usual sheriff's deed.

As we understand the facts, notice was given of the attempted redemption by Comstock & Co. to the master and to the purchaser at the foreclosure sale before the execution to such purchaser of the master's deed above mentioned.

The controversy is between the creditors, Comstock & Co., and the purchaser, Evans. The question involved is as to the right of a creditor whose claim has been allowed against the estate of a deceased debtor, to redeem from the sale of the debtor's land after the expiration of seven years from the allowance of the claim. The circuit court decided against such right. Section 27, c. 77, Rev. St., entitled "Judgments, Decrees, and Executions," provides that, "for the purpose of redemption from the sale of real estate of a deceased debtor, any person, whose claim shall have been probated and allowed against the estate of such deceased debtor, shall be considered a judgment creditor, and, for the purpose of enabling such creditor to redeem from such sale, it shall be lawful for the clerk of the court, wherein letters testamentary or of administration were granted, to issue special execution to the sheriff of the proper county, commanding him, upon redemption being made, to levy upon and sell the premises so sought to be redeemed, and like proceedings shall be had as upon other executions." This section 27 is a part of the act of March 22, 1872, entitled as aforesaid. It went into effect at the same time with the rest of the act. In order to ascertain its meaning it must be construed in connection with the other sections which precede and follow it. The person whose claim has been allowed against the estate is to be considered a "judgment creditor" in the sense in which the term "judgment creditor" had already been used in the preceding sections. As a creditor who had obtained his judgment in the life-time of the debtor had been required to have execution issued, and a levy and sale made, so a creditor obtaining judgment against the estate of the deceased debtor was also required to proceed in the same way. The object of section 27 was to give the judgment creditor of the deceased debtor the same right of redemption which had just been given to the judgment creditor of the living debtor, and to prescribe for the former the same mode of effecting such redemption as had been prescribed for the latter. In both cases the issuance of an execution is an essential requirement in the proceeding for redemption. Whatever limitation the act may contain as to the time within which an execution must be issued, applies as well to the special execution named in section 27 as to the ordinary *fi. fa.*, mentioned in section 20. Turning to section 6, we find this language: "No execution shall issue upon any judgment after the expiration of seven years from the time the same becomes a lien except upon the revival of the same by *scire facias*," etc. The words "any judgment" are broad enough to include the probated claim, which is to be considered a judgment by the terms of section 27, and the special execution provided for in that section is certainly comprehended within the meaning of the words "no execution." We are therefore of the opinion that the restriction laid down in section 6 was intended to apply to the claims and special executions referred to in section 27.

In the present case the judgment was rendered on January 19, 1880, and the special execution was issued more than seven years thereafter. That execution must be regarded as having been void, and of no effect, if the judgment of Comstock & Co. can be regarded as having become a lien at the date of its rendition. By the terms of section 6 the period of seven years begins with the time the judgment "becomes a lien." Section 1 of the act provides "that a judgment of a court of record shall be a lien on the real estate of the person against whom it is obtained * * * from the time the same is rendered or revived for the period of seven years, and no longer." It is true that the judgment in favor of the claimant against an estate is not that he recover his damages and costs, and have execution therefor, but that the amount due him be paid in due course of administration by the administrator, etc. But the creditors who prove up their claims against an estate have a right to have the land of the deceased debtor subjected to the payment of such claims in case of a deficiency of personal assets. Mure, the administrator, files his petition to sell the land within a proper time. The purchaser at the admin-

istrator's sale will hold the property as against the grantee of the heir. This right of the creditors of an estate to have the realty sold to pay their debts is in the nature of a lien upon the land. In *Vansyckle v. Richardson*, 13 Ill. 171, we said: "The statute, in effect, reserves a lien on the lands of an intestate, to secure the payment of any excess of indebtedness beyond the proceeds of the personal estate. This lien is to be enforced by the administrator for the benefit of the creditors generally." *McCoy v. Morrow*, 18 Ill. 519; *Burson v. Goodspeed*, 60 Ill. 277; *Myer v. McDougal*, 47 Ill. 278; *Wheeler v. Dawson*, 63 Ill. 54; *Reed v. Colby*, 89 Ill. 104; *Furlong v. Riley*, 103 Ill. 628. In *Bishop v. O'Conner*, 69 Ill. 431, it is said: "It is not accurate to say that the lands are charged, but rather that they are liable to be charged," etc. While the liability of the lands to be charged with the debts of the decedent may not amount to a lien within the technical meaning of that word, yet the creditor may so enforce this liability, through the administrator, as against purchasers and incumbrancers holding under the heir, that he derives from it all the advantages of a lien. This being so, there is no reason why a creditor, having a judgment against the estate of a deceased debtor, should have a longer time for the enforcement of his rights against the debtor's land through the medium of an execution than is awarded to a creditor obtaining his judgment in the life-time of the debtor. Why should the former be assimilated to the latter as to the mode in which he may redeem, and not as to the time within which he must redeem? If the lien of the latter's judgment is for only seven years, so that he cannot issue an execution after that time for the purpose of redemption, why should not the former's right to reach the debtor's land, not through administration, but through an execution issued for the purpose of redemption, be also limited to seven years? There would be no justice in making any distinction between the two classes of creditors so far as the exercise of the right to redeem is concerned. We have held that by analogy to the duration of a judgment lien the administrator must file his petition to sell within seven years from the death of the owner, unless such facts are shown as furnish a satisfactory explanation of the delay. *Reed v. Colby*, *supra*; *McCoy v. Morrow*, *supra*. Even if this rule were applied in the present case, no good reasons are given why the petition to sell the mortgaged premises may not have been filed within the seven years. The record does not show when Arends died, nor when letters of administration were taken out upon his estate. The proof only furnishes the date of the allowance of the claim of Comstock & Co. But although the petition to sell may be filed after seven years have passed since the death of the intestate, if the delay is satisfactorily explained, yet we are of the opinion that, when the owner of the probated claim desires to redeem, he must take out execution within seven years from the time his claim is allowed, independently of what reasons may or may not exist for the delay. His right to redeem is derived solely from the statute. It does not exist outside of the statute. He must therefore follow the proceeding pointed out in the statute, and in the mode there prescribed. Other judgment creditors have a lien for only seven years from the time judgment is rendered, and cannot issue execution for redemption purposes after the lapse of that period. In like manner the creditor, proving his claim against the estate of the deceased debtor, can only have a charge upon or liability against the land, so far as the remedy by redemption is concerned, for seven years from the time his claim is allowed, and cannot issue the special execution provided for in section 27 after that time. This was the view of the court below, and we think its decision was correct. The judgment of the circuit court is affirmed.

(124 ILL. 666)

COAL RUN COAL CO. v. FINLEN.

(*Supreme Court of Illinois.* May 9, 1888.)

1. CONSTITUTIONAL LAW—TAXATION—CORPORATIONS.

Rev. St. Ill. c. 120, § 3, subd. 4, which provides for the assessment by the state board of equalization of the capital stock, including the franchise, of corporations organized for pecuniary profit, except corporations organized for manufacturing purposes or for the publishing of newspapers or for the improvement of stock, which are to be assessed as individuals, is not in conflict with Const. Ill. art. 9, § 1, providing that the legislature shall have power to tax corporations by "general law uniform as to the class upon which it operates," as the legislature is not thereby prohibited from classifying corporations for taxation.

2. TAXATION—ASSESSMENT BY STATE BOARD—REVIEW.

The action of the state board of equalization in assessing the capital stock and franchises of a corporation will not be reviewed unless fraud is disclosed.

Appeal from circuit court, La Salle county; DORRENCE DIBELL, Judge.

The statute referred to in the opinion is section 3 of chapter 120 of the Illinois Revised Statutes.

Ball & Strawn, for appellant. *Mouloney & Stead*, for appellee.

CRAIG, J. This was a bill brought by the Coal Run Coal Company to enjoin the county clerk of La Salle county from extending taxes upon the assessed value of the capital stock and franchise of the company, as assessed and returned by the state board of equalization for the year 1883. Two questions are presented and relied upon to reverse the decree dismissing the bill: *First*, that division 4 of section 3 of the revenue act, which relates to the taxation of the capital stock of companies and associations in this state, as amended in 1879, violates the rule of uniformity provided for by section 1 of article 9 of the constitution of this state; *second*, that the state board of equalization of this state, in the application of the rule adopted by them for the taxation of capital stock of corporations, have violated this rule of uniformity. Section 1 of article 9 of the constitution provides that the general assembly shall have power to tax peddlers, auctioneers, * * * and persons or corporations owning or using franchises and privileges in such manner as it shall from time to time direct by general law uniform as to the class upon which it operates. Division 4 of section 3 of the revenue act is as follows: "*Fourth*. The capital stock of all companies and associations now or hereafter created under the laws of this state (except those required to be assessed by the local assessors as hereinafter provided) shall be so valued by the state board of equalization as to ascertain and determine, respectively, the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association. Said board shall adopt such rules and principles for ascertaining the fair cash value of such capital stock as to it may seem equitable and just; and such rules and principles, when so adopted, if not inconsistent with this act, shall be as binding and of the same effect as if contained in this act, subject however to such change, alteration, or amendment as may be found from time to time to be necessary by said board: provided, that in all cases where the tangible property or capital stock of any company or association is assessed under this act the shares of capital stock of any such company or association shall not be assessed or taxed in this state. This clause shall not apply to the capital stock, or shares of capital stock, of banks organized under the general banking laws of this state: provided, further, that companies and associations organized for purely manufacturing purposes, or for printing, or for publishing of newspapers, or for the improving and breeding of stock, shall be assessed by the local assessors in like manner as the property of individuals is required to be assessed." It will be observed that under the section *supra* the capital stock, including the franchise, of all corporations organized for pecuniary profit, is required to be assessed by the state board of equalization, except corporations organized fo

purely manufacturing purposes, or for printing or for publishing of newspapers, or for the improving and breeding of stock, which are to be assessed by the local assessors in the same manner as the property of individuals. This difference in the assessment of different corporations organized under the statute, it is said, renders the section of the statute obnoxious to that clause of the constitution which authorizes the general assembly to tax corporations owning or using franchises in such manner as it shall direct by general law uniform as to the class upon which it operates. This provision of the constitution was before us in *Porter v. Railroad Co.*, 76 Ill. 579, and in remarking upon it we then said: "It surely cannot be doubted that the requirements that the board of equalization shall ascertain and determine the fair cash value of the capital stock, including the franchise, of all companies and associations now or hereafter created under the laws of this state over and above the assessed value of the tangible property of such company or association, is a general law, or that it is uniform as to the class upon which it operates. * * * It is not required, as seems to be thought by some of the counsel with whose arguments we have been favored, that the legislature shall, in providing for the taxation of corporations, under the last clause of the section referred to, designate the precise amount which the corporations shall pay, and that this shall be the same for each corporation without regard to the value of the franchise or privileges enjoyed, nor that such taxation shall be of like character with that which may be imposed on inn-keepers and others pursuing the particular vocations named. It is only required that they shall be taxed in such manner as the general assembly shall from time to time direct by general law, and the only uniformity required is as to the class upon which such general law shall operate. It is therefore left entirely to the legislature to determine whether corporations shall be taxed only on their tangible property; on the amount of their capital paid in; on the amount of their gross receipts; or, as in the present instance, on the value of their tangible property and on the fair cash value of their capital stock, including their franchises, over and above the assessed value of their tangible property, subject merely to the limitation that it shall be directed by general law, uniform as to the class upon which it operates." Adhering to what was said in regard to the meaning of the section of the constitution under consideration, we do not regard the section of the statute involved in conflict with the constitution. The section of the constitution undoubtedly requires the law the general assembly may enact to be a general law, and uniform as to the class upon which it operates; but this does not prohibit the legislature from classifying the corporations for taxation. We see nothing in the constitution which prohibits the legislature from providing one method for determining the value of the capital stock, including the franchise, of a railroad company; another method for a mining corporation; and still another for manufacturing corporations. We see no clause in the constitution which prohibits the legislature from placing certain specified corporations in one class and providing a uniform method of assessment for that class, and placing certain other specified corporations in another class and providing a uniform manner of assessment for that class. There is no language whatever used in the clause of the constitution which forbids the legislature from forming a class, and after the class is formed it is declared that the general assembly shall have power to tax corporations owning franchises in such manner as it shall direct. How shall it direct? By general law uniform as to the class. What object the general assembly may have had in placing mining corporations in one class for assessment and corporations organized for manufacturing, printing, or for breeding of stock in another class it is not for us to inquire. So long as the statute does not conflict with the original law it will be upheld whether wise or unwise.

As to the second branch of the case upon which relief is predicated, but little need be said. In the argument it is said that appellant corporation ought

not to have been assessed in any sum, and that other corporations escaped entirely from being assessed which ought to have been assessed, and hence the rule of uniformity was violated. The state board of equalization had the power to make the assessment, and the action of that body cannot be reviewed by the courts except for fraud. *Spencer v. People*, 68 Ill. 510. In *Insurance Co. v. Pollak*, 75 Ill. 292, where an assessment had been made by the state board of equalization, as here, it was held that in the absence of fraud or want of power the courts are powerless to give relief against an excessive assessment. The legislature has empowered the state board of equalization to assess the capital stock, including the franchise, of corporations organized under our laws, and it is no part of the duty of a court of equity to interfere with the action of that body, unless the evidence disclosed fraud in making the assessment, which is not the case here. The decree of the circuit court will be affirmed.

(124 Ill. 560)

HAWES, Judge Superior Court, *v. PEOPLE ex rel. PULVER*.

(*Supreme Court of Illinois. May 9, 1888.*)

CONSTITUTIONAL LAW—JUDICIAL POWERS—MANDAMUS.

Under Const. Ill. art. 6, § 11, providing that inferior appellate courts may be created, to which appeals and writs of error may be prosecuted from circuit and other courts, the appellate court has no jurisdiction to issue a writ of *mandamus* to a judge of the superior court to compel him to sign a bill of exceptions in a cause not appealed to the appellate court, nor otherwise pending there.

Appeal from appellate court, First district.

Moses & Newman, for appellant. *Kraus, Mayer & Stein*, for appellee.

MULKEY, J. On the 9th day of November, 1887, the people of the state of Illinois, on the relation of Emilie Pulver, filed in the appellate court for the First district a petition for a *mandamus* against the Hon. Kirk Hawes, as judge of the superior court of Cook county, to compel him to sign a bill of exceptions in a certain cause lately heard before him in said court, wherein the said Emilie Pulver was plaintiff, and the Rochester German Insurance Company was defendant. No appeal had been taken in the case to the appellate court, nor was it otherwise or for any purpose pending in that court. The respondent appeared, and entered a motion to dismiss the petition, on the ground that the court had no original jurisdiction in *mandamus*. The court reserved the motion for the hearing. The issues were then made up in the usual way, and the cause was heard upon the petition, answers, replication, and proofs, resulting in the entry of a final order awarding a peremptory writ of *mandamus*, directing the respondent to sign and seal the bill of exceptions in question, in conformity with the prayer of the petition. The respondent brings the case here for review. Section 11, art. 6, of the constitution, provides as follows: "After the year 1874, inferior appellate courts of uniform organization and jurisdiction may be created in districts formed for that purpose, to which appeals and writs of error, as the general assembly may provide, may be prosecuted from circuit and other courts, and from which appeals and writs of error shall lie to the supreme court in all criminal cases, and cases in which a franchise or freehold or the validity of a statute is involved, and in such other cases as may be provided by law. Such appellate courts shall be held by such number of judges of the circuit courts, and at such times and places, and in such manner, as may be provided by law; but no judge shall sit in review upon cases decided by him, nor shall said judges receive any additional compensation for such services." This is the only provision of the constitution relating to the jurisdiction of the appellate courts, and it follows that whatever powers they may lawfully exercise are referable to it as their source. It is a grant of appellate jurisdiction only, and it is not competent for the legislature to clothe these courts, as such, with any other

kind of jurisdiction. It is a familiar principle that every grant of power carries with it such implied powers as are necessary to the exercise of the powers expressly conferred; yet this principle can have no application to a case like the one before us. The present suit is an original action, and is not in any sense in aid of or in furtherance of the court's appellate jurisdiction. If, upon the facts disclosed, the action would lie, it might have been brought either in this court or the circuit court; and, when prosecuted to a successful termination, the judgment, if desired to be reviewed, would, for the purposes of an appeal to the appellate court, be precisely in the same position as if the bill of exceptions had been signed and sealed by the judge without suit, and the petitioners, after all, would be under no obligation to take the case to the appellate court. It might or might not be taken there, which clearly shows that the action of *mandamus*, under the circumstances, could not be regarded as necessary to or in furtherance of its appellate jurisdiction. If the case to which the petition related had been pending in the appellate court by appeal or writ of error, quite a different question would be presented. In that case, no reason is perceived why the action of *mandamus* would not lie. Such action would then be in aid of the court's appellate jurisdiction. Indeed, the eleventh section of the appellate court act expressly authorizes the issuing of a writ of *mandamus* for such purpose. But this is only declaratory of what the rule under the constitution would have been without it. It is a mere expression of what would have been implied from the establishment of these courts.

As the judgment in this case will have to be reversed on the ground the appellate court improperly assumed jurisdiction therein, it will not be proper to consider the other questions discussed in the briefs. The judgment of the appellate court is reversed, and the cause remanded, with directions to that court to quash the writ, and dismiss the petition.

SCUTT v. ROBERTSON.

(Supreme Court of Illinois. May 9, 1886.)

1. PARTNERSHIP—FIRM PROPERTY—PATENT LICENSE.

S. conveyed certain letters patent for the manufacture of barbed wire to a wire-fencing company by a deed which was put on record, the letters patent being put into the stock of the fencing corporation at a fixed valuation. After such transfer, R. bought a large number of shares of stock in the corporation. Subsequently, on suit being brought by the W. & M. Company for an infringement of patent, arrangements were made by which that company was to release all claims for damages, and the corporation in which R. and S. were interested was to assign its patents to the former company, and go out of business; it being understood among the stockholders that a license would be issued to such members as desired to form a new firm, and continue the manufacture of the wire. S. conducted the negotiations, and the patents were assigned to him; he transferring them to the W. & M. Company, and receiving a license by which he was permitted to manufacture wire, and to take in copartners, not exceeding three in number. Accordingly, a partnership was formed between S., R., and another; the latter two agreeing to be bound by the license as though they were original parties. It appeared that, when the license was procured, it was understood that a fourth party should enter the partnership; but he was excluded, on the suggestion of S. Held, that the license was partnership property.

2. SAME—DISSOLUTION.

A partnership engaged in the manufacture of barbed wire, under a license from the holder of the patent, dissolved. The license was partnership property, but had been originally issued to S., one of the members, providing that he might associate with himself others who would agree to be bound by the conditions of the license, and the other members had agreed to be so bound, but only so long as they were associated with S. Held that, after the dissolution, the sole interest in the license vested in S.

Appeal from appellate court, Second district.

Gornsey & Knox and Haley & O'Donnell, for appellant. George S. House and C. A. Hill, for appellee.

PER CURIAM. The opinion of the appellate court for the Second district herein is as follows:

"Opinion by BAKER, J. In 1875, the original firm of H. B. Scutt & Co., composed of Hiram B. Scutt, Ward Dillman, William Watkins, and Israel B. Curtiss, was engaged in the manufacture of barbed fencing, under a patent that had been issued to said Scutt early in 1876. Curtiss and Dillman retired from the firm, and James R. Ashley and C. N. Ashley were substituted as members thereof. The fencing made by the firm consisted of a twisted strip of metal, with prongs inserted in it at short distances, and it soon became manifest such fencing could not successfully compete with wire having barbs upon it. On the 1st of August, 1876, letters patent No. 180,656 were issued to H. B. Scutt for what is known to the trade as the 'Scutt Barb,' it being a flat metal barb inserted between twisted wires. The device patented seems to have been principally this contrivance of Scutt, aided by suggestions from Watkins; and the firm paid all the expenses and charges of procuring the patent; and the firm manufactured wire under it, to a limited extent, until the 30th of September, 1876,—said Watkins having in the mean time, about the 1st of September, sold out his interest in the business to the other members of the firm of H. B. Scutt & Co., and the business of the concern being continued under the same firm name. In the latter part of September, 1876, a corporation was formed, known as 'The Joliet Wire-Fence Company,' with a capital stock of \$50,000, divided into 500 shares of \$100 each. The patent was put into the corporation at \$35,000, the machinery and stock on hand at \$5,000; and \$10,000 in cash was put in by A. B. Meeker, H. S. Smith, H. A. Bigelow, and W. S. Brooks in unequal proportions. By deed dated September 29, 1876, H. B. Scutt conveyed to the firm of H. B. Scutt & Co. letters patent No. 180,656; and by deed dated September 30, 1876, the firm of H. B. Scutt & Co. conveyed to the Joliet Wire Company said letters patent, No. 180,656. The original subscriptions of stock made upon the stock subscription book of the corporation were evidently of a merely preliminary character, and made for the purpose of convenience in the organization of the company, in accordance with the agreement that had been entered into between the firm of H. B. Scutt & Co. and Messrs. Meeker, Smith, Bigelow, and Brooks; and, after the organization was completed, some of the first stock certificates were surrendered and canceled, and new certificates issued in lieu thereof, so that after October 3, 1876, the stock of the company was owned and held as follows: 250 shares by H. B. Scutt & Co., 85 shares by Meeker, 85 shares by Brooks, 50 shares by Smith, and 30 shares by Bigelow. The Joliet Wire-Fence Company manufactured and sold the Scutt barb, which was supposed or claimed to be covered and secured by letters patent No. 180,656, and the business done by it was both extensive and profitable. On the 1st day of October, 1877, C. N. Ashley, of the firm of H. B. Scutt & Co., sold to Daniel Robertson, appellee in the present controversy, 80 shares of stock in the corporation, for \$10,000; and a certificate of stock for said 80 shares, signed by Scutt, appellant herein, as president of the company, was issued to Robertson. At the time of this purchase of stock by Robertson the title to letters patent No. 180,656 stood vested of record in the Joliet Wire-Fence Company; the deeds from H. B. Scutt to H. B. Scutt & Co., and from the latter to the corporation having been duly recorded in the patent-office on October 19, 1876. In December, 1876, the Washburn & Moen Manufacturing Company and I. L. Elwood, who claimed to own and control the patents under which barb wire of any description could be manufactured,—in other words, the 'bottom patents' covering barb-wire fencing,—instituted two suits in the United States court at Chicago against the Joliet Wire-Fence Company, claiming an infringement of their patents, and seeking to enjoin the last-named company from manufacturing barbed wire. In the latter part of 1878, this litigation was still pending; and as the Joliet Company had made a large amount of barbed wire, and very consider-

able sums were claimed by the Washburn & Moen Company, and by Elwood, for damages, the stockholders in the Joliet Company were exceedingly anxious with reference to the results of the litigation. The profits of the business were therefore distributed among the stockholders about as fast as earned, and on the 13th of August, 1876, the capital stock of the company was reduced from \$50,000 to \$10,000. Prior to this time there had been a diversity of opinion among the stockholders; Meeker, Smith, Brooks, and Bigelow desiring large and frequent dividends, and Scutt, Robertson, and the two Ashleys insisting that the profits should be retained by the corporation, and used in extending its business. In the fall of 1878, the four stockholders first mentioned were desirous of closing up the business of the wire-fence company, and retiring from the barb-wire business, and anxious that an arrangement should be made with the Washburn & Moen Company and Elwood, whereby all liability for damages should be released, and they allowed to retain the moneys they had made; and, while Scutt, Robertson, and J. R. and C. N. Ashley were also desirous of securing immunity from damages, they were also, each of them, anxious to continue the manufacture of barbed wire. In September or October, 1878, Scutt, who was president of the fence company, was sent by that company to Worcester for the purpose of conferring with the Washburn & Moen Company, and ascertaining whether or not a compromise could be effected which would stop the pending litigation, and release the fence company and its stockholders from all claim from damages. Upon his return he reported that a settlement could be made, relieving the corporation from damages, but only on condition the corporation would close up its business, and assign all its patents to the Washburn & Moen Company; and that Mr. Washburn would be in Chicago in November or December, and that a conference could be had and settlement made with him at that time. At a meeting of the board of directors of the wire-fence company held on the 18th day of November, 1878, the following resolution was unanimously adopted: 'Whereas, the Washburn & Moen Manufacturing Company and I. L. Elwood have, by their attorney, made certain overtures for a settlement of the litigation now pending between this company and the parties above mentioned, be it resolved by the board of directors of the Joliet Wire-Fence Company: that its president be appointed a committee of one, with power to confer with said parties, and to act as may in his judgment be deemed best for the interests of this company, and upon the following terms, which are agreed to, to-wit: The Washburn & Moen Manufacturing Company to grant full indemnity for all damages for the past, and up to January 1, 1879, and the Joliet Wire-Fence Company to retire from the business of manufacturing barbed fence wire at that time, and to assign all patents under their control to the Washburn & Moen Manufacturing Company.' On the 5th day of December, 1878, at a meeting of said board of directors then held, the following resolution was adopted, to-wit: 'Resolved, by the board of directors of the Joliet Wire-Fence Company, this day convened in regular session, that the executive committee of this board be, and they are hereby, authorized to sell to any responsible parties the machinery, tools, fixtures, contracts for labor, leases, and all the franchises, etc., of this the said Joliet Wire Fence Company, at such price and on such terms as to them may seem a fair valuation for the same, and to deliver possession thereof on the 1st day of January, A. D. 1879.' The Joliet Wire-Fence Company, by H. B. Scutt, its president, by deed dated December 12, 1878, conveyed letters patent No. 180,656 to Hiram B. Scutt; and said Hiram B. Scutt, by deed dated December 18, 1878, conveyed said letters patent to the Washburn & Moen Manufacturing Company. On the same 18th day of December, the wire-fence company, at a meeting of its board of directors, reconsidered so much of the resolution adopted on December 5th as referred to the sale of the franchises of the company, and adopted the resolution following, to-wit: 'Resolved, by the board of directors of the Joliet Wire-Fence

Company, that they do hereby ratify the assignment to H. B. Scutt of the following described letters patent, to-wit: Letters patent No. 180,656, dated August 1, 1876, and letters patent No. 193,557, dated July 24, 1877, applied for and granted to H. B. Scutt, patentee and assignor. And that said company also assign to said Scutt all their right, title, and interest, if any, in and to all letters patent under which they have been operating or hold under their control.' On the same 18th day of December, the Washburn & Moen Manufacturing Company executed to the Joliet Wire-Fence Company a release of all damages; and on the same day a written agreement was entered into by the Washburn & Moen Company and Hiram B. Scutt, and approved of by I. L. Elwood. This agreement contained some 26 sections, in the first of which it was stated that the Washburn & Moen Manufacturing Company granted to Hiram B. Scutt, doing business, or proposing to do business, under the firm name and style of H. B. Scutt & Co., a license to manufacture, use, and vend to others twenty-five hundred tons in each calendar year during the continuance of the license and agreement of certain designated styles of barb fence wire, under certain letters patent therein enumerated. And it was provided in the second section that Scutt should have the privilege of associating with him in the manufacture of barbed fence wire, under the license, not to exceed three copartners in number, as he might choose at any one time; provided, each and every one of said copartners should first subscribe to the terms and conditions of the license, and enter into a written obligation to that effect; and provided, also, that the business should always be conducted by said Scutt, or said Scutt and associate or associates, under the style and firm name of H. B. Scutt & Co. On the said 18th day of December, 1878, Hiram B. Scutt, who had negotiated and transacted at Chicago with Mr. Washburn, of the Washburn Moen Company, the business pertaining to the settlement of the matters in controversy between the latter company and the Joliet Wire-Fence Company, returned to Joliet on the evening train with the above-mentioned license, and at once exhibited it to Robertson and James R. Ashley; he meeting them by appointment. A new firm of H. B. Scutt & Co. was organized shortly thereafter, consisting of Hiram B. Scutt, Daniel Robertson, and James R. Ashley. C. N. Ashley had also expected to be a member of such firm, and it was the understanding of his brother and of Robertson that he was to be a partner; but, an objection being made to him by Scutt, he was persuaded by his brother to not insist upon going into the copartnership. The new firm bought the machinery and some of the unmanufactured stock of the wire-fence company, and the contract the latter had with the penitentiary authorities for convict labor was transferred to it; and early in January, 1879, the firm commenced to do business as manufacturers of barbed fence wire under the license.

"On the 31st of December, 1878, Robertson and J. R. Ashley executed a written agreement, whereby they agreed to be bound by the agreement between the Washburn & Moen Company and H. B. Scutt, during the time they were members of the firm of H. B. Scutt & Co., the same as though they were original parties to the same, and promised and agreed to execute each and every requirement thereof in good faith for the term they might be associated with said Scutt in the business of manufacturing said barbed wire. There were no written articles of copartnership entered into by the partners, but the agreement between them was they should each contribute equal amounts to the capital of the firm, and should share in the profits equally. The license, by its original terms, was in force until the 31st day of December, 1885; but by a modification made January 20, 1881, by agreement between the Washburn & Moen Company, and the firm, and approved by I. L. Elwood, it was extended to be in full force and effect for the period of seventeen years from the 27th day of February, 1877, or until the 27th day of February, 1894, and the tonnage of the firm was increased to five thousand tons per day. H. B. Scutt & Co. continued to manufacture fence wire, doing a large and profitable

business, until the 19th day of September, 1881, when James R. Ashley sold out his interest in the firm to Scutt and Robertson for \$53,333.33. The tangible assets of the firm at that time, after deducting all debts owing by them, were over \$165,000. By the written agreement made by the parties at the date of the withdrawal of said Ashley from the firm, he conveyed to Scutt and Robertson, among other things, all his right, title, and interest in and to the contracts, licenses, and patents of the firm. The business was continued by Scutt and Robertson, under the same firm name, until the 30th of June or the 1st day of July, 1882. In the latter part of March or early part of April of that year, Scutt served upon Robertson a written notice that on the 30th day of June, 1882, he would withdraw from the firm of H. B. Scutt & Co.; and that from the time of such withdrawal the use of his name in the business, except so far as might be necessary to close up the business of the firm, would not be allowed. For some time prior to the 22d day of April, 1882, Scutt had been endeavoring to sell the tonnage license from the Washburn & Moen Company, and the property and business of the firm of H. B. Scutt & Co. At the date last stated he executed two written agreements; by one of which he agreed, in consideration of \$45,000, to assign and transfer to H. B. Scutt & Co., Limited, of Pittsburgh, in due form, on or before the 1st day of July, 1882, all rights and licenses, held by him, either in his own right, or in trust for others, for the manufacture and sale of barbed wire, and the use of machines for the manufacture thereof, to include all rights enjoyed by him or H. B. Scutt & Co., of Joliet, in connection with said business, and especially all licenses granted by the Washburn & Moen Manufacturing Company and I. L. Elwood, authorizing the manufacture and sale of four thousand tons of barbed wire per annum. By the other of said agreements, executed by H. B. Scutt & Co., the machine-shop, machine-tools, good-will, and business of the firm of H. B. Scutt & Co. were sold to H. B. Scutt & Co., Limited, of Pittsburgh, for \$20,000, the delivery of the property to take place July 1, 1882. In accordance with the provisions of this latter contract, the property included therein was delivered to H. B. Scutt & Co., Limited, on the said 1st day of July. On the same day Scutt wrote to the Washburn & Moen Manufacturing Company and I. L. Elwood as follows: 'I have this day assigned to Messrs. H. B. Scutt & Co., Limited, the privilege of manufacturing and selling four thousand tons of barb wire per annum out of five thousand tons, which I am authorized to make by virtue of the license granted by you. I therefore authorize you to cancel my license to that extent, and to grant a new license to the above company for four thousand tons, or to cancel all the outstanding licenses, substituting therefor a new one to them for four thousand tons, and to me for one thousand tons per annum.'

"On the 3d of August, 1883, Daniel Robertson exhibited in the Will circuit court the bill of complaint now under consideration, against Hiram B. Scutt, for the settlement of the partnership accounts of the late firm of H. B. Scutt & Co. The bill, among other things, alleged that the copartnership obtained, owned, and possessed a license from the Washburn & Moen Manufacturing Company and Isaac L. Elwood to manufacture barbed wire, under which the firm operated and paid royalty; and charged that Scutt, without the knowledge or consent of the complainant, sold, assigned, and conveyed the said license, and the tonnage and other rights acquired by said firm thereunder, to H. B. Scutt & Co., Limited, or to some other corporation, firm, or person unknown, for the sum of \$45,000; that Scutt had paid no part thereof to complainant, or accounted to him or to the firm therefor, but, on the contrary, had concealed said sale from complainant for a long time after it was made, and denied to him that he had sold the same; and that Scutt now pretends that said license and tonnage was his own property, but that said license and tonnage was in truth and in fact the property of the firm of H. B. Scutt & Co., composed of complainant and said H. B. Scutt. The substantial and control-

ling issue made by the bill was whether or not the license of December 18, 1878, was the property and an asset of the late firm of H. B. Scutt & Co. A hearing was had before the court upon the pleadings and the proofs, and an order and decree entered on November 14, 1885, which contained the following special findings of fact, to-wit: (1) That on or about January 1, 1879, Hiram B. Scutt, James R. Ashley and Daniel Robertson entered into copartnership as equal copartners, share and share alike, under the firm name and style of 'H. B. Scutt & Co.' (2) That the agreement and license of date December 18, 1878, from the Washburn & Moen Manufacturing Company, and approved by I. L. Elwood, named in said bill of complaint, and as amended subsequent to its date, and prior to the withdrawal of James R. Ashley from the said firm of H. B. Scutt & Co., composed of Hiram B. Scutt, James R. Ashley, and Daniel Robertson, and so continued until the withdrawal of the said James R. Ashley from the said firm of H. B. Scutt & Co. (3) That on or about the 13th day of September, A. D. 1881, the said James R. Ashley retired from the said copartnership of H. B. Scutt & Co.; and on said day last named the said James R. Ashley sold, assigned, transferred, and delivered to said Hiram B. Scutt and Daniel Robertson, in equal shares, all his right, title, and interest in and to the assets and property of the said copartnership of H. B. Scutt & Co., including the said license above named, as part and parcel of the copartnership property of H. B. Scutt & Co. (4) That, upon the withdrawal of said James R. Ashley from the said firm of H. B. Scutt & Co., Hiram B. Scutt and Daniel Robertson continued a partnership under the name, style, and firm of H. B. Scutt & Co., continuing the business of the old copartnership of H. B. Scutt & Co., under the same name and style; and that in the new firm of H. B. Scutt & Co. the said Hiram B. Scutt and Daniel Robertson became and were equal copartners, share and share alike; and that the new firm of H. B. Scutt & Co., continued, as thus formed, until dissolved, by mutual consent, on or about the 1st day of July, A. D. 1882. (5) That said Hiram B. Scutt and Daniel Robertson brought into the new copartnership of H. B. Scutt & Co., as capital, in equal shares, share and share alike, the assets and property which were of the old firm of H. B. Scutt & Co., then remaining; and that the said license above named from Washburn & Moen Manufacturing Company, approved by I. L. Elwood, of date December 18, 1878, as amended, became and was the property of the new firm of H. B. Scutt & Co., composed of Hiram B. Scutt and Daniel Robertson; and that the said Hiram B. Scutt and Daniel Robertson, as such copartners, became and were equally interested, share and share alike, in the same, as sole owners thereof, and of all moneys, debts, evidences of debt, assets, and property arising or to arise on account thereof. The cause was then referred to the master in chancery to state an account, with his findings with reference thereto; said account to be stated in accordance with findings of the court. The cause was again heard by the court at the September term, 1886, upon exceptions filed by Scutt, the defendant, to the report made by the master of his findings and statement of account. This report of the master was quite voluminous, and contained twelve special findings; the eighth and twelfth of which were as follows: '(8) I charge H. B. Scutt with \$600, the amount of a book-account of H. B. Scutt & Co. against Daniel C. Stover, which I find was settled by deed of patent from Stover to John F. Scutt, made at the special request of H. B. Scutt, and with interest on said amount from March 8, 1883, the date of settlement, to September 30, 1876, at the rate of six per cent., making a total of \$727.70.' '(12) I find that H. B. Scutt, at the dissolution of the partnership of H. B. Scutt & Co. on July 1, 1882, retained and appropriated to his own use one thousand tons of tonnage covered by the license of Washburn & Moen and I. L. Elwood to H. B. Scutt, and that said tonnage was of the value of \$11,250, being the same value per ton as the four thousand tons of tonnage sold to H. B. Scutt & Co., Limited, by H. B. Scutt. I therefore

charge H. B. Scutt with \$11,250, with interest thereon from July 1, 1881, to September 30, 1886, at the rate of six per cent. per annum; amounting, principal and interest, to the sum of \$14,109.35.' The court sustained the exceptions of the defendant to the eighth and twelfth findings of the master, and overruled all other of his exceptions to the report, and the report was referred back to the master to restate the account in conformity with the order of the court then made. The cause was again heard by the court on the 25th day of February, 1887, on exceptions filed by each of the parties to the suit to the second report, and the statement of account made by the master; and all of said respective exceptions were overruled by the court, and said second report of the master approved; and a final decree was thereupon entered, based upon said second report, in favor of Daniel Robertson, and against Hiram B. Scutt, for the sum of \$30,063.88 and costs, and execution awarded therefor. From this final decree Hiram B. Scutt has taken this appeal, and has assigned errors upon the record; and Daniel Robertson, appellee, has assigned cross-errors.

"The material question to be determined upon the assignments of error made by appellant is whether or not the circuit court erred in finding that the license issued by the Washburn & Moen Manufacturing Company, with the consent of Isaac L. Elwood, to H. B. Scutt, of date December 18, 1878, with the amendments thereto, was the partnership property, and, in equity, an asset, of the late firm of H. B. Scutt & Co. The cross-errors question the ruling of the court sustaining exceptions to the eighth and twelfth findings contained in the first report of the master. The evidence found in the record is so very voluminous and conflicting that it cannot well be compared and discussed within reasonable limits, and we shall therefore not here undertake so to do, to any considerable extent. In our opinion the proofs sustain the finding of the court that the license was equitably an asset and the property of the copartnership of H. B. Scutt & Co. Without stopping to consider the antecedent status and ownership of letters patent No. 180,656, it is clear from the evidence that on September 29, 1876, appellant, by his deed of that date, conveyed said letters patent to the old firm of H. B. Scutt & Co.; and that they, by their deed of September 30, 1876, conveyed said letters patent to the Joliet Wire-Fence Company; and that such conveyances were absolute in their terms, and were duly recorded in the patent-office in October of that year. It is also clear, from the evidence, that when appellee, on the 1st day of October, 1877, purchased, for the consideration of \$10,000 in cash, eighty shares of capital stock in the Joliet Wire-Fence Company from C. M. Ashley, then a member of the old firm of H. B. Scutt & Co., and obtained a stock certificate therefor, signed by appellant as president of the corporation, the title to these letters patent stood vested of record in the wire-fence company; that said letters patent had theretofore been put into the capital stock of the company at \$35,000; and that appellant was not claiming or asserting any right, title, or interest, either legal or equitable, in or to said letters patent, other than that which he held as a stockholder in the corporation. Appellee, therefore, had full right to rely upon their being the absolute property of the corporation. The decided weight of the evidence is that prior to the negotiations had by appellant with Mr. Washburn at Worcester early in the fall of 1878, and up to the time of the final settlement with the Washburn & Moen Company, at Chicago, and the procurement of the license, it was the understanding and agreement between appellant and those of the stockholders of the wire-fence company who desired to continue the manufacture of the barbed wire fencing that the mission of appellant in his negotiations with the Washburn & Moen Company included, not only procuring indemnity against damages for wire already made and sold, but also the making of some arrangement whereby the fence-wire business could be continued. The testimony of Robertson, James B. Ashley, Cyrus N. Ashley, and W. S. Brooks

is all expressly to that effect, and is sufficient to overcome the testimony of appellant to the contrary. We also think it evident, from the testimony of Brooks and the other evidence in the case, that it was known and understood by all the stockholders that the business was to be continued after a settlement with the Washburn & Moen Company by a portion of the members of the wire-fence company, either as a corporation or otherwise, and that they all acquiesced in such arrangement, and in such continuance of the business; and that, on the return of appellant from Worcester, he reported to them a release of damages could be procured, and a license for future operations obtained, but only upon condition that the corporation was dissolved, and all the patents held by it, including letters patent No. 180,656, were assigned to the Washburn & Moen Company, and a firm organized, instead of a corporation, to which the license should be granted. It was plainly in furtherance of the desires of those of the stockholders who did not wish to continue in the barbed-wire business, and in furtherance of their interests as they understood them, that the proposed arrangement should be carried out in its entirety. These outside stockholders were all engaged in other business, and had discovered they could not continue business pleasantly with Robertson and the members of the old firm of H. B. Scutt & Co. They were anxious to get out of the fence-wire business, and be relieved of all liability for damages, and it was of interest to them that some person or persons or corporation should continue the manufacture of wire, to whom they could dispose of their machinery, tools, stock, contracts, and other property connected with the manufacture of fence wire. We think it very plain, from the direct evidence, from the surrounding circumstances, from the conduct of the wire-fence company, and each and every of its stockholders, and from the inherent probabilities of the case, that it was fully understood and agreed by all the stockholders, not only that the patents should be assigned to the Washburn & Moen Company, but all the rights, titles, interests, and benefits that should accrue from the proposed license to be issued by the Washburn & Moen Company should vest in and be the property of the firm that should be formed to continue the manufacturing of barbed wire.

"It is objected that, by the arrangement and agreement as testified to by Robertson and J. R. and C. N. Ashley, said C. N. Ashley was to have been a member of the new firm; that if the fence company was the absolute owner of the letters patent, and conveyed the same to Scutt in trust, it was only in trust to secure indemnity for all damages for the past, and up to January 1, 1879; and that, even if in trust for any licenses, it was in trust for four,—Scutt, Robertson, and the two Ashleys; and that, if Scutt was an agent to procure the license, he was an agent for the four persons mentioned, and not the agent of Robertson, James R. Ashley, and himself alone. Brooks testifies, in evidence, that Scutt made a verbal report, when all the members of the corporation were present, that Washburn would have nothing to do with a corporation,—it must be a firm; that if they would dissolve the corporation, and make an assignment to him of the patents in their hands, he would in consideration of this, and of their forming a company and taking out a license, give them immunity for the past; and that his report was adopted, and they agreed to make a settlement. While it is evident, from the testimony, that it was fully understood by all the stockholders that it was a part of the proposed settlement that a license should be issued to such firm as should be formed by members of the fence company, yet it does not appear that the corporation was ever advised what particular stockholders would enter the proposed firm, or that the individual stockholders, excluding appellant, appellee, and the two Ashleys, had such information. So, whatever trust there was in that behalf was for the benefit of such of the stockholders as should actually become members of the proposed new firm of H. B. Scutt & Co. If Scutt was in fact the agent of the four in obtaining the license in his own name for the

benefit of himself and his copartners in the contemplated firm of H. B. Scutt & Co., and one of the four was afterwards, by the act and procurement of Scutt himself, excluded and prevented from becoming a member of the firm, and the person so excluded acquiesced in such exclusion, and waived all his claims in that behalf, and is making no complaint in regard thereto, and the others also acquiesced in such exclusion, and the firm was actually organized with three members instead of four, then Scutt should be held to be estopped in equity from now claiming he was not the agent in procuring such license of the persons who became copartners when the firm was actually formed. In our opinion, the language used in the first and second sections of the license negotiated by Scutt, and dated December 18, 1878, and the fact that, on his return to Joliet from Chicago with the license, he met appellee and James R. Ashley by appointment, and displayed to them such license, are strongly corroborative of the claim that in procuring such license he was not acting for himself alone, but as the agent of those who were about to form the new firm, and purchase the property of the Joliet Wire-Fence Company. Strongly corroborative of the same theory, and at variance with the defense now made by him, are the statements contained in his letter of December 9, 1878, to C. Boiltcher, of Boulder, Colo., in which he says, in his own handwriting: 'Now our affairs wear a different aspect. A combination has been formed composed of the leading wire manufacturers, and including the Washburn & Moen Manufacturing Company, and I. L. Elwood & Company, making the Glidden wire, and ourselves, or, rather, H. D. Scutt & Company, who will succeed this company on January 1st next. This combination controls all the valid patents on barb wire, and goes into effect January 1st. The price of wire will be advanced to ten cents in car-lots, or one-half cent more than you paid. H. B. Scutt & Company assume the liabilities and assets of Joliet Wire-Fence Company.' In the written agreement signed by appellant, appellee, and J. R. Ashley, dated September 19, 1881, executed on the occasion of the withdrawal of the latter from the firm, it is stated that Ashley conveys to Scutt and Robertson all his right, title, and interest in and to the licenses of the firm; and it is the uncontradicted testimony that the firm held no license other than that dated December 18, 1878, executed by the Washburn & Moen Manufacturing Company, and approved by Isaac L. Elwood, and the amendments thereto. This circumstance shows that this license was at that time regarded by the copartners as the property of the firm, although, from the evidence, it is probable it was not then considered—at least, by said Ashley and appellee—to be of any considerable pecuniary or salable value. It is also a circumstance worthy of notice that as late as the 22d of April, 1882, appellant in the secret written agreement he made with H. B. Scutt & Co., Limited, for the sale of four thousand tons of the tonnage covered by the license, he expressly mentions and includes rights and licenses held by him in trust for others, and all rights enjoyed by H. B. Scutt & Co., of Joliet. We deem it unnecessary to refer to numerous other facts and circumstances in proof. There are some matters of considerable probative force that tend to prove the theory of the case contended for by appellant. Notable among these is the difference between the "consent" which was signed by appellee and James R. Ashley, the substance of which we have given in the statement of the case, and the agreement provided for by the terms of the contract made by appellant with the Washburn & Moen Manufacturing Company, and by which appellant was bound, and the fact that Ashley refused to sign an agreement which would have bound them for and during the period of the existence of the license. Notable, also, is the absence from the inventory that was made of the assets of the firm, at the time of the sale of the interest of Ashley to Scutt and Robertson, of all mention or valuation upon the license. In our opinion, however, especially in view of the circumstances of explanation found in the record, and of the weight of the evidence considered as a whole, these facts are

not of controlling influence. Our conclusion is that the alleged errors insisted upon by appellant are not well assigned.

"If the tonnage of four thousand tons per annum, which was sold and transferred by appellant to H. B. Scutt and Co., Limited, was equitably an asset, and the property of the firm of H. B. Scutt & Co., composed of appellant and appellee, then, also, the remaining one thousand tons of yearly tonnage—they both being parcels of the five thousand tons of annual tonnage included in the license as amended—was also, equitably, an asset, and the property of the copartnership of H. B. Scutt & Co., composed of appellant and appellee. The evidence, as we understand it, shows that this one thousand tons of tonnage was at or about the time of the sale and delivery to H. B. Scutt & Co., Limited, and of the dissolution of the firm of H. B. Scutt & Co., of Joliet, appropriated and converted by appellant to his own use. It was included in the license for five thousand tons, which was on the 1st day of July, 1882, surrendered to the Washburn & Moen Company for cancellation, with a request a license for the one thousand tons should be issued to him, (Scutt.) This was done without the knowledge or consent of Robertson, and the fact it was or had been done was studiously concealed from the latter, notwithstanding his repeated inquiries for information. The license and its several amendments were in fact canceled, but no new license was issued to Scutt for the one thousand tons. The license or tonnage to the amount of the thousand tons, in some way or manner, or by some arrangement, which is not made clear by the evidence, remained in the hands of the Washburn & Moen Company, but Scutt got the benefit of it. On his direct examination, Scutt testified that the one thousand tons of tonnage is owned by him, and that he is still manufacturing under it. On his cross-examination, he said: 'That thousand tons still remains in my name. It is my individual property, and I am manufacturing under it to-day, and am reporting to Washburn & Moen Manufacturing Company my sales.' From his acts and his claim of exclusive ownership, it must be presumed, as against himself, that he has converted and appropriated it to his own use. If the thousand tons of tonnage was the property of the firm, and Scutt denied the title of his partner therein, and by his procurement, in disregard of the rights of his copartner, the license therefor was surrendered and canceled, and the benefits derived from such surrender and cancellation appropriated by him to his own individual use, it would seem he should, in equity, account for the value of such tonnage. The evidence is very clear that this tonnage was a salable property, and could readily and easily have been sold and disposed of for the benefit of the firm. In *Ligare v. Peacock*, 109 Ill. 94, it was held that if a partner, after dissolution of a partnership, retains the possession of partnership property, and appropriates it to his own use, he must account for it at a fair cash value. In *Laswell v. Robbins*, 39 Ill. 209, it was held that where a partner has been intrusted with partnership property, and has it under his control, he must be charged with its value, and to discharge himself, he must account for its disposition, and what he has done with the proceeds; and that, in such case, the one partner only has to show that the other received the property and its value, and the presumption then arises that he is liable, and, to discharge himself, he must show some legal defense. The master, in his first report, charged appellant with this one thousand tons, and found that said tonnage was of the value of \$11,250, being the same value per ton as the price at which the four thousand tons were sold to H. B. Scutt & Co., Limited. The evidence of the witnesses, Lambert, Connell, Curtis, Bishop, Watkins, Collins, and Lord fully sustains the finding of the master in respect to the value of this tonnage. We think the circuit court erred in sustaining the exceptions of appellant to the twelfth special finding contained in the first report of the master, and in overruling the exceptions taken by appellee, in respect to the same matter, to the second report of the master; and we think

the cross-error assigned by appellee in that behalf is well assigned, and that the final decree rendered by the court should have included the moiety of appellee in this \$11,250, with interest thereon at the rate of six per cent. per annum from July 1, 1882, to the date of the decree.

"In respect to the ruling of the court sustaining the exceptions of appellant to the eighth special finding of the master, we find no error. The testimony of appellee himself shows that it was with his knowledge and consent that Scutt made the arrangement with Stover by which the account of the firm against Stover was settled by the assignment of patent No. 164,947.

"For the error of the circuit court in refusing to allot as a copartnership charge against appellant the item of \$11,250, and interest thereon, for the conversion and appropriation to his own use of the one thousand tons of tonnage included in the license as amended, the decree of that court is reversed; and the cause is remanded to said court, with directions to enter a final decree in favor of Daniel Robertson, and against Hiram B. Scutt, not only for the several items of charge included in the decree hereby reversed, with interest computed upon said items in the manner allowed in the report of the master and said former decree, calculated to the date of the decree to be entered, but also including a further charge for the moiety of or equal one-half interest of appellee in said \$11,250, with interest thereon at the rate of six per cent. per annum from July 1, 1882, to the date of the entry of the decree. And it is further ordered that the costs of this appeal be taxed to appellant. Affirmed in part; reversed in part."

After a careful examination of the voluminous evidence in this record, we arrive at the same conclusion as that reached by the appellate court, with one exception; and we therefore adopt the opinion of the court as our own, in the case, with such exception. The exception relates to "the remaining one thousand tons of yearly tonnage," spoken of in the opinion. The license was not transferable. It was granted to Hiram B. Scutt, with the privilege of associating with him under the license not to exceed three copartners in number, provided they should first subscribe to the terms and conditions of the license by a written obligation to that effect. The third clause of the license is as follows: *Third*. "The foregoing license, right, and privilege is granted upon the following express conditions, to be well and truly performed and complied with on the part of said Hiram B. Scutt, or Hiram B. Scutt and associate or associates, doing business as H. B. Scutt & Co. as conditions precedent to the continuance of said license." The twentieth is a like clause as to the associates. There are a great number of express conditions on the part of the licensee. James R. Ashley and appellee, Robertson, did execute the following agreement in writing: "Whereas, articles of agreement were entered into by Washburn and Moen Manufacturing Company, of Worcester, Mass., and H. B. Scutt, and duly signed by the above-mentioned parties, on the 18th day of December, 1878; and whereas, there is a certain clause in such agreement duly authorizing the said H. B. Scutt to associate with himself three parties to engage in the manufacture and sale of the Scutt barbed wire; and, whereas, we, the undersigned, James R. Ashley and Daniel Robertson, desire to associate ourselves with the said H. B. Scutt, and to do business under the firm name of H. B. Scutt & Co.: Now, therefore, we, the said James R. Ashley and Daniel Robertson, do each acknowledge that we have read the above-mentioned contract or agreement between the Washburn and Moen Manufacturing Company and H. B. Scutt; that we are familiar with each and every detail of said agreement; and do hereby agree that we will be bound by said agreement, during the time that we are members of the firm of H. B. Scutt & Co., the same as though we were original parties to the same; and promise and agree to execute each and every requirement, in good faith, for the term that we may be associated with the said H. B. Scutt in the business of manufacturing the said barbed wire. Dated, Joliet, Ill., December 31, 1878.

JAMES B. ASHLEY. D. ROBERTSON." This was not satisfactory to the Washburn & Moen Manufacturing Company, and they sent back another paper to Ashley and Robertson to sign. This they refused to do, because, as Ashley said, there were conditions in it he was not satisfied to sign; one of which was to bind them to acknowledge the validity of these patents as long as the license continued, which they did not propose to do. But that is one of the conditions of the license. This testimony, with the paper they did sign, shows that they refused to bind themselves for the performance of the conditions of the license for any longer time than while they were associated with Scutt as partners. How could they expect to have any benefit from the license after they ceased to be partners with Scutt, and were not bound by the conditions of the license? The benefit of the license is, in most clear and express terms, limited to persons associated with Scutt as partners, and who should first have become bound by the terms and conditions of the license. These precise terms of the license were well known to Robertson and Ashley, and they acquiesced in the form of the license as taken, as satisfactory to them. Scutt had contributed individually to the consideration. He had assigned to the Washburn & Moen Manufacturing Company three patents which he owned individually; and he had given them the benefit of his inventive genius, there being a stipulation that the company should have the benefit of the inventions he might thereafter make. Robertson and Ashley appear to have acted upon the understanding that the license was for their benefit only while they were partners with Scutt. This is indicated by the writing they signed, limiting their being bound by the conditions of the license to the duration of the partnership, and refusing to be so bound as long as the license continued. At the time Ashley withdrew from the partnership only 10 months before the sale of this 4,000 tons of the tonnage for \$45,000, an inventory was made of all the assets of the partnership. This license was not named among them, and he sold out for one-third of the value of these inventoried assets. He never got one cent, as he says, on account of the license. When Scutt and Robertson came to dissolve the partnership, the dissolution is by mutual consent, Robertson signs a writing for the sale of the machinery, etc., for manufacturing at a named price, nothing is said about manufacturing thereafter, or about the license. There was no indication of any expectation that Robertson was to have any benefit from the license thereafter. All this tended to show, as in the case of Ashley, that Robertson considered his interest in the license as ending with his ceasing to be a partner with Scutt. Scutt went on afterwards manufacturing under the license, as he had the sole right to do. Robertson was at liberty to go on and manufacture barbed wire, if he saw fit, and deny the validity of the company's patents, in accordance with his refusal to be bound to acknowledge their validity any longer than while the partnership continued. The license appears to have been a thing of value and benefit to Robertson and Ashley only while and so long as they were associated with Scutt as partners. What was realized from and on account of the license during the partnership, we think, should be considered as belonging to the partnership. The 4,000 tons of tonnage was sold for \$45,000 on April 22d, which was before the dissolution of the partnership; and this may well be treated as an asset of the partnership. But, as to the remaining 1,000 tons which was not disposed of, we think that Robertson's interest in the license with respect thereto ceased upon the dissolution of the partnership, and that it should not be counted as property of the partnership. The judgment of the appellate court in respect of this particular, of 1,000 tons of tonnage, is reversed, and the decree of the circuit court will be affirmed.

(124 Ill. 527)

EVERINGHAM v. NATIONAL CITY BANK OF OTTAWA

(Supreme Court of Illinois. May 9, 1888.)

1. EXECUTION—LIEN—RIGHTS OF SUBSEQUENT ATTACHING CREDITORS.

On February 14th, B. obtained judgment, issued execution, and directed the sheriff to levy on certain realty which the debtor had previously conveyed, informing the sheriff that he was about to file a bill in aid of the levy, and did, the same day, file such bill, alleging the conveyance to be fraudulent, and the insufficiency of the personalty. On February 16th, B. directed the sheriff to levy the attachment in another suit by him against the same debtor on the personalty, and on March 11th directed a levy of the first execution on the same personalty. E. attached the same personalty on March 2d, and on March 16th obtained judgment and issued special execution, under which the personalty was sold. B.'s levy on the realty was released, and the bill in aid dismissed, March 25th. It not appearing that B. acted in bad faith, *held*, that he did not lose his prior lien on the personalty, and that his judgment should be paid in full out of the proceeds thereof, in preference of E.'s judgment.

2. SAME—DISTRIBUTION OF PROCEEDS.

Where plaintiff in a suit commenced by *capias* recovers judgment upon a promissory note executed for money to be afterwards advanced, and at the same term, in a suit in attachment, recovers another judgment for the money advanced, the latter judgment only, as against judgments in attachment suits recovered at the same term by other parties, is entitled to share in the distribution of the proceeds of the attached property, though the Illinois attachment act, § 87, provides that all judgments in attachment against the same defendant, returnable at the same term, and all judgments in suits by summons, *capias*, or attachment, against such defendant, recovered at that term, shall share *pro rata* in the proceeds of the property attached.

Appeal from appellate court, Second district.

Duncan, O'Connor & Gilbert, for appellant. *D. B. Snow* and *Mayo & Widmer*, for appellee.

PER CURIAM. We have given careful consideration to the very full and exhaustive arguments, both oral and written, made in this case; and, having done so, we are satisfied that the following opinion of the appellate court states the points in contention, and the law applicable thereto, with such fullness and accuracy that no useful end can be subserved by writing another opinion; and for the reasons there given the judgment of the appellate court is affirmed:

"BAKER, J. In February, 1884, William Butters executed to Ann Armour a mortgage upon 207 acres of land in La Salle county, to secure the payment of \$3,000 in five years, with seven per cent. interest, and said mortgage is still a valid and subsisting lien upon said land. On February 9, 1887, the firm of Nash, Wright & Co. obtained a judgment by confession in the circuit court of La Salle county for \$3,626.21, and costs, against said William Butters and James R. Butters, and on the same day execution was issued on the judgment, and levied on the real estate above mentioned; and at the date of the hearing in the circuit court of the matter at bar there was still due and unpaid upon said judgment the sum of \$1,700. On February 11, 1887, said William Butters executed to one John H. Druitt a warranty deed to said land, for the expressed consideration of \$12,000; which deed was duly filed for record on the next day. On February 14, 1887, the National City Bank of Ottawa recovered a judgment by confession in the circuit court of La Salle county against William Butters and James R. Butters for \$3,102.22 and costs; upon which execution was issued on the same day, and placed in the hands of D. B. Snow, the plaintiff's attorney, who directed the sheriff to levy it upon said 207 acres of real estate, and informed the sheriff that he was about to file a bill in chancery in aid of the levy. No other directions were given to the sheriff concerning this execution until March 11, 1887, as hereinafter mentioned. On the same day the National City Bank, by the same attorney, filed a bill in chancery in the circuit court in aid of the levy, alleging that the title

to this real estate had been in the defendant William Butters, but that said William Butters had made a fraudulent conveyance thereof to John H. Druitt. The bill also alleged that the defendants in the execution had no other property subject to execution of sufficient value to satisfy the judgment. The prayer of the bill was that the conveyance from Butters to Druitt be adjudged fraudulent and void, and that the land be subjected to sale under the execution. This bill was prosecuted until March 25, 1887, when it was dismissed without prejudice. On February 16, 1887, the National City Bank of Ottawa, by the same attorney, commenced a suit in attachment in the circuit court, returnable to the March term, 1887, against James R. Butters, for \$1,000; and on the same day D. B. Snow, the plaintiff's attorney, delivered the writ of attachment to the sheriff, and directed him to levy it upon the personal property, the proceeds of which are now in controversy; which the sheriff accordingly did. Judgment for \$1,000 and costs was duly entered against the defendant on the 22d day of March, 1887. On February 18, 1887, Lyman Everingham commenced an action of *assumpsit* by *capias*, in the circuit court, against William Butters and James R. Butters, returnable to the March term, 1887, upon which such proceedings were had; that on March 21, 1887, the *capias* was quashed, and judgment entered against the defendants for \$5,077.77 and costs, upon which execution was issued, and returned no property found or money made. The judgment was rendered upon a promissory note executed by the defendants January 11, 1887, as collateral security for moneys to be thereafter advanced by the plaintiff to James R. Butters; which moneys formed the consideration of the judgment next hereinafter mentioned. On March 2, 1887, Lyman Everingham commenced in the circuit court a suit in attachment, returnable to the March term, 1887, against James R. Butters; and the writ issued in that suit was on the same day levied upon the same personal property which had been levied upon under the attachment of February 16, 1887, in favor of the National City Bank. Judgment for \$5,420 and costs was duly entered in this suit on March 16, 1887, and a special execution was issued, under which the property attached was sold. On March 11, 1887, the National City Bank, by its attorney, directed the sheriff to levy the execution of February 14, 1887, for \$3,102.22; upon the personal property which had been levied upon under the writs of attachment; which the sheriff accordingly did, and the property was sold under that execution, as well as under the special execution in favor of Everingham, on the 26th day of March, 1887, the amount realized by the sale being \$4,318.80; and, after deducting all costs and expenses, there was left in the sheriff's hands for distribution to the judgment creditors the sum of \$4,174.16. On March 25, 1887, the attorney of the National City Bank directed the sheriff to release the levy on the real estate, and dismissed the bill in chancery without prejudice; and on March 26, 1887, Everingham filed his bill in chancery to set aside the sale of the real estate from William Butters to John Druitt, and to subject the land to the satisfaction of his judgment for \$5,077.77 against William Butters and James R. Butters.

"Upon the foregoing facts, it was claimed by Lyman Everingham that although the execution of February 14, 1887, for \$3,102.22 in favor of the National City Bank was the first writ placed in the sheriff's hands, yet, by reason of the directions given to the sheriff by its attorney to levy on the real estate, the prosecution of the bill in chancery in aid of the levy, and the levy made February 16, 1887, upon the personal property, by direction of its attorney under its own writ of attachment, which was junior to its execution of February 14, 1887, the lien of the latter writ was voluntarily waived or suspended, and that the proceeds of the execution sale should therefore be applied *pro rata* upon the judgment of \$1,000 in favor of the bank, and the judgments of \$5,420 and \$5,077.77 in favor of Everingham, and that no portion of the proceeds should be applied upon the execution of February 14, 1887, for

\$3,102.22. But the court below held that the judgment for \$3,102.22 in favor of the bank must first be paid in full, and that, inasmuch as Everingham's judgment of \$5,077.77 against William Butters and James R. Butters was merely collateral security for the judgment of \$5,420 against James R. Butters, only the latter judgment could participate in the proceeds, and that therefore the balance of the fund after paying the said judgment of \$3,102.22 should be applied *pro rata* upon the judgment of \$1,000 in favor of the bank, and that of \$5,420 in favor of Everingham. This action of the court, it is insisted, was erroneous, and in support of such position the following propositions are urged: *First*, that any directions, express or implied, given by plaintiff to the sheriff, by reason of which a levy upon property under an execution is delayed, operate, while such directions are in force, to suspend the lien of the writ; *second*, that the directions given by Snow, the attorney of the National City Bank, to the sheriff, were equivalent to directions not to levy upon the personal property in question until March 11, 1887, and therefore operated to suspend the lien of the execution until that date; *third*, that the conduct of the bank's attorney from February 14th to March 11th is conclusive evidence that during that time it was not seeking to enforce the execution of February 14th against this personal property, and therefore the lien of the execution upon it during that time was suspended; *fourth*, that the levy on the real estate, and the filing of the bill in aid, were inconsistent with a levy on the personal property, and therefore suspended the lien; *fifth*, that, the action of the bank with respect to its levies being such as would have a tendency to mislead and hinder Everingham in the collection of his debt, the bank is estopped from asserting a right to levy on the personal property under its senior execution; *sixth*, that the judgment of \$5,077.77 in favor of Everingham was one upon which Everingham was entitled to a *pro rata* share of the fund.

"In respect to personal property the general rule is that executions are to be satisfied in the order of their priority; the writ first delivered to the officer taking precedence as the first lien, and the others following in the order in which they are received. This rule obtains even though the first seizure may have been made on a subsequent execution; and, if the sheriff has more than one execution in his hands, he should apply the proceeds of sale on the elder writ, for the sale is not for the benefit of the particular writ which is first levied, or under which the sale is made, but for the benefit of all the writs in his hands in the order in which they rank as liens upon the personalty. So, also, a *fi. facias* delivered to a sheriff takes preference of an attachment levied before the *fi. fa.*, but after such delivery. *Freem. Ex'ns*, § 196; *Herm. Ex'ns*, § 188; *Rogers v. Dickey*, 1 Gilman, 636; *Leach v. Pine*, 41 Ill. 65; *Lawrence v. McIntire*, 83 Ill. 399. This much seems to be conceded in this case; but the contention of appellant is that as the attorney for appellee gave to the sheriff a description of the real estate, and told him to levy appellee's execution thereon, and at the same time informed him that he was about to file a bill in chancery in aid of such levy, and actually did file such bill, therefore appellee lost the right to levy its senior execution on the personal property, and assert a priority over the junior writs, because the levy on real estate, and the exhibiting of the bill in aid, were inconsistent with a levy on the personal property, and a suspension of the lien of the senior execution. It is well-settled doctrine that, as the object of an execution is to obtain satisfaction of the judgment on which it issues, therefore any act of the creditor, or directions from him to the sheriff, diverting the execution from this purpose, renders it dormant and inoperative against other creditors, and clothe them with priority. *Gilmore v. Davis*, 84 Ill. 487; *Koren v. Roemheld*, 6 Bradw. 275; *Kellogg v. Griffen*, 17 Johns. 274; *Knower v. Barnard*, 5 Hill, 377. This doctrine had its origin in the statute of 13 Eliz. c. 5, which provided that executions taken out with intent to hinder, delay, or defraud cred-

itors or others, should be, as against the persons sought to be hindered, delayed, or defrauded, utterly void. It has been deduced from this statute that any attempt to make use of an execution, even without any actual fraudulent intent, for purposes of security merely, is a perversion of the writ, and renders it constructively fraudulent as to junior executions and writs. It has been remarked that there is no settled rule whereby it may be determined when a senior writ loses its preference, and that each particular case must be determined by its own peculiar circumstances. Under the circumstances of the case in hand, the bank was guilty of no improper use of the process of the court, and by its conduct waived no legal right or lost no lien. Immediately upon recovery of judgment, it sued out a *fiery factas*, and had it levied upon real estate, and on the same day filed a bill in chancery in aid of the levy, for the purpose of setting aside what it supposed to be a fraudulent conveyance of the land. It used unusual zeal and diligence in getting service and pressing the suit in aid.

"The allegations of the bill were that William Butters had not sufficient personal property to satisfy the execution, and that James R. Butters had not sufficient property liable to execution to satisfy the judgment, and that he was virtually insolvent. It does not appear that at the time of the levy on real estate the bank had any actual notice of the personal property which was afterwards seized and sold, or of its value. It may be the levy on the land was not the most effective way in which the bank could have proceeded in order to make its money, and make it as quickly as possible, but probably it was not then advised of any more promising mode of procedure. In any event, what it did was in furtherance of the object of the writ to enforce payment of its judgment. Neither the bank nor its attorney directed the sheriff not to levy on personal property. The bill in equity could only be prosecuted upon the theory the personal property the defendants in execution had was insufficient to satisfy the debt; and, had the bank known there was sufficient of such property, it would clearly have been inconsistent in it to both file the bill and levy on the personalty. But that is not the stand-point from which this case is to be regarded, for appellee was proceeding, as is shown by the allegations of the bill, upon the theory of an insufficiency of personalty, and there is nothing in the record to indicate it was not acting in good faith. Besides this, a levy on real estate, even of value sufficient to pay the debt, is not *prima facie* a satisfaction of the execution. The levy, therefore, did not prevent the sheriff from seizing other property under the writ, and selling it. It will not do to say that whenever an execution is, by direction of a plaintiff, levied on certain property, such levy is effective to suspend the lien of the writ in respect to all other property of the defendant in execution. Even in regard to personalty, where a levy sufficient to pay the indebtedness operates *sub modo* as a satisfaction, it may turn out the property seized belongs to another person, or is exempt from forced sale, or is insufficient to satisfy the debt, or is removed from the possession or control of the sheriff by the act of the defendant in execution. The rule prevails, without exception, that an officer, notwithstanding a prior levy, has, at any time before the return-day, power to make such further seizure as may be necessary to satisfy the plaintiff's debt. *Freem. Ex'ns*, § 253; *Montgomery v. Wayne*, 14 Ill. 373. But, here, as the first levy was upon real estate, the case is all the stronger for appellee; as such levy, regardless of the question of value of property, did not, like a levy on sufficient personal property, operate, while undisposed of, as such a satisfaction of the judgment as to bar an attempt to enforce collection in any other manner. *Herrick v. Swartwout*, 72 Ill. 340. In *Deloach v. Myrick*, 6 Ga. 410, a *fiery factas* had been levied on lands, and the levy afterwards dismissed, by order of plaintiff's attorney, and a levy made upon a negro boy, and intermediate the two levies the boy had been sold to Deloach & Wilcoxson, and it was decided they could not hold the boy as against the lien of the plaintiff in exe-

cution. See, also, *Hammond v. Myrick*, 14 Ga. 77; *Hogshead v. Carruth*, 5 Yerg. 227. The logic of appellant's claim made herein would lead to the conclusion that a direction to levy upon particular property would be effective to suspend the lien of the execution as to all other property of the execution debtor. Herein, we think, lies the fallacy of his argument. It is true that from February 14th to March 11th the bank was not seeking to enforce its execution of February 14th against the personal property upon which it was subsequently levied; but, in our opinion, the conclusion does not follow therefrom that during that time the lien of the execution was dormant and constructively fraudulent as to such personal property. That which the rule deduced from the statute of Elizabeth is leveled against, is the perversion of the writ of *fieri facias* from its legitimate purpose of enforcing payment; and there is no such perversion when there is an absolute intention of collecting the judgment, and a levy is made in good faith, which is afterwards abandoned, and a new levy made on other property, upon discovery of the fact the first levy is, or probably will prove to be, ineffective. In this case the bank seems to have been more than ordinarily diligent and industrious in its efforts to enforce payment through its senior execution. At the time of the levy on the land, it was already incumbered by a valid mortgage lien and a prior judgment lien, amounting together to about one-half its value. As soon as it was ascertained from the depositions taken in the chancery suit that the conveyance to Drutt was probably *bona fide*, and for a valuable consideration, the bank forthwith directed a levy upon the personal property, and shortly thereafter released the levy on the land, and dismissed its bill in aid of such levy. The fact that the bank supposed at the time of the first levy, and for a month thereafter, that it would be able to make its debt out of the realty, and did not during that time either intend or seek to subject the personal property in satisfaction of such debt, was not an abuse of the process of the court. The law does not punish the plaintiff in senior execution for making an ineffectual levy, by forfeiting his prior lien upon all property not included in such levy. All that it requires of him is that he should act in good faith, and retrace his steps during the life-time of his senior execution, and before the personal property has been actually sold by virtue of a junior writ. If we are right in our conclusion, then appellant can take nothing by his claim that the direction to the sheriff to levy the bank attachment writ of February 16th upon the personal property was, by necessary implication, a direction to do nothing to overthrow the effect of that levy, and therefore a command not to levy the senior execution upon it. Besides this, as is well answered by appellee, in no other certain way than by this attachment could the bank share *pro rata* with other creditors or James R. Butters in any surplus of proceeds of sale of the personal property levied upon, over and above the amount sufficient to satisfy its senior execution of February 14th.

"It is further objected to the order of distribution made by the circuit court that the Everingham judgment for \$5,077.77 was a judgment upon which he was entitled to receive a *pro rata* share of the fund derived from the sale of the personally. Appellant bases his claim in this regard upon two grounds. One is that section 37 of the attachment act, without any ambiguity of language, provides, in express terms: 'All judgments in attachment against the same defendant returnable at the same term, and all judgments in suits by summons, *capias*, or attachment against such defendant, recovered at that term, or at the term when the judgment in the first attachment upon which judgment shall be recovered is rendered, shall share *pro rata* according to the amount of the several judgments, in the proceeds of the property attached, either in the hands of a garnishee or otherwise.' The other ground relied upon is that Everingham held the note upon which the \$5,077.77 judgment was rendered as collateral security for the James R. Butters indebtedness to him, and that he should be permitted to enjoy the benefit of the right for which

he contracted to pursue both his remedies until the amount actually due him is paid, and that otherwise the security which he supposed he obtained is rendered nugatory, and the judgment which he holds as security is declared canceled. Section 41 of the attachment act provides that the act shall be construed in all courts in the most liberal manner for the detection of fraud. In *Railroad Co. v. Crane*, 102 Ill. 249, it was held that our statute relating to attachments, from its provisions and the spirit of the whole act, is entitled to and should receive a liberal, and not a strict, construction. It is plainly the intention and policy of the statute that all creditors who avail themselves of the right given to participate in the proceeds of the property attached by recovering judgment in conformity with the requirements of the statute shall be placed upon an equality, and that the proceeds of the property attached shall be distributed among them equally and impartially in proportion to the amounts of their respective debts. There was but one indebtedness due from James R. Butters to appellant, and that was merged in the judgment of \$5,420, and the order of distribution made by the court directed that such judgment should receive its *pro rata* share of the residue of the fund left after paying off the execution, which was a prior lien upon the fund. The judgment of \$5,077.77 against William Butters and James R. Butters was a mere collateral security for the judgment against James R. Butters alone. The security it afforded consisted of the liability it imposed upon William Butters for the payment of the debt of James R. Butters. In respect to James R. Butters, it was but a second judgment for the same debt. It would be a plain evasion of the intentment of the statute, and a fraud and wrong upon the rights of other creditors, if one creditor should be allowed to recover separate judgments against the common debtor upon divers evidences held for one and the same debt, and then be permitted to receive a *pro rata* dividend upon each of such judgments. Such an interpretation of the statute would be a prolific source of fraud and injustice, and would render inoperative the legislative intention. We think the order of the court in the premises was right. We find no error in the record, and the judgment will be affirmed."

(125 Ill. 109)

SCHNEIDER v. BECKER.

(Supreme Court of Illinois. May 9, 1888.)

1. TRUSTS—RESULTING—PROOF.

B. bought land, taking title in his own name, and subsequently conveyed it to his brother C. A., their sister, filed a bill in chancery against C. after the death of B., and 80 years after the purchase of the land, alleging that her share in her father's estate, which she had left with B., went into the purchase money, and prayed for an accounting and for a deed. Her case was supported only by testimony as to conversations, in which defendant had admitted that her share had formed part of the purchase money, and had offered to buy her interest. Defendant denied such conversations, and he and another sister testified that they and B. furnished the purchase money. There was testimony that defendant had accounted to plaintiff for her share, left with B.; and during an interval of nine years after the purchase, though plaintiff lived at a distance, no communication to her in relation to her interest in the land was produced. Held, that the evidence justified dismissal of the bill.

2. EVIDENCE—DECLARATIONS—WHEN ADMISSIBLE.

Where a sister sought to establish a trust against her brother in land to which he held title in his own name, upon the ground that her share in her father's estate constituted part of the purchase money, declarations of their mother in her behalf are not admissible.

Appeal from circuit court, Cook county; LORIN C. COLVINS, Jr., Judge. Bill in chancery by Barbara Schneider against Peter Becker. Bill dismissed, and plaintiff appeals.

Edward Roby, for appellant. G. W. Stanford, for appellee.

SHELDON, C. J. This was a bill in chancery in the circuit court of Cook county to enforce an accounting by an alleged trustee as to an undivided part

of a certain farm, and to require a conveyance of the legal title to such share of the land to the *cestui que trust*, as well as the payment of such moneys as should be given to her by virtue of the trust. The defendant denied, by his answer, that he held the title in trust, set up that the claim was stale, and that the complainant and the defendant's grantor had an accounting and a settlement, upon which complainant released all her claims and demands alleged in the bill. The court, upon final hearing on proofs taken, dismissed the bill for want of equity, and the complainant took this appeal.

The following facts appear: In 1829, Wendel Becker died in Prussia, leaving him surviving his widow, Susannah, and six children, named Wendel, Mary, Peter, Joseph, Lena, and Barbara. In 1852 or 1853, the deceased's estate was sold and converted into money, the whole of the estate amounting to about \$3,200, making each child's share about \$533. Joseph, Peter, and Barbara had come to America; and in the spring of 1852 or 1853 the widow, Susannah, and Wendel and Lena, came to the United States, bringing with them the residue of the father's estate, except her portion which had been paid to Mary, and a part of his share which had been paid to Joseph. Peter met the widow, Wendel, and Lena in New York, and went with them to Sheboygan, Wis., where Joseph was residing. Upon their arrival, Barbara, who was then married and had become Mrs. Schneider, was living in Cincinnati, carrying on a millinery and dressmaking business there, and she came to Sheboygan to see her mother and brother and sister. There Wendell and the mother paid to Joseph the residue of his share of the father's estate out of the money which they had brought with them. They offered to pay to Barbara her share, but she declined to receive it, preferring to let it remain with them. She remained there about two weeks. In the fall after, Wendell and Peter bought the farm in controversy, situate in Cook county, Ill., consisting of 280 acres, at \$12 an acre, making \$3,360. The claim is that Barbara's share of her father's estate went into the purchase of this farm. The deed was taken in the name of Wendel; and Wendel, Peter, Lena, and the mother immediately moved upon the farm, and continued to live upon it. Lena was married to Louis Munch in 1859, and after that lived one year more upon the farm. Wendel, in whose name the title was, afterwards, in 1869, conveyed the farm to Peter Becker, and this bill was filed by Barbara Schneider against Peter Becker on July 24, 1883. There is no direct evidence that any money of appellant went into the purchase of the farm in controversy. The most that appellant can say is that she left her share of her father's estate in Wendel's hands to be invested when he bought. The material evidence in support of the bill is chiefly of witnesses testifying to alleged declarations of appellee. The witness, Mary Imhoff, who was the hired girl of appellant, speaks of a conversation in 1874 she heard between appellant and appellee in Chicago about her share in the farm on which he lived, and heard her ask him for her share, \$2,750, with interest, and he said he didn't have the money at the time, but the land was out there; and she speaks of another conversation of like import in 1876. Julia Stranson, who was then a sewing girl for appellant, speaks of the same conversation that the former witness did as occurring in 1874, and heard the same about appellant asking \$2,750 for appellee. These witnesses were testifying to what occurred 12 or 14 years before, when the latter witness was but 13 years old, and both saying they had not talked with appellant about the matter until the day before. Rosina C. Rider testifies to a conversation in 1863 or 1864 in which appellee made appellant an offer for her share in this farm, saying he would give her \$2,750. "She said, 'Well, you bring the money, and then the share will be yours,' and then she laughed." Lizzie Smith, the daughter of appellant, testified, substantially, the same as the foregoing witnesses relative to the offer of \$2,750 for appellant's interest in the farm. This is substantially the strength of appellant's case as resting upon admissions of appellee.

Wendel and the mother had deceased before the bringing of this suit. Much of the testimony in the record is of declarations made by them, which was received subject to objection. The declarations of the mother, evidently, were not competent. Whether those of Wendel were it is not material to consider; for, if they be received, we would regard them as being, in their preponderance, rather against than in favor of appellant.

The only witness who had actual knowledge on the subject was appellee, who did the negotiating for the purchase, and was present when the purchase of the farm was made, and the purchase money paid. He testifies positively that no money of appellant went into the purchase, but that all of the purchase money was furnished by Wendel, Lena, and himself; and he contradicts all the testimony of appellant's witnesses with respect to his declarations. Lena, one of the parties to the purchase, and who had all the means of knowledge that one could have who was not present and saw the purchase money paid, testifies positively that Wendel, Peter, and herself furnished all of the purchase money for the farm. After having lived on the farm for many years with Wendel and Peter and her mother, and after getting married, she sold out her interest in the farm to Joseph, and when she comes to sell she sells, not a one-fourth interest, but a one-third interest. Appellee and Lena do not concur with appellant in her statement that she left the money to be invested in any land, but say that appellant simply left the money in Wendel's hands, not wishing to take it to Cincinnati. It was natural that Wendel, Peter, and Lena, being practical farmers, and Peter unmarried, and having lived some time in this country, should together buy a farm, and go and live upon it with their mother, and carry it on together. Appellant, living in Cincinnati, and carrying on the millinery business there, would not be likely to wish to engage in farming in Cook county, in this state, or to invest in a farm there. The point is made that the shares of Wendel, Peter, and Lena in their father's estate were not sufficient for the purchase of the farm, and that to make up the amount of \$3,360, the purchase money, appellant's share was required, and it must of necessity have constituted a part of the purchase price. It appears by uncontradicted evidence that Wendel and Lena had, besides their share in their father's estate, about \$1,500 savings from their upward of 20 years of service in Germany, from the time of the death of the father to the year they came to America. Peter says he had some property and money besides his share. This would seem to make out sufficient money which Wendel, Peter, and Lena had for making the purchase without there being occasion for the use of any of appellant's money for the purpose. After leaving Sheboygan, appellant returned to Cincinnati, and did not appear in Cook county until some nine years afterwards. The testimony is that about \$500 a year profits were realized from the farm. If appellant's money had been invested in this farm, and she was the owner of a one-fourth interest in it, it is natural there would have been during these nine years some communication in writing pertaining thereto; that there would have been inquiries made and letters to her having some reference to the matter; but not a line in writing in any way referring to the subject is shown in the evidence. It appears that appellant had large money transactions with her brother Wendel, and that she had in his hands a large amount in money. She had a settlement with him in 1876, and received a deed from him of two houses and lots in Chicago for \$7,500 each, subject each to a mortgage of \$2,500, and of the east half of a certain 10 acres of land near Chicago. This property was considered as one-half of the land received by Wendel in exchange for a mill property in Minnesota. At the time, appellant executed a release to Wendel. The release is lost. A disinterested witness, who was present at the time, says the settlement was not confined to the mill property, but embraced money appellant had in Wendel's hands, and is explicit in the statement that the release given was one in full of all claims and demands against Wendel. Appellant says

the settlement related to the mill property they had owned together in Minnesota, and was confined thereto; that the release did not embrace this land matter. This bill was not filed until after the death of Wendel and the mother, and was filed 30 years after the transaction of the purchase of the farm. There was an oral examination of the witnesses in the court below, and of course that court had a better opportunity than we have to judge of the credibility of witnesses.

We have not attempted to give or to discuss in any detail the voluminous evidence in this record. We have but referred to portions of it, stating some considerations naturally arising therein. The whole testimony has been carefully considered, and we must content ourselves with stating our conclusion therefrom. Upon an examination of the entire evidence in the case, we cannot say the decree is so clearly against the evidence as to require its reversal by a court of review, and it must therefore be affirmed.

(124 Ill. 502)

GAGE v. PIRTLE.

(*Supreme Court of Illinois*. May 9, 1888.)

TAXATION—TAX TITLES—VACATION—REIMBURSEMENT OF HOLDER.

Under *Seas. Laws Ill.* 1885, p. 235, which provides "that any judgment or decree of court setting aside any tax deed procured under this act shall provide that the claimant shall pay to the party holding such tax deed all taxes and legal costs, together with all penalties, as provided by law, as it shall appear the holder of such tax deed or his assignors shall have properly paid, or be entitled to, in procuring such deed," a decree setting aside a tax deed as a cloud upon title, because of insufficiency of the notice of tax sale, upon payment of the amount paid at the tax sale, and all subsequently paid taxes, with interest thereon, is proper, without requiring payment of the amount that would have been required to redeem the property, together with interest thereon.

Appeal from superior court, Cook county; EGBERT JAMISON, Judge.

Bill by James S. Pirtle, trustee, against Henry H. Gage. Decree for complainant, and appeal by defendant.

Augustus N. Gage, for appellant.

Smith & Pence, for appellee.

The rule of allowing the amount paid at the sale, and also all subsequently paid taxes and assessments, together with interest thereon, is the proper one. *Gage v. Waterman*, 13 N. E. Rep. 543; *Reed v. Tyler*, 56 Ill. 288; *Barnett v. Cline*, 60 Ill. 205; *Reed v. Reber*, 62 Ill. 240; *Phelps v. Harding*, 87 Ill. 442; *Farwell v. Harding*, 96 Ill. 32; *Wilmerton v. Phillips*, 103 Ill. 78; *Moore v. Wayman*, 107 Ill. 192; *Smith v. Hutchinson*, 108 Ill. 662; *Peacock v. Carnes*, 110 Ill. 99; *Gage v. Hervey*, 111 Ill. 305; *Gage v. Nichols*, 112 Ill. 269; *Carme v. Peacock*, 114 Ill. 347, 2 N. E. Rep. 165.

SHELDON, C. J. This was a bill to set aside a tax deed as a cloud upon title, alleging as a reason therefor the insufficiency of the service of notice of the tax sale. The court found that the notice given of the tax sale was insufficient, and decreed the relief sought upon the terms of payment by the complainant to the defendant within 10 days of the amount paid at the tax sale, and all subsequently paid taxes, with interest thereon. We think the court's finding was right as to the insufficiency of the service of notice; but that point is not pressed in the argument, the purpose appearing to be to get a decision of the question whether the court ordered payment of a sufficient sum of money as the condition of relief; appellant's counsel saying: "The decision, then, is upon this question only: Did the circuit court err in granting relief without directing the payment of such sum as would have been required to make a redemption, together with interest thereon?" The tax sale was on October 26, 1880, being for the taxes of 1871 to 1879, both inclusive.

The tax deed was made on June 9, 1883. *Gage v. Busse*, 102 Ill. 592, is relied upon by appellant's counsel as in support of the affirmative of this question. That case is not quite the present one. There was then a small amount of illegal tax included in the judgment for the sale. The bill to set aside the sale was filed a short time before the expiration of the time for redemption. It was there said: "It is not perceived that equity requires that appellant should be shorn of his rights under the purchase to any greater extent than in so far as they are affected by the amount of taxes erroneously included in the judgment. On that hypothesis the decree ought to have been that complainants be allowed to redeem from the sale by paying the redemption money allowed by the statute, had the judgment and sale been for the proper amount of taxes, which can be readily ascertained by deducting the erroneous taxes from the amount of the judgment." As the sale there was confessedly just to the extent of the most part of the judgment, it seems to have been considered that the proceeding should, in equity, be viewed as in the nature of an application to redeem. There was no reference in the opinion to any previous decision of the court, and, however the decision may be viewed under the circumstances of that case, it was not the intention there to depart from the long line of the former uniform decisions of the court that the condition of the equitable relief granted upon the setting aside of a tax deed should be the payment of the amount paid at the tax sale, subsequent taxes paid, and interest. The long list of such decisions is cited in the brief of appellee's counsel. *Gage v. Busse* we do not regard as an authority sustaining appellant's claim that an amount equal to redemption money should in this case have been required to be paid.

It is insisted that the proviso to the act of the general assembly in force July 7, 1885, (Laws 1885, p. 235,) amendatory of section 224, c. 120, Rev. St., requires the payment of such amount to be made. That provision is as follows: "That any judgment or decree of court setting aside any tax deed procured under this act shall provide that the claimant shall pay to the party holding such tax deed all taxes and legal costs, together with all penalties as provided by law, as it shall appear the holder of such deed or his assignors shall have properly paid, or be entitled to, in procuring such deed, before such claimant shall have the benefits of such judgment or decree." It is claimed that the term "penalties" embraces the amount of redemption money. The amount paid for redemption from a tax sale is not styled a "penalty" in the provision of the statute for redemption from a tax sale. There are penalties spoken of in the revenue act; as, in the order of sale, that "the court shall give judgment for such taxes and special assessments and penalties as shall appear to be due." Those penalties may satisfy the term "penalties" used in this proviso, without making it necessary to resort to the money paid on redemption, to find application for the term. The penalties to be paid by this proviso are penalties which the holder of the tax deed or his assignors shall have paid, or be entitled to, in procuring the tax deed. Money paid on redemption is not money paid by the tax-sale purchaser, or which he was entitled to, in procuring his tax deed or otherwise. It is money paid by the landowner, and paid not to procure but to prevent a tax deed. It is not money the tax-sale purchaser was ever entitled to have. The provision of the statute respecting redemption is that "real property sold for taxes may be redeemed at any time before the expiration of two years from the date of sale by payment of the amount for which the same was sold, and 25 per cent. thereon if redeemed before the expiration of six months from the day of sale; if between six and twelve months, fifty per cent.; if between twelve and eighteen months, seventy-five per cent.; and if between eighteen months and two years, one hundred per cent. on the amount for which the same was sold. The person redeeming shall also pay the amount of all taxes and special assessments accruing after the sale paid by the purchaser, with ten per cent. interest thereon."

This is the amount, it is claimed, which was required to be paid here by the above proviso of the statute of 1885. We do not so think. It would not seem reasonable to require the land-owner to pay such amounts in order to have set aside a tax deed upon his land which had been wrongfully obtained. It would be equitable that he should refund to the tax-sale purchaser the amount paid upon the purchase and all taxes, charges upon the land, paid by the latter, with interest; and we think that is all which the statute requires to be paid; that the statute really does no more than to enact what this court had decided should be paid as the condition of having a tax deed set aside. Had it been the intention that the land-owner should pay an amount equal to the sum which would have had to be paid upon a redemption of the land from the tax sale, it would have been quite easy to have so said in plain terms, instead of expressing such purpose in the blind and roundabout way of this statute. The decree must be affirmed.

(124 Ill. 506)

O'MELIA *et al.* v. MULLARKY.*(Supreme Court of Illinois. May 9, 1888.)***1. DEED—EFFECT—EXECUTED USE—TRUSTS.**

One M. conveyed a certain piece of land in trust for defendants and others, the title to vest absolutely in fee-simple after the death of E., but so to vest only upon the express condition that said E. should, during his life, have a home upon said land, and good and sufficient support therefrom, and also the control and management thereof. Subsequently one of the grantees conveyed all his title and interest in the land to plaintiff. Such grantee died some six years before E. *Held*, that the trust was an executed use, and E. took a legal estate for life, with remainder in fee to the grantees as tenants in common; and hence, at the time of the conveyance to plaintiff, his grantor held in fee a proportionate share in the land, which passed to plaintiff.

2. PARTITION—EVIDENCE—TITLE.

In a suit for partition, where all parties claim through a common grantor, plaintiff is not required to prove the source of such grantor's title.

Appeal from circuit court, Stephenson county; WILLIAM BROWN, Judge. *U. D. Meucham* and *L. Stoskopf*, for appellants. *John C. Kean*, for appellee.

MULKEY, J. On the 3d day of March, 1885, the appellee, Anthony Mullarky, exhibited his bill in the circuit court of Stephenson county against the appellants, Margaret O'Melia, Patrick O'Melia, and John Glynn, praying for the partition of certain real estate particularly described in the bill,—two-fifths of which is alleged to belong to the complainant, two-fifths to Margaret O'Melia, and the remaining one-fifth to Patrick O'Melia; and all claim in fee-simple. On the hearing, the court found their respective interests to be as stated in the bill, and a decree of partition was entered accordingly. The propriety of that decree is the question presented by this appeal.

It appears that James Mitchell, by deed bearing date January 19, 1867, conveyed and quitclaimed the land in question in trust for Bridget Mullarky, Margaret O'Melia, (one of the defendants,) James Mullarky, John P. Mullarky, and Ellen Mullarky, heirs at law of Mark Mullarky, deceased, and the title to said lands to vest absolutely in fee-simple in said above-specified heirs at and after the death of Edward Mullarky, the uncle of said heirs, but so to vest upon, and only upon, the express condition that said Edward Mullarky shall, during the whole remaining term of his natural life, have a home upon said lands, and a good and sufficient support therefrom, and also the control and management thereof; it being the express understanding and condition hereof that the title and interest of said lands shall only vest in said above-specified heirs of Mark Mullarky upon the death of the said Edward Mullarky, in case he is provided with a home upon and a support from said lands during his life." On the 20th of November, 1867, the above-mentioned James

Mullarky, by his deed of that date, conveyed all his title and interest in the land to appellee. On the 28th of January of the following year, John P. Mullarky, another of Mark Mullarky's heirs, conveyed to appellee all his interest in said land; making altogether two-fifths. The interests of the appellants, as heretofore stated, is not controverted, so that the only question to be determined is whether the above-mentioned conveyances are sufficient to establish appellee's claim of title. It is further objected that "there is no evidence in the record from whom or from what source James Mitchell derived his title to the land." There is nothing in this objection. The making of such proof, under the circumstances, was not required. All the parties claim through a common source, namely, James Mitchell; and it is admitted in the answer that at the time of his conveyance he was the owner in fee of the premises. It is also contended that appellee took nothing by the deed from James Mullarky to himself, for the reason that he died some six years before Edward Mullarky, the tenant for life, and consequently, as is claimed, before any estate vested in him. This objection is founded upon a misapprehension of the true character of Mitchell's conveyance. It assumes that the heirs of Mark Mullarky mentioned in Mitchell's deed took merely a contingent trust-estate, whereas the supposed trust is clearly an executed use under the statute. By virtue of that deed, Edward Mullarky took a legal estate for his own life, with remainder in fee to the heirs of Mark Mullarky as tenants in common. Of course, their estates were also legal vested estates. The deed imposed no duties upon Anthony Mullarky, either with respect to the beneficiaries or the estate conveyed; hence he took under it what is known as a "dry trust" merely, or, in other words, he acquired but a momentary seizin to serve the use which the statute executed by transferring the legal estates to the beneficiaries named. Such being the legal effect of the deed, it follows that at the time of James Mullarky's conveyance to appellee the remainder in fee of one-fifth of the land was in him, and consequently passed by his deed to appellee.

It is further claimed that John P. Mullarky was a minor at the time of his conveyance to appellee, and that as soon as he attained his majority he revoked it. We do not think the proofs justify the claim. A number of other objections are raised in appellant's brief, but they are so manifestly without merit that we decline to discuss them. The decree will be affirmed.

(125 III. 72)

PENNSYLVANIA CO. v. SLOAN.

(*Supreme Court of Illinois. May 9, 1888.*)

1. PARTIES—MISNOMER—EVIDENCE.

In an action for injuries sustained through negligence of defendant's servants, the original summons named as defendant the P., Ft. W. & C. R. Co., and was sued out within the statutory period after plaintiff's injury. Subsequently, but after the expiration of the statutory period, defendant was substituted upon the record. Under the issue raised by defendant's plea of the statute, evidence was introduced on the part of plaintiff to the effect that, several years before the injury, the P., Ft. W. & C. R. Co. had been sold out under a decree in foreclosure, and thereafter ceased to do business, and simply retained its organization for the purpose of closing up its affairs; that the road was subsequently leased to defendant, and that the latter was operating the road at the time of the accident, and when suit was brought, but that the cars on the track at that time were marked "P., Ft. W. & C. R. R.," as were also the sign-boards, locomotives, and windows of the freight and ticket offices; that the agent upon whom the original summons was served, was the general freight agent of defendant company. *Held*, that this evidence was competent, as tending to show that defendant company was the real party defendant in the suit begun by the original summons.

2. LIMITATION OF ACTIONS—PLEADING THE STATUTE.

A plea of limitation to the whole amended declaration will not raise the point that a count added by the amendment introduces a new and outlawed cause of action.

3. RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—SIGNALING—INSTRUCTIONS.

In an action for injuries sustained through the negligence of defendant's employes, an instruction began with the words: "If the jury believe, from the evidence, that a flagman of the defendant improperly and inopportunistically signaled the plaintiff's team," etc. *Held*, that the omission of the words "carelessly" and "negligently" did not render the instruction sufficiently inaccurate to mislead the jury.

Appeal from appellate court, First district.

This was an action brought by George M. Sloan against the Pennsylvania Company for injuries sustained through the alleged negligence of defendant's employes. There was judgment for plaintiff in the court of first instance, which was affirmed in the appellate court, and defendant now appeals to the supreme court.

George Willard, for appellant. *John Lyle King*, for appellee.

MAGRUDER, J. This suit was commenced in the circuit court of Cook county on July 3, 1874, by the appellee, to recover damages for personal injuries received July 5, 1872. On the latter day, appellee was riding in a buggy westward on Eighteenth street in the city of Chicago, and came to Stewart avenue, along which the railroad tracks of the appellant, 10 or 12 in number, run from north to south, and from north-east to south-west. He was stopped by a train passing on one of the tracks furthest to the west, and waited for some time for an opportunity to get across. A number of stationary cars, standing on one of the easterly tracks south of Eighteenth street, obstructed his view of the tracks between the stationary cars on the east and the moving train on the west. When the latter train had passed, he was signaled to come on, and motioned to hurry up, by the flag-man, whose duty it was to give signals of the movements of the cars and engines. Before he could cross the net-work of tracks, a train backing up from the south, and theretofore hidden by the stationary cars, stopped his further progress, by moving directly in front, and so near as to touch the horse's head. The horse became frightened, and reared and plunged, and backed the buggy towards the east, where it was in danger of colliding with a locomotive advancing from the north in appellee's rear. In this state of affairs, the whistle of the locomotive was suddenly blown, and increased the fright of the horse. In peril of his life from the train in front of him, the locomotive in the rear of him, and the plunging of the frightened horse, appellee jumped from the buggy, and received the injuries complained of.

The declaration charges that the servants of appellant were guilty of negligence in signaling appellee to advance across the tracks when an approaching train, that he could not see, made it unsafe to do so, and in driving the locomotive along the track at that time, needlessly and improperly blowing its whistle. The suit, as originally begun by summons issued on July 3, 1874, was against the Pittsburgh, Fort Wayne & Chicago Railroad Company. The *alias* summons, dated July 23, 1874, was served July 31, 1874, on R. C. Meldrum as agent. The original declaration was filed August 10, 1874, to which the general issue was pleaded. The first trial was had in April, 1876, and resulted in a verdict of \$3,000. A new trial was granted. The second trial took place in November, 1876, and resulted in a verdict of \$4,000. A new trial was again granted. The third trial began on March 26, 1877, but on March 27, 1877, leave was given to plaintiff to amend by substituting the Pennsylvania Company in place of the Pittsburgh, Fort Wayne & Chicago Railroad Company. A juror was withdrawn, and the cause continued. The summons issued and dated on March 27, 1877, was served on March 28, 1877, on the Pennsylvania Company, by reading to R. C. Meldrum, agent. March 27, 1877, an amended declaration was filed, consisting of five counts, to which the Pennsylvania Company filed two pleas: *First*, general issue; *second*, statute of limitations,—the latter plea being that action did not accrue within two years next before suit was brought. To the second plea four replications

were filed, each of which was demurred to, and demurrer sustained as to second and third, and overruled as to first and fourth. Issue was joined on the first replication, and two rejoinders were filed to the fourth. The rejoinders were demurred to, but the demurrer was overruled, and plaintiff elected to stand by it. June 4, 1877, an order was entered substituting the Pennsylvania Company for the Pittsburgh, Fort Wayne & Chicago Railroad Company. In September, 1877, a third trial was had, resulting in verdict and judgment for \$3,000. An appeal was then taken to the appellate court, where the judgment was reversed, and the cause remanded. The mandate was filed in October, 1880. Afterwards, in January, 1885, leave was granted to plaintiff to withdraw all replications then on file, and to file new replications to the second plea, upon the first of which issue was joined, and to the second and third of which rejoinders were filed and demurred to. A fourth trial was begun in September, 1885, but plaintiff withdrew a juror, and the cause was continued. The fourth trial was, however, again begun, and finished in November, 1886, and resulted in verdict and judgment for \$5,000. The latter judgment has been affirmed by the appellate court, whence it comes before us by appeal.

The first of the new replications to the second plea averred that the defendant, the Pennsylvania Company, was a foreign corporation, possessed of and operating solely and exclusively the Pittsburgh, Fort Wayne & Chicago Railroad, extending from Chicago to Pittsburgh and all the cars, etc., and the servants, etc., of the defendant, and the causes of action mentioned in the declaration, were solely caused by the negligence of defendant's servants etc.; that Meldrum was local and general agent of defendant in Chicago, and on July 3, 1874, plaintiff sued out summons, and impleaded defendant in the name of the Pittsburgh, Fort Wayne & Chicago Railroad Company, (the said Pennsylvania Company being known and reputed as the Pittsburgh, Fort Wayne & Chicago Railroad Company;) that the *alias* summons against defendant in the reputed name of Pittsburgh, Fort Wayne & Chicago Railroad Company was served July 31, 1874, on Meldrum, as agent of Pennsylvania Company; that the Pennsylvania Company appeared by its solicitors, and, without pleading in abatement, pleaded to the merits, etc. The replication then sets forth the trials in April and November, 1876, the amendment and substitution of March, 1877, the issuance of summons in March, 1877, against the Pennsylvania Company, and its service on Meldrum, as agent of that company, etc., and concludes as follows: "And so plaintiff says this suit is the same suit commenced against defendant in name of P., Ft. W. & C. Railroad Co., and that said causes of action accrued within two years before commencement of suit." If the suit had been begun against the Pennsylvania Company by that name, it was undoubtedly commenced in time to escape the bar of the statute. The theory of the appellant is that the action, having been begun against the Pittsburgh, Fort Wayne & Chicago Railroad Company was not begun against the Pennsylvania Company; and that the bar of the statute was complete as to the latter company, because it was not made a party until 1877, more than two years after the cause of action accrued. To answer this position, appellee contends that the Pennsylvania Company was the company sued in the first place, but that it was merely sued by the wrong name, to-wit, by the name of the Pittsburgh, Fort Wayne & Chicago Railroad Company. The law undoubtedly is that, where the real party in interest, and the one intended to be sued, is actually served with process in the cause, even though under a wrong name, he must take advantage of the misnomer by plea in abatement in such suit; and, if he does not, he will be concluded by the judgment or decree rendered, the same as if he were described by his true name. *Pond v. Ennis*, 69 Ill. 341. If the Pennsylvania Company was the real party sued and served, though by the wrong name, it should have pleaded the misnomer in abatement. It did not do so. The first plea filed was to the

merits. The issue made upon the plaintiff's replication to defendant's second plea was whether or not the Pennsylvania Company was sued and impleaded by a wrong name, and served with summons under a wrong name. The issue then made was one of fact, and was submitted to the jury along with the other facts. This question of fact, no less than the other questions of fact, is settled and determined, so far as we are concerned, by the judgment of the appellate court. Defendant upon the trial, introduced no evidence whatever under either plea. All the proof in the record was put in by the plaintiff. The latter called to the stand and examined several of appellant's officers, agents, and attorneys. It appeared from their testimony that foreclosure proceedings were instituted against the Pittsburgh, Fort Wayne & Chicago Railroad Company in 1867, or at some date prior thereto. That the road was sold out under decree in such proceedings, and purchased by the Pittsburgh, Fort Wayne & Chicago Railroad Company, which was thenceforward its owner. That thereafter the Pittsburgh, Fort Wayne & Chicago Railroad Company ceased to do business, ran no cars, operated no road, and simply retained an organization for the purpose of closing up its affairs. That the Pittsburgh, Fort Wayne & Chicago Railroad Company operated the road until June 7, 1869, and then leased it to the Pennsylvania Railroad Company; which latter company assigned the lease, in 1870 or 1871, to the appellant, the Pennsylvania Company. That the appellant was operating the road and running the cars when the accident occurred, and when the suit was brought. That the cars on the track at that time were marked "P., Ft. W. & C. R. R.," and "R. W." The sign-boards were marked "P., Ft. W. and C. Co." The initials "P., Ft. W. & C. Ry." were on the locomotives. The same lettering was on the windows of the freight and ticket offices, though the name of the Pennsylvania Company was also on the transom over the door, and on some of the windows. That Meldrum was general freight agent of appellant. That the officers of appellant were consulted about the accident, and made reports in reference to it to the main office in Pittsburgh. That appellant's attorney filed the original plea and defended the original suit, etc. There was also testimony tending to show that the plaintiff intended to sue the company, which was running the cars at the time the injury was committed, and which was employing the servants charged with the negligence complained of, and it is undisputed that that company was none other than the appellant. This testimony, which was strenuously objected to by appellant's counsel, was competent as bearing upon and tending to prove the issue of fact made upon the replication to the second plea. Indeed, it would seem to have been difficult for any ordinary man to find out just what name, among the many names made use of, was the real name of the company whose servants were in charge of the cars and the tracks at the time appellee was injured. We do not think that the objections made by appellant to the instructions which were given upon the subject of the plea of the statute of limitations are well taken. These objections fall with the objections to the testimony already referred to. The instructions in relation to the plea were based upon the testimony tending to show the use of the wrong name, and merely told the jury, in substance, that the statute of limitations did not apply, if the facts set up in the replication as above stated, should be found from the evidence to be true. While the Pittsburgh, Fort Wayne & Chicago Railway Company, appellant's lessor, may have been liable for the injury, yet appellant, the lessee, was also liable. The railway company was not sued. The defendant originally sued was called the "Pittsburgh, Fort Wayne & Chicago Railroad Company." As the corporation formerly known by that name was virtually defunct, and existed only to wind up old business, and not to attend to new business, appellant's officers and agents could not have supposed that corporation to have been the defendant intended to be sued, when service was had upon appellant's own representative in Chicago.

The seventh instruction given for plaintiff begins with these words: "If the jury believe, from the evidence, that a flag-man of the defendant improperly and inopportune signaled the plaintiff's team," etc. This language is criticised upon the alleged ground that it bases the right of recovery, not upon the negligence or carelessness of defendant's servant, but upon the question whether or not such servant performed his duty in an improper and inopportune manner. The words "carelessly" and "negligently" are in the declaration, and, if they had been added to the words used in the instruction, the latter would have been more technically accurate. But we do not think it was sufficiently inaccurate to mislead the jury. "Improper" means "not fitted to the circumstances;" "inopportune" means "unseasonable in time," or "at the wrong time." If the flag-man signaled to the plaintiff to come on, when the circumstances were such as to require him either not to signal at all, or to signal for a further waiting, or if the flag-man signaled to plaintiff to come on at a time when a train, unseen by plaintiff, but which the flag-man was bound to observe, was moving near and directly towards the team, then such flag-man was guilty of negligence in the performance of his duty. Moreover, the fifth instruction had called attention to the case of one person being put in peril by the "negligence and misconduct" of another, and had directed inquiry to the question whether the plaintiff, in the exercise of ordinary care, had been compelled by "the negligence of the defendant" to jump from his buggy.

The seventh instruction is also objected to as basing the right of recovery solely upon the action of the flag-man, and not upon the action of the engineer in backing the locomotive and blowing the whistle. Inasmuch as the original declaration attributed the injury to the moving and whistling of the locomotive in the rear of the team, and to no other cause, while the amended declaration filed in 1877 added the improper signaling of the flag-man as a further cause of the injury, it is therefore claimed that the amended declaration set up a new cause of action which came within the bar of the statute. Both declarations claim damages for the same injury, and for the same fright to plaintiff's horse. Without, however, passing upon the question whether the case comes within the principle announced in *Railroad Co. v. Cobb*, 64 Ill. 128, it is sufficient to say that the negligence of the flag-man and the negligence of the engineer are separately averred in separate and distinct counts, though they are also charged together in one of the counts, and that the plea of the statute of limitations is to the whole declaration. Where separate causes of action are set up in separate counts, and defendant pleads the statute to the whole declaration, plaintiff is entitled to recover if one of his causes of action is not within the bar. 1 Chit. Pl. *546; *Perkins v. Burbank*, 2 Mass. 81. The evidence tends to establish negligence on both of the grounds mentioned in the amended declaration. To justify him in making the point now raised, the defendant should have pleaded separately to that portion of the declaration which has reference to the conduct of the flag-man.

The ninth instruction given for the plaintiff tells the jury that, if they "find the defendant guilty," they shall assess his damages, etc.; and then proceeds to state the elements that may be taken into consideration in fixing the amount of the damages. In regard to this instruction, counsel for appellant says: "The amount which the jury are thereby allowed to assess is not limited to any belief on their part as to what the testimony shows." The criticism is not warranted. The enumeration of such effects of the injury as may be compensated for in damages closes with the words, "as shown by the testimony." Previous instructions had stated that the defendant would be guilty if certain facts should be found from the evidence to be true. The finding of the defendant guilty as specified in the ninth instruction presupposed a belief, from the evidence, in the truth of the facts referred to in such previous instructions. The judgment of the appellate court is affirmed.

(124 Ill. 453)

HOLMES v. BEMIS.

(Supreme Court of Illinois. May 9, 1888.)

JUDGMENT—BY CONFESSION—WARRANT OF ATTORNEY—REPUGNANCY—SURPLUSAGE.

Where the note of a married woman, payable to I. H., her husband, authorizes the confession of judgment in favor of "the said H. & Bro., or their assigns, upon said note," and the name "H. & Bro." does not occur elsewhere in the instrument the words "& Bro." may be rejected as surplusage; and a judgment thereon, entered by the guarantor of the husband's note, for which the husband assigned the note of the wife as collateral security, the guarantor having paid the husband's note, is good.

Appeal from appellate court, First district.

Roberts, Hutchinson & Thomas, for appellant. *Brady & Northrup*, for appellee.

MULKEY, J. On or about the 18th of April, 1885, Avery, Hillabrant & Co. discounted for Ira Holmes his promissory note for \$5,000, which was guarantied by Henry V. Bemis. Of the proceeds of the note, \$2,101.25 was applied to the payment of an existing indebtedness from Holmes to Avery, Hillabrant & Co; \$1,648.75 was placed to his credit with them on the joint account of Holmes & Bemis; and the remaining \$1,250 was paid to Holmes in cash. At the time of this transaction, and as a part of the same, Holmes assigned and turned over to Avery, Hillabrant & Co., as collateral security for the payment of the \$5,000 note, a certain other note for the sum of \$10,000, which he held on his wife, Virginia B. Holmes, bearing date April 12, 1885, and payable to himself one year after date. This note contained, in the usual form, a power of attorney to confess a judgment thereon in case default was made in its payment. Holmes having made default in the payment of the \$5,000 note, the same was paid by the guarantor, Henry V. Bemis, who, upon such payment, received from Avery, Hillabrant & Co. for his indemnity the \$10,000 collateral note above mentioned. On the 24th of February, 1887, Bemis caused a judgment by confession to be taken on said note in the superior court of Cook county in his name, as assignee, against the maker, Virginia B. Holmes, for the sum of \$12,312.48. A motion was subsequently made by the defendant to vacate and set aside the judgment, which was heard upon affidavits on the 9th of March, 1887. The court denied the motion, but reduced the judgment to \$3,807.50; which order and judgment was affirmed by the appellate court for the First district, whence the case is brought to this court for review. There is some controversy about the facts, but with that we have nothing to do.

So far as this court is concerned, there is but one question presented by the record which we regard as worthy of notice, and that is whether the confession of the judgment was warranted by the power of attorney in question. While the note itself is made payable to Ira Holmes alone, the power of attorney authorizes any attorney of any court of record to confess a judgment "in favor of the said Holmes & Bro., or their assigns, upon said note," etc. The judgment, as just seen, was entered in the name of Bemis, assignee of the note, and not in the name of Holmes & Bro., or their assigns. Bemis derived his title through the payee, the only original source through which he could have clothed himself with the legal title and interest in the note; and it is clear that the benefits of the power were intended as much for the assignee of the note as the payee himself, for both are expressly named in the power. It would seem, therefore, a matter of no consequence whether the holder acquired his title mediately or immediately from the payee. All the difficulty encountered in the construction of the power of attorney arises from adding the words, "& Bro." after the expression "the said Holmes." Rejecting those words as surplusage, the whole difficulty at once vanishes. To retain them without resort to extraneous proofs would be to render that

part of the instrument meaningless. A construction which leads to such a result should always be avoided if it can be upon any reasonable hypothesis. The instrument, as written, it will be observed, confers power to confess a judgment in favor of "the said Holmes & Bro.;" but the difficulty is that "Holmes & Bro.," taken in its entirety as a single name or designation, has not been previously mentioned, and hence the expression "the said" which precedes and grammatically qualifies it, has really no application to it. Indeed, that is the only time or place the expression occurs in the whole instrument. The name Holmes, however, had occurred before and the qualifying expression used would have well applied to it had it been used alone. Moreover, it would have given full force and effect to the power of attorney, as we must presume the parties to it intended. It is clear, therefore, that the only purpose or function which the additional words "& Bro." perform is to introduce a repugnancy that obscures the sense of the instrument, and if given any effect at all, would defeat it altogether. We regard them, therefore, as redundant and useless words, having no legitimate connection with the other parts of the instrument, and for this reason we hold they should be rejected as surplusage. This construction gives effect to the instrument according to the presumed intention of the parties; that contended for by appellant would defeat it. Judgment affirmed.

(124 Ill. 510)

CITY OF CHICAGO v. STINSON.

(Supreme Court of Illinois. May 9, 1888.)

DEDICATION—WHAT CONSTITUTES—EVIDENCE.

A strip of land was claimed by the defendant city as part of one of its streets; plaintiff asserting that the street extended only to the rear of his lot, which he had owned for more than 20 years, during which time this lot, like the land surrounding it, was uninclosed, and people traveled over it between the street at the rear and the avenue in front of it. Seventeen years before suit the owner of some property to the rear of this lot, without consulting plaintiff, and solely for the benefit of his own property, extended some grading and ditching he had done along the line of this street, and across plaintiff's lot, to the avenue. Some 14 years before suit sidewalks had been laid on both sides of the strip; but it did not appear whether by the city authorities, or by the parties who traveled over the lot, and who had previously been in the habit of laying down planks over the mud-holes. No notice of laying such sidewalk was given to plaintiff, nor was his adjoining property assessed therefor. A sewer was laid across the lot from the one on the street to the main sewer on the avenue. The records of the sewerage office seemed to indicate that this sewer was built eight years before the suit, but none of the witnesses spoke of having seen it more than four years before suit. Plaintiff knew nothing of the ditching and grading, or of the laying of the sidewalk or the sewer. The portions of the lot lying on either side of the strip were never separately assessed for taxation. *Held*, that the evidence failed to show either intention to dedicate this piece of land to the public, or such knowledge of user as would amount to acquiescence.¹

Appeal from superior court, Cook county; JOSEPH E. GARY, Judge.

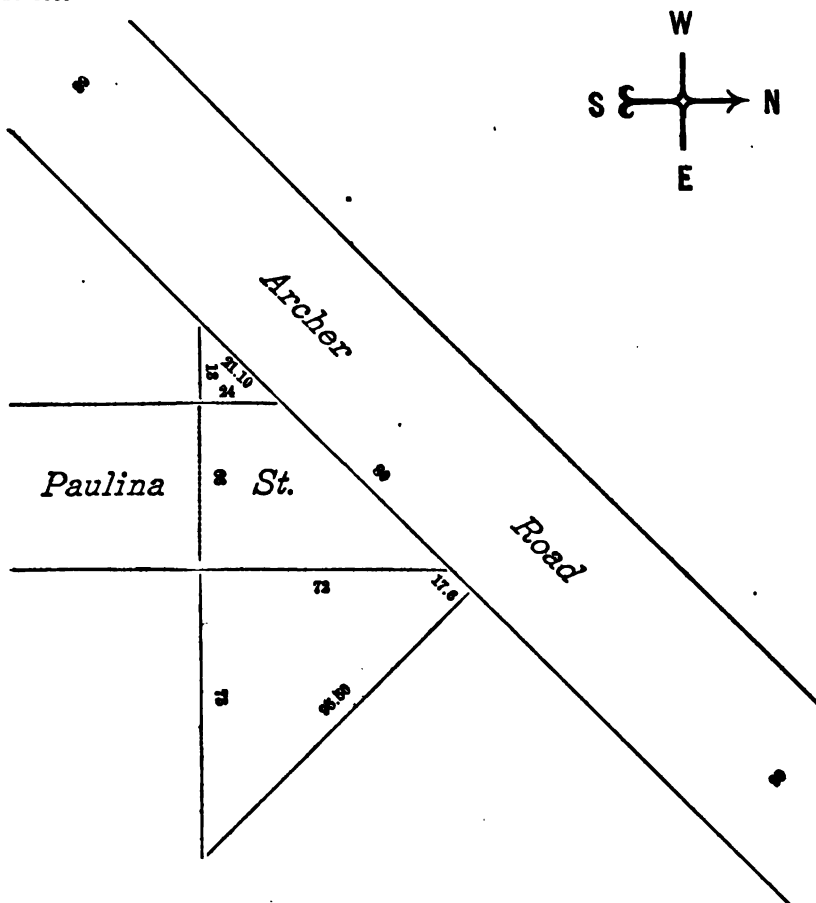
Ejectment by appellee, James Stinson, against appellant, city of Chicago.

Clarence A. Knight and George Burry, for appellant. Thomas Dent, for appellee.

MAGRUDER, J. This is an action of ejectment, begun on March 11, 1886, by the appellee against the appellant, in the superior court of Cook county, for the recovery of a strip of land forming a part of lot 31, in Stinson's subdivision of outlots 1, 2, and 10, in Canal Trustees' subdivision, section 31, in the city of Chicago. On October 22, 1887, the cause was by agreement submitted to the court for trial without a jury. The finding and judgment

¹On the general subject of the dedication and acceptance of a highway, see *Rube v. Sullivan*, (Neb.) 87 N. W. Rep. 666, and note; *Railroad Co. v. Lee*, (Tex.) 7 S. W. Rep. 857; *Miller v. Town of Aracoma*, (W. Va.) 5 S. E. Rep. 148; *Cotter v. City of Augusta*, (Ga.) 6 S. E. Rep. 180; *Hamilton v. Railroad Co.*, (Ill.) 15 N. E. Rep. 854.

were in favor of the plaintiff below, the appellee here. The city defended on the ground that the property sought to be recovered had been appropriated and was in use as part of a street. It is conceded that the record title is good in appellee; but it is claimed by the city that there has been a common-law dedication of the piece of land in question as a part of Jones or Paulina street. Paulina street, in this portion of the city, runs from the south, northward towards Archer road or avenue, and terminates on the north at the south line of lot 31 if the strip in controversy is not a part of it, but extends up and connects with Archer avenue if the strip is a part of it. In other words, if the strip belongs to appellee, it lies between Archer avenue and the northern end of Paulina street, and is in the way of the extension of Paulina street to Archer avenue. The following diagram shows the location of the lot and street:



Before title can be divested by dedication, the proof must be very satisfactory, either of an actual intention to dedicate, or of such acts or declarations as should equitably estop the owner from denying such intention. *Kelly v. City of Chicago*, 48 Ill. 388. Long use, and long acquiescence in such use by the owner of the land, are sometimes regarded as in and of them-

selves evidence of a dedication. In cases, however, of implied or presumed acquiescence or consent on the part of the owner, very much depends upon the location of the road or street, the amount of travel, the nature of the use of the public, the rights asserted by the public, the knowledge of the owner, and like circumstances. *Onstott v. Murray*, 22 Iowa, 457. We have said: "Acquiescence, with knowledge of the use by the public without objection, is not * * * conclusive evidence of a dedication, for it may be rebutted." *Kyle v. Town of Logan*, 87 Ill. 64. The two prominent elements to be considered in determining whether there has been a common-law dedication or not are the intention of the owner to dedicate, and the acceptance by the public of the intended dedication. "The owner of the land must do some act, or suffer some act to be done, from which it can be fairly inferred he intended a dedication to the public." *Kyle v. Town of Logan*, *supra*. Applying the principles thus announced to the facts of the present case, we think that the proof fails to establish a common-law dedication. During more than 20 years before the beginning of this suit, appellee was the owner of lot 31. It has been uninclosed, and the land lying around it has been uninclosed. Under such circumstances, the mere fact that parties may have traveled over it, in passing back and forth between Paulina street and Archer avenue, does not of itself indicate an intention to dedicate. Appellee swears that he has lived in Chicago since 1849, and that no street has ever been cut through lot 31 with his consent or approbation, and that he never learned of any claim on the part of the city to any portion of the lot for the purposes of a street until a short time before the beginning of this suit. His agent swears that he paid all the taxes for the appellee upon lot 31 from 1862 to 1875, and from 1880 to 1887, and took up and canceled certificates of sale, issued by reason of the sale of the lot for taxes during the years from 1875 to 1879. The portions of the lot lying on the east and west sides of the strip in controversy were not during any of these years separately assessed for taxation. Without attempting an analysis of all the testimony, it is sufficient to refer to three main facts or circumstances which are relied upon to prove such user and acquiescence as are claimed to indicate an intention to dedicate: *First*. It appears that this part of lot 31 was ditched and graded in 1869. This ditching and grading, however, was not done by the city authorities, or any other representatives of the public. One Lombard owned land south of lot 31, and, in order to accommodate his own property, he extended some ditching and grading which he did along the line of Jones and Paulina streets northward across lot 31 to Archer avenue; thereby draining the water from the south into the sewer on Archer avenue. But this he did without consulting appellee. Stinson swears that he never knew that the strip in controversy was graded or ditched on either side, or that dirt from such ditches was thrown up in the center, as testified to by one or two of appellant's witnesses. *Second*. It is claimed that sidewalks were laid along the east and west sides of the strip in the year 1872, or about that time. For years previous to 1872, parties who were in the habit of passing from Paulina street across the lot to Archer avenue would put down planks to walk on over the mud-holes. It does not appear whether the sidewalks in question were laid by such private parties, or by the city authorities. Certain it is that no notice was ever given appellee of the laying of such sidewalks, nor was his adjoining property assessed therefor. The testimony shows that neither he nor his agent, Johnston, knew of the sidewalks claimed to have been built there. *Third*. It appears that a sewer running south, and connecting the main sewer on Archer avenue with another sewer in Paulina street, was laid across lot 31. The records of the sewerage office seem to indicate that this sewer was built in 1878, but no witness speaks of having seen it earlier than 1882. Appellee swears that he never knew that a sewer had been laid across his lot. We think the evidence clearly shows that appellee never had any intention of dedicating this piece of land to the

public; nor is he proven to have had any such knowledge of the acts claimed to be evidences of user by the public as would amount to acquiescence on his part. The circumstances relied upon in this case to estop the appellee from denying an intention to dedicate, are not so strong and forceful as those which were held not to establish such intention in *City of Chicago v. Johnson*, 98 Ill. 618. It is not pretended that appellee ever conveyed this property to the city, or ever made any plat or subdivision with a street running through lot 31; or that the city ever instituted any proceedings to condemn, or ever acquired any rights by adverse possession for a statutory period of limitation. Hence appellee ought not to be deprived of his land without compensation, unless the proof of a voluntary dedication of it to the public is clear and convincing. Such proof is wanting. The judgment of the superior court of Cook county is affirmed.

(124 Ill. 646)

CITY OF CHICAGO v. HILL *et al.*

(Supreme Court of Illinois. May 9, 1888.)

DEDICATION—WHAT CONSTITUTES.

The strip of land in dispute was claimed by the city as being the easterly 33 feet of a 66-foot avenue, and was separated from the rest of plaintiffs' lot, which they had owned since 1855, by a fence extending 462 feet. It did not appear by whom the fence was built, but it was shown to have been standing as early as 1861, and then seemed to be five or six years old. The plaintiffs were minors,—one till 1865; the other till 1870. They were non-residents, and the property was in charge of an agent. Taxes were paid down to 1873 on the entire lot. A witness who had rented the lot from the agent in 1861 was told by him that he might move the fence 33 feet to the west, if he wanted more room. There had been a sidewalk on the west side of the street for many years, but none was laid on the east side till 1883. In 1875, a petition to condemn this strip was filed, under an ordinance passed in 1873 for widening the avenue, and the condemnation of this strip and other property. The ordinance was repealed in 1883, and the petition dismissed in 1885. In 1879, the city constructed a sewer through the strip, applying for and obtaining a license for that purpose from plaintiffs' agent. The gas company had laid pipes through the strip some 15 years before, and, while the condemnation proceedings were pending, plaintiffs paid an assessment for a lamp-post. *Held*, that the evidence of intention to dedicate, arising from the fencing of the strip, though very strong, is rebutted by the other evidence, and there is nothing in the case to estop the plaintiffs from denying the dedication.¹

Appeal from superior court, Cook county; JOSEPH E. GARY, Judge.

Ejectment by Ebenezer Hill, Sr., Ebenezer Hill, Jr., Julia D. Hill, and Ella L. Hill, by Ebenezer Hill, Sr., their next friend; and Ella W. Wildman, against the city of Chicago. The defendant appeals from a judgment in favor of plaintiffs.

Clarence A. Knight and *George Burry*, for appellant. *Montgomery & Smith*, for appellees.

SHELDON, C. J. This was a suit in ejectment, brought by the appellees against the city of Chicago, to recover possession of the west 33 feet of lot 3 in the assessor's divisions of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 34, township 39 N., range 14 E., third P. M. May, 1848, George Dellicker bought this 10-acre tract. May, 1849, he died, leaving seven brothers as heirs. Three of these sold their interests to their brothers William and Frederick, so that in February, 1855, William and Frederick owned five-sevenths, Samuel one-seventh, and Leonard N. one-seventh. That same year, October, 1855, Leonard N. died, leaving three children, William F., Ellen W., and Julia W., who were all minors. In 1859, Frederick Dellicker brought suit for partition against his brothers William and Samuel, and Samuel C. Wildman, as guardian of the minor children of Leonard N. In

¹See *City of Chicago v. Stinson*, *ante*, 43, and note.

May, 1860, partition was decreed, and in December the master made deeds in pursuance of the decree. In 1864, the assessor, following the partition made by the commissioners, made the following subdivision:

<i>Douglas</i>		<i>Place.</i>	
2.50	2.50	5.00	
3	2	1	
W. F. Dellicker, Ellen W. Dellicker, Julia W. Dellicker, Minor Heirs of Leonard N. Del- licker.	Sam'l Dellicker. 1 75-100 acres.	Wm. Dellicker. 3 70-100 Acres.	7.40
1 75-100 Acres.			
2.50	2.50	5.00	
4			
Frederick Dellicker. 2 80-100 Acres.			
10.00			

Douglas place appears to be the same as Thirty-Fifth street, hereinafter spoken of. The title of appellee Ella W. Wildman is derived, two-thirds by inheritance from her father, Leonard N. Dellicker, and one-sixth from her brother William F. Dellicker, who died intestate May 6, 1863, under 21 years of age. Appellees Ebenezer Hill, Jr., Julia D. Hill, and Ella L. Hill, all infants, take from their mother, Julia W. Hill, who died intestate April 22, 1884, leaving them and her husband, Ebenezer Hill, Sr., surviving. Mrs. Hill, like Mrs. Wildman, derived title, two-thirds from her father, Leonard N. Dellicker, and one-sixth from her brother William F. Dellicker. Ella W. Wildman became of age in 1865, and Julia W. Hill in 1870. The suit was commenced in 1886, and tried in 1887. A trial before the court without a jury resulted in a finding and judgment in favor of the plaintiffs, and the defendant, the city of Chicago, took this appeal. The proof of title in the plaintiffs, aside from a dedication, is not disputed; but it is insisted the land in controversy has been dedicated for the purpose of a street, known as "Forest Avenue," and this is the only question presented. The strip of land claimed is 33 feet wide, and 462 feet long. Its north end is the center line of Douglas place, which is 66 feet wide; then for 429 feet on the west it forms the east half of Forest avenue, which also is 66 feet wide. The west line of lot 3 is identical with the center line of Forest avenue. The fence on Forest avenue is at the north end, one-tenth of a foot west, and at the south end one foot west, of the east line of the 33-foot strip, measuring to the outside of the fence, but measuring to the inside of the posts it is just about on the line. The fence on Thirty-Fifth street is a little south of the south line of the street,

as shown on the plat. As to who built these fences, or when and under what circumstances they were built, the record is silent, further than may be inferred from the following testimony: The witness Richards testified that he lived on the corner of Thirty-Fifth street and Kankakee avenue from September, 1861, to 1881. That he was gardening, and the lot he occupied was bounded on the east by Kankakee avenue, north by Douglas place, west by Forest avenue, and extended south about five or six hundred feet. Thirty-Sixth street was not open. He rented from the agents for the ground. That Forest avenue was not graded. There was a roadway there,—a track where teams drove through. That the fences were in the same place they now are,—the same posts. That the agent of the property told him that, if he wanted more ground, he might move the fences out 33 feet west and north. From the general appearance of the fence at the time he went there, he should think it had been there at least five or six years. The witness Doane testified that he had been acquainted with the vicinity of Forest avenue and Thirty-Fifth street since 1865. That he lived on the south-east corner about 10 or 11 years. Had 600 feet front on Forest avenue. That at that time, 1865, there was a fence on the opposite—the east—side of Forest avenue, and he placed his fence under direction of the county surveyor 66 feet west of it. From appearances, he should think the fence had been there quite a while,—five or ten years; and that it still remains in the same place, both on Douglas place and Forest avenue. That the street had always been called "Forest Avenue" ever since he knew it. There was a track from 10 to 15 feet wide, such as is made by teams passing. The street was not thrown up while he was there. For the last 14 or 15 years there had been a sidewalk on the west side. That a double brick house was built on the east side 14 or 15 years ago, and a wooden one nearly opposite his lot; and between Thirty-Fifth and Thirty-Ninth streets there must have been at least six houses built on Forest avenue from 1865 to 1875. The witness Beren had known Forest avenue from Thirty-Fifth street south since May, 1866. He bought at that time 50 feet on it, and built in 1882; and the year after there was a sidewalk built on the east side of the street. That the street was open the same width as far as Thirty-Eighth street; whether to Thirty-Ninth he was not positive. It appeared that appellees had all the while paid taxes on the whole of lot 3; that they were non-residents of the state; that the property was in the charge of local agents. There was a stipulation as to certain facts, among which were that, July 23, 1873, the city council of Chicago passed an ordinance to widen Forest avenue from Thirty-Fifth to Thirty-Ninth street, directing the condemnation, among other property, of this strip; which ordinance was afterwards repealed, April 8, 1883. That on May 20, 1875, the city filed a petition to condemn, under the ordinance; which petition was dismissed December 7, 1885. That the gas company laid gas-pipe through the strip nine feet east of the center line of Forest avenue fifteen years before. That in 1875 the city made an assessment for lamp-posts, which was paid by appellees; and in the same year a lamp-post was erected about 100 feet south from Thirty-Fifth street, at the curb-line on the east side of the street. That the city, by ordinance, January 27, 1873, established the grade of Forest avenue from Thirty-Fifth to Thirty-Seventh street. That June 5, 1884, appellees built a fence on the north, west, and south sides of the strip, connecting with the old fence. That, the same day, the city tore down the fence. The stipulation embraces some other projects of improvement of the street by the city, which, as they were subsequent to the petition for condemnation, and were resisted by appellees, it is not deemed material to mention. It appears, further, that in the summer of 1879 the city constructed a three-foot brick sewer two and one-half feet east of the center line of Forest avenue from Thirty-Fifth street south to Thirty-Ninth street; but that license to do so was first asked and obtained from the agent in charge of the property.

From the facts appearing, we are of opinion the court was justified in finding that there had not been a dedication of this strip for the purpose of a street. There had been, it is true, user for a long time by the public of the ground for the purpose of travel. But this alone will not establish a dedication. It is of the essence of a dedication that there should be the intention to make the dedication, and the evidence should be clear, either of such actual intention, or of such acts or dedications as will equitably estop the owner from denying such intention. *Grube v. Nichols*, 36 Ill. 92; *Kelly v. City of Chicago*, 48 Ill. 389; *McIntyre v. Storey*, 80 Ill. 127; *Herhold v. City of Chicago*, 108 Ill. 467; *City of Chicago v. Johnson*, 98 Ill. 618. In *Grube v. Nichols* it was said: "The intention to dedicate is a vital, controlling element in such a grant. A dedication is not an act of omission to assert a right, but it is the affirmative act of the mind of the donor. It arises from the active, and not the passive, condition of the mind of the owner. The mere non-assertion of a right does not establish a dedication, unless the circumstances establish the purpose or intention to donate the use to the public." It was remarked in *Kelly v. City of Chicago*: "As this court has in several cases said, in order to justify us in holding that title has been divested by dedication, the proof should be very satisfactory, either of an actual intention to dedicate, or of such acts or declarations as should estop the owner from denying such intention." There was clearly no intention on the part of these appellees to make any dedication or knowledge on their part that their land was being used for a street until shortly before the suit was commenced, as they testify. But there might have been such an intention in some predecessor in the title, and that would have sufficed. The placing of the fences on the west and north sides of the lot, just 33 feet within both the west and north lines, and thus fencing out these two strips of 33 feet each, is very strong evidence of their being left out for a street, and perhaps should be accepted as satisfactory evidence of a dedication, but for the strong countervailing evidence which is found in the case that there had been no dedication. It is true, there is no direct evidence who actually built the fences, but it may be fair to presume they were built by the owner; and especially where made, as they were, with such a manifest design and exactness of purpose to fence out just 33 feet. In disproof of intention to dedicate, Richards, the tenant, says the agent of the property told him, if he wanted more ground, to move the fences out 33 feet west and north; but he did not move them. On July 23, 1873, the city passed an ordinance to widen Forest avenue from Thirty-Fifth to Thirty-Ninth street, and directing the condemnation, among other property, of this strip. The ordinance, though, on April 3, 1883, was repealed. And on May 20, 1875, the city filed a petition to condemn under that ordinance; it being dismissed December 7, 1885. This was most potent evidence that there had not been a dedication of this strip to public use, and should, we think, particularly in connection with the applying for and obtaining by the city of a license to lay a sewer in the strip as stated above, conclude the city from asserting that there had been such a dedication. In *Princeton v. Templeton*, 71 Ill. 71, it was held that such a condemnation proceeding was a clear admission that the town had no claim to the premises sought to be condemned, and was an admission that estopped the town from claiming a dedication. That the gas company laid gas-pipe through the strip some 15 years ago does not appear to have been known to appellees; it was but an act of trespass, which we cannot see should affect their title. The making by the city in 1875 of an assessment for lamp-posts, which was paid by appellees, and the erecting a lamp-post in the same year on the east side of the street and of this strip, were after the commencement of the condemnation proceeding, and while it was pending. Appellees had reason to believe the strip would be condemned and made part of the street, and we see nothing in this lamp-post assessment and proceeding to make against appellees. The appellee Wildman, and the

mother of the appellees, from whom they inherited, were minors much of the time. The appellees were all non-residents of the state, and we find nothing in the circumstances of this case which should equitably estop them from denying the dedication claimed. The judgment of the superior court will be affirmed.

(125 Ill. 52)

HULSE *et al.* v. MERSHON *et al.*

(Supreme Court of Illinois. May 9, 1888.)

JUDGMENT—BY CONFESSION—INSOLVENCY—ATTORNEY'S FEES.

Under Rev. St. Ill. c. 110, § 65, par. 66, providing that judgment may be confessed "for a debt *bona fide* due," a confession of judgment by an insolvent debtor for \$8,451 debt, and \$1,258 attorney's fees, is fraudulent and void, as to his other creditors, to the extent of such attorney's fees.

Appeal from appellate court, First district.

Frank J. Smith and *Mr. Helmer*, for appellants. *Millard R. Powers*, for appellees.

MAGRUDER, J. This is a creditors' bill, filed by appellees against appellants in the superior court of Cook county, upon three judgments, amounting to \$2,709.40, rendered by that court at the October term, 1886, against the appellant E. M. Hulse, and upon which judgments executions were duly issued, and returned unsatisfied. The bill seeks to reach the amounts of certain attorney's fees, included in certain judgments by confession entered up in favor of a number of preferred creditors, who, together with their attorneys, are made defendants, and appear herein as appellants. Answer was filed to the bill, and replication filed to the answer. The cause was heard upon an agreed state of facts, embodied in a written stipulation, signed by counsel for both sides. The superior court dismissed the bill for want of equity, and the case was taken by writ of error to the appellate court. The latter court reversed the decree of the superior court, and remanded the cause, with directions to decree the payment of the moneys collected as attorney's fees in satisfaction of the judgments of the complainants; ordering that the plaintiffs in error there, who are appellees here, recover their costs, etc. The case is brought here by appeal, and upon certificate of importance, signed by two judges of the appellate court. On September 9, 1886, E. M. Hulse, then engaged in the business of manufacturing and selling furniture in Chicago, owed complainants \$2,709.40, as already stated, and also owed the following amounts to the following defendants: Cassell, \$3,825.71; Katlinsky & Co., \$985.25; Harris Rag & Metal Co., \$1,000; Swisky, \$517; Bowes, \$1,011.35; Hartman, \$505.95; Barth, \$611. On that day, Hulse, being insolvent, and aware of his insolvency, desired to prefer the defendants thus named, who were simple-contract creditors, and whose claims were not yet due, and to that end retained as his personal counsel two attorneys in Chicago, whom he informed of his insolvency, and consulted as to what steps might be lawfully taken to prefer said creditors. He was advised that he could give defendants judgment notes, and add therein reasonable attorney's fees. Thereupon the attorneys, at the request of Hulse, prepared judgment notes for the full amounts due the defendants, respectively, as above stated, and also for about 15 per cent. in addition thereto as attorney's fees. The attorney's fees in the note to Cassell were \$573; in that to Katlinsky & Co., \$145; in that to the rag and metal company, \$150; in that to Swisky, \$75; in that to Barth, \$90; in that to Bowes, \$150; in that to Hartman, \$75. The total amount of the seven judgment notes given to the preferred creditors was \$9,709.26, of which \$8,451.26 was actual indebtedness, and \$1,258 was for attorney's fees. The notes were dated September 10, 1886, and due on demand. Hulse, after signing them, left them with the attorneys, who, under his instructions, gave them to the defendant creditors, after the latter were informed of the foregoing facts, in consideration of their receipts

in full for all their claims against Hulse. The creditors then retained these same attorneys to enter judgments on the notes, and collect them out of Hulse's assets. On September 11, 1886, the attorneys entered up judgments in favor of said defendants upon the notes, respectively, for the amounts above specified, together with the attorney's fees already named. Executions were issued, and all of them, except that in favor of Barth, were levied upon the assets of Hulse. Barth's execution was returned unsatisfied, and on September 15, 1886, he filed a creditors' bill in the superior court, and, on the same day, obtained the appointment of one Wilson as receiver. On September 25, 1886, the assets in the sheriff's hands were turned over to the receiver, subject to the rights of the execution creditors, and the receiver proceeded at once to make sale. On October 18, 1886, he made report, showing that he had funds enough to pay the said judgments, his own fees, and \$50 to said attorneys, who also acted as attorneys for the receiver. The report was approved, and, under order of court, the receiver paid in full the judgments so rendered in favor of the defendants, amounting to \$9,709.76, and including the \$1,258 for attorney's fees. Cassell being a resident of Wisconsin, the attorneys in question, who received the whole amount of his judgment, remitted to him \$3,825.71, the amount of his claim, and retained the \$573 for their fees. When the judgment notes were given, and also when the judgments were entered up, and again when the creditors' bill was filed and the receiver appointed, these attorneys knew that Hulse was insolvent, and that the judgment notes were given for the purpose of preferring the defendant creditors to the extent of their just claims, and that, when such notes were paid in full, the assets of Hulse would be nearly or quite exhausted, and that the complainants and the other creditors would be unable to collect their claims. Appellees claim that, under the facts thus stated, the attorney's fees provided for in the powers of attorney attached to the notes were, in law and equity, gifts to the payees in the notes, and, as such, fraudulent and void as to the other creditors, and that the appellants should be compelled, in equity, to turn the amount of such fees over to appellees, or to a receiver for their benefit. The appellants claim that Hulse had a right to make the judgment notes, as he reserved to himself no right or interest therein, and only included the fees in them to enable the payees to get payment of their just debts "without deduction of loss by costs or other expenses;" and that as to the defendant attorneys, the money received by them out of said judgment of Cassell was so received by them as his attorneys; and that appellees, as against such attorneys, have no rights in the premises. It was stipulated that, if the court below should find for defendants, the bill should be dismissed; but, if the finding should be for complainants, decree should be entered against the attorneys for the \$573, and against the other defendants, respectively, for the amounts of attorney's fees embraced in their respective judgments.

We think that the position of the appellees is correct, and should be sustained. It is undoubtedly true that a debtor in failing circumstances, and who does not seek the benefit of a general assignment act, may prefer one creditor to the exclusion of others, when he does so in good faith. But it is also true that a gift or voluntary conveyance by an insolvent debtor is presumptive evidence of fraud. When a man voluntarily, and without consideration, puts his property out of his hands, being at the time in debt, his act in so doing is, as to pre-existing creditors, fraudulent and void. *Moritz v. Hoffman*, 35 Ill. 553. In the present case, Hulse, though insolvent, had a right to give the judgment notes to the appellants, respectively, for the respective amounts of their claims against him, and thereby prefer them over his other creditors; but he had no right to give them \$1,258 out of his assets when he was insolvent, and thereby prevent other creditors, equally meritorious, from realizing that much towards the payment of their debts. If the judgment in favor of appellants had been obtained by suit in the ordinary

way, attorney's fees could not have been taxed as a part of the costs. The plaintiffs in the judgments would have been obliged to pay their own attorney's fees; nor could they have recovered of Hulse, in separate suits, the amounts advanced by them for such fees. Therefore, when he agreed to give those fees to the appellants at a time when his assets were only sufficient to pay the appellants and no other creditors, he deprived such other creditors of their lawful dues. Hulse did not owe the \$1,258 to appellants. He was not legally bound to pay it to them. Hence, when he put it in the notes, he made a voluntary donation of it to them, while he was indebted to others. The right of the insolvent to give a preference can only be exercised as to the amount actually and lawfully due. When Hulse gave the preferred creditors the privilege of retaining \$1,258 out of his assets to be applied towards the payment of attorney's fees for entering up several judgments, amounting altogether to only about \$9,000, he did not thereby provide for the payment of a debt then actually and lawfully due. By adding the \$1,258 into the notes, he attempted to create a new debt, not resting upon a sufficient consideration to give it preference over the claims of other creditors. It is only "for a debt *bona fide* due" that a person may confess judgment. Rev. St. c. 110, § 65, par. 66. It is true that when a creditor is compelled to sue, and deduct attorney's fees for prosecuting the suit, he does not realize the full amount of what his debtor owes him; he only realizes such amount less attorney's fees paid out. The moral obligation resting upon the debtor to see that the creditor gets all his money without deduction of fees is undoubtedly a sufficient consideration for a contract between a solvent debtor and his creditor to have judgment confessed for a reasonable fee in addition to the debt. In the cases alluded to by counsel, where a reasonable fee has been allowed to be included in the judgment by confession, pursuant to the contract therefor in the judgment note, no question arose as to the insolvency of the debtor, nor as to his right to give a preference by judgment note while in an insolvent condition. In those cases the simple question was whether a contract to confess judgment for the debt and a reasonable fee was a valid and binding contract. But, under our Illinois statutes and practice, there is no legal obligation resting upon the debtor to protect his creditor against deduction for fees, in case the latter is compelled to sue. When a debtor is insolvent, and provides for giving some of his creditors preferences over others equally meritorious, a legal obligation, and not a mere moral obligation, must lie at the basis of such preferences. The judgments of the appellate court are affirmed.

(124 Ill. 457)

CHICAGO, M. & ST. P. R. CO. v. KRUEGER.

(Supreme Court of Illinois. May 9, 1888.)

1. MASTER AND SERVANT—NEGLIGENCE OF MASTER—RUNNING CARS WITH NOBODY IN CHARGE.

In an action against a railroad company for personal injury, where it appeared that plaintiff, while in the employ of defendant, was passing through a space between the track of defendant's road, and an obstruction at the side which was four feet seven inches from the first rail, but was only two feet seven inches therefrom when a train was on the track; and a train of defendant's, propelled by its own momentum, no person having charge of it, and no warning of its approach being given, came up behind plaintiff, striking him and causing the injury,—an instruction to the jury to give a verdict for defendant was properly refused.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Where it appeared that between two parallel tracks of defendant's road there was an obstruction, leaving a narrow passway on each side, and that plaintiff, while engaged in washing cars for defendant on one of the tracks, in passing from one car to another, went through the space on the other side of the obstruction, which was then the wider, there being no cars standing on that track, and the court instructed the jury that if plaintiff carelessly and negligently passed over to the space on the other side, thereby putting himself in danger, and received the injuries sued

for in consequence thereof, he could not recover, although defendant was negligent, refusing a similar instruction asked by defendant containing a recital of facts which the evidence tended to prove, there is no error.

3. NEW TRIAL—PREJUDICE OF JUROR.

Where a juror cross-examined witnesses, the judgment cannot be reversed on the ground that he thereby manifested prejudice.

Appeal from appellate court, First district.

Action by Herman Krueger against the Chicago, Milwaukee & St. Paul Railroad Company for personal injuries. Judgment for plaintiff, and defendant appeals.

E. Walker, for appellant. *B. M. Shaffner*, for appellee.

SHELDON, C. J. This is an appeal from a judgment of affirmance by the appellate court for the First district of a judgment for recovery of damages in a suit by Krueger against the Chicago, Milwaukee & St. Paul Railroad Company for a personal injury caused by the alleged negligence of the railroad company. It appears that Krueger was in the employ of the company, and that his business was to wash passenger cars while standing in the company's yard; that upon the track in this yard, known as "No. 1," cars were placed for washing; and that upon track No. 2 cars were switched from the main track for the purpose of making up passenger trains. These tracks were 12 feet apart, rail to rail, and in the center of such space there were car wheels and axles kept. The wheels had a diameter of 33 inches, and were attached to the axles, which lay parallel with the rails of the tracks, and in the center of this space was a hydrant to which Krueger was in the habit of attaching his hose while engaged in washing the cars. Cars standing upon the track projected over the rails about two feet, leaving a clear space of two feet and seven inches between the standing car and the wheels. There was this space between the car standing upon the track upon which Krueger had been engaged and the wheel standing in the center between the tracks, and also the same space or distance between the wheel and any car moving upon track No. 2; but, if there were no car so moving, the space would be four feet seven inches between the wheel and the south rail of track No. 2. Krueger was engaged in his regular work upon track 1. He had finished washing a car standing upon such track, and crossed from track No. 1 to or near track No. 2, and was proceeding westward with the hose on his shoulder to wash the car standing next to the one that he had just completed upon the same track immediately to the west. While either in close proximity to the rail, or between the rails, and upon track No. 2, as testified by some witnesses, a car came from the east on track No. 2, striking the plaintiff, and injuring him as alleged in the declaration. The charge of negligence in the declaration is that the car was being propelled by its own momentum without any person having charge of the same, and that no warning was given of the approach of the car.

The controverted questions of fact as to the negligence of the defendant, and the use of due care by the plaintiff, are settled by the judgment of the appellate court, whose decision in such respect is final. It is only the rulings of the court upon questions of law which are open to our review. The refusal of the trial court to give the first, second, and eighth instructions asked by the defendant is assigned for error. The first was a request that the jury be directed to return a verdict for the defendant. There was evidence in the case certainly tending to show a cause of action, and this instruction was rightly refused. The second instruction was faulty, under repeated decisions of this court, in containing a long recital of many facts which, as stated, the evidence tended to prove. But, aside from this, the principle of law asked to be given to the jury after such recital was to the purport that if the plaintiff, in the discharge of his duty, without sufficient cause, negligently and carelessly crossed to track No. 2, and was walking in close proximity thereto when

he was injured, that he could not recover; and the eighth refused instruction was of like purport,—that if the plaintiff, in the discharge of his duty, was not required to go upon said track No. 2, or in close proximity thereto, he could not recover. By the second instruction given for the defendant the jury were told that if the plaintiff carelessly and negligently passed over and upon track No. 2, and in front of a passing car, and thereby received the injuries complained of, he could not recover; and by the third modified instruction given for the defendant the jury were informed that if the plaintiff had, without just reason, put himself in a place of danger, and thereby and therefrom received the injuries complained of, the jury should find for the defendant, even though the jury should find from the evidence that the defendant was guilty of negligence in not placing a switchman upon the approaching car to give warning to the plaintiff of his danger. These instructions, which were thus given for the defendant, embodied, as we consider, the same proposition of law, substantially, that was contained in the refused instructions, and we therefore find no material error in not giving the latter. Complaint is made of prejudice on the part of one of the jurors. This complaint is founded entirely upon manifestations of alleged prejudice exhibited by the juror during the progress of the trial in his cross-examination of witnesses. However this may be, we do not find therein ground for reversing the judgment. The judgment will be affirmed.

(124 Ill. 451)

BANNON v. THAYER.

(Supreme Court of Illinois. May 9, 1888.)

JUDGMENT—RES ADJUDICATA—PARTIES.

Land subject to a mechanic's lien was conveyed in trust to secure a note payable to the maker's order, and by him indorsed in blank. The lien was foreclosed by suit, in which the maker of the note and the trustee were the only defendants; but, the latter dying pending suit, it was abated as to him, and the successor in trust (who had purchased the note pending the suit) was not substituted. *Held*, that this suit did not bar foreclosure of the trust deed.

Appeal from appellate court, Second district.

Bill by H. Le Roy Thayer against Patrick R. Bannon to foreclose a deed of trust. Judgment for plaintiff, and defendant appeals.

Haley & O'Donnell, for appellant. *C. W. Brown*, for appellee.

SCHOLFIELD, J. James Beaul, being the owner of certain lots in Joliet, made a contract with Patrick R. Bannon on the 20th of April, 1881, to erect certain buildings thereon. Bannon erected the buildings pursuant to the contract. On the 8th of May, 1882, Beaul borrowed money of A. I. Wheeler, and executed his promissory note, payable to his own order, for the amount thereof, and indorsed it in blank; and he and his wife thereupon made a deed of trust of the lots in Joliet to secure the payment of the note, and he then delivered the note and deed of trust to Wheeler. The deed of trust was to George Woodruff, as trustee; but it provided that in the event of his death, or inability, etc., to act, Le Roy Thayer should be trustee in his stead, with full power, etc. It was duly recorded in the proper office on the 9th day of May, 1882. On the 1st of June, 1882, Beaul was found, by the proper tribunal for that purpose, to be insane, and was thereafter confined in the insane asylum at Kankakee. On the 17th of June, 1882, Bannon filed in the office of the clerk of the circuit court of Will county his petition for a mechanic's lien to enforce payment of the amount due him under his contract with Beaul, making Beaul and George Woodruff defendants. Woodruff died on the 26th of October, 1882, and the suit was thereafter declared to be abated as to him. Thayer was not made a party to the suit, and the only remaining party, after the death of Woodruff, was Beaul, who answered by his conservator. Decree was rendered on the 8th of October, 1883, in con-

formity with the prayer of the petition; and Bannon afterwards, at a sale under that decree, became a purchaser of the lots. The note held by Wheeler, not having been paid, was assigned to Thayer, after the petition for the mechanic's lien was filed, and before final decree thereon was rendered. The present bill is by Thayer, as the holder of the note delivered to Wheeler, to foreclose the deed of trust. Bannon has set up in his answer and relies for a defense on the proceedings to enforce the mechanic's lien. The lower courts held that, neither Thayer nor Wheeler having been made a party to that proceeding, Thayer is unaffected by it; and the only question here is whether that ruling is right.

We held in *McGraw v. Bayard*, 96 Ill. 153, that both the trustee and the *cestui que trust* are necessary parties in such case; and this was predicated upon our previous ruling, to like effect, in *Scanlan v. Cobb*, 85 Ill. 296. It is objected that, the note described in the trust deed being payable to the order of Beaully, it was impossible to find out who was the holder so as to make him a party. But, if that had been the fact, the holder should have been made a party by the description of the "unknown owner of the note." Section 7, Rev. St. 1874, p. 199. We think, however, that the evidence abundantly shows that Bannon had actual notice of facts which it was his duty to have investigated, and which, upon investigation, would have disclosed the name of the holder of the note. There is no pretense of excuse for not having made Thayer a defendant in the place of Woodruff, after the death of the latter. The judgment of the appellate court is, in our opinion, right. It must therefore be affirmed.

(125 Ill. 105)

OGDEN *et al.* v. BEMIS.

(*Supreme Court of Illinois. May 9, 1888.*)

1. TAXATION—TAX SALE—CERTIFICATE TO TAX LIST.

Under Starr & C. St. Ill. c. 120, § 190, providing that, on the day advertised for the sale of property for taxes, the county clerk "shall carefully examine said list upon which judgment has been rendered, * * * and shall make a certificate to be entered on said record that such record is correct, * * * which shall be the process on which all real property shall be sold," etc., a sale made without the entry of such certificate upon the record is invalid.

2. SAME—NAME OF PURCHASER.

Where a tax certificate was issued to H. Coombs, and the tax deed was executed to Hiram Coombs, but the person applying for the tax deed produced the certificate, and in his affidavit referred to his published notice as having there stated "when he did purchase the land or lot described in the annexed certificate of tax sale," held a sufficient identification of Hiram Coombs as the purchaser at the tax sale.

3. SAME—PARTIAL CANCELLATION.

A mere showing that a tax certificate was canceled as to a part of the real estate described therein does not deprive the holder of the right to a deed for the balance.

Appeal from superior court of Cook county; G. GARNETT, Judge.

This is a bill to set aside certain tax deeds as a cloud upon complainant's title. One of the deeds in question was issued to Hiram Coombs, while the certificate of purchase at the tax sale was issued to H. Coombs. In making application for the tax deed, Hiram Coombs produced the certificate; and in making affidavit, referring to the publication of notice, said: "In which notice he stated when he did purchase the land or lot described in the annexed certificate of tax sales." There was no express averment that Hiram Coombs and H. Coombs were one and the same person.

Wilson & Moore, for appellants. *H. S. Mecartney*, for appellee.

MULKEY, J. On the 12th day of May, 1887, the appellee, Ruth M. Bemis, exhibited her bill in the superior court of Cook county against the appellants, Isaac C. Ogden, John Carne, Jr., and Hiram Coombs, setting forth that she

was the owner in fee of certain real estate described in the bill, to which the defendants pretended to have some claim or title by virtue of certain tax deeds, particularly described in the bill. These tax deeds are charged to be illegal and void, and the bill prays that they be set aside as a cloud upon complainant's title. Upon the hearing, a decree was entered in conformity with the prayer of the bill, from which the present appeal is prosecuted. The tax deeds in question are four in number. The first is founded upon a tax sale to R. W. Bridge in 1877, and was executed by the proper authorities to the South Park commissioners on the 10th of August, 1880; the second was executed to Hiram Coombs, February 8, 1882, and is based upon a tax sale made in 1879; the third and fourth bear date December 17, 1885, and both run in the name of John Carne as grantee, and are based upon the tax sales made in 1883,—one being for a special assessment, and the other for general taxes on the same property.

The sales under which the last two deeds were made were invalid, and it follows the deeds themselves are equally so; for, for every tax deed to be available for the purpose of passing title, must be founded upon a legal and valid sale. The sales in question were made without process as required by the 196th section (Starr & C. St.) of the revenue act. That section provides as follows: "On the day advertised for sale, the county clerk shall carefully examine said list upon which judgment has been rendered, and see that all payments have been properly noted thereon; and said clerk shall make a certificate, to be entered on said record, following the order of court, that such record is correct, and that judgment was rendered upon the property therein mentioned for the taxes, interest, and costs due thereon, which certificate shall be attested by the clerk under seal of the court, and shall be the process on which all real property, or any interest therein, shall be sold for taxes, special assessments, interest, and costs due thereon, and may be substantially in the following form." The record here contemplated was made up in strict conformity with the statute, except that the clerk's certificate was wanting. This was a fatal defect, for it is the certified record that constitutes the process which is indispensable to a valid sale. *Eagan v. Connelly*, 107 Ill. 458. With respect to the other deeds, we are inclined to hold that none of the objections urged against them are well taken. It is contended, in the first place, that it does not sufficiently appear that "H. Coombs," to whom the sale was made, and "Hiram Coombs," to whom the tax deed was issued, are one and the same person. We think the affidavit made by Hiram Coombs upon which the deed was issued sufficiently shows that he was the same person to whom the sale was made. That, together with the ordinary presumptions which arise from the facts shown, we regard as sufficient. It is objected to the deed made to the South Park commissioners, as assignee of the certificate of purchase issued to Bridge, that, while the latter was the holder of such certificate, he canceled the same as to a part of the real estate therein mentioned. We are unable to say that was not a legitimate transaction, as the circumstances under which it occurred are not given or explained; nor is it perceived how the appellee could be prejudiced by it.

For the errors indicated the decree of the court below is reversed, and the cause remanded, with leave to both parties to amend pleadings and take additional testimony, if so desired, and for such other proceedings as are not inconsistent with the views herein expressed.

(124 Ill. 636)

PEOPLE v. CITY OF CHICAGO.

(*Supreme Court of Illinois. May 9, 1888.*)

TAXATION—TAXABLE PROPERTY—MUNICIPAL CORPORATIONS.

Money belonging to the city of Chicago was embezzled by the city treasurer. A large part of the money embezzled consisted of school funds, but was no part of the

fund derived from the state for school purposes; the moneys having been raised by taxation to defray expenses. In partial adjustment of the defalcation, the treasurer conveyed to the city certain lands outside the corporate limits, and part of the lands were rented; the rent being appropriated to the different funds which had lost by the embezzlement. *Held*, that such lands were not exempt from taxation, not coming within any specific provision of the statute exempting from taxation property owned by municipal corporations.

Appeal from county court, Cook county; RICHARD PRENDERGAST, Judge. *Thos. H. Hood and Whitehead & Pickard*, for appellant. *John W. Green and Theodore Brenton*, for appellee.

CRAIG, J. The question presented by this record is whether the lands owned by the city of Chicago situated in the towns of Cicero and Riverside, and commonly known as the "Gage Farm," are exempt from taxation. The facts in regard to the manner the city acquired and hold the lands are agreed upon as follows: That in the year 1887 David A. Gage was city treasurer of the city of Chicago; that a defalcation having been made by him to the amount of \$507,703.56 of city funds, such as schools, water, etc., (the amount of school fund taken or embezzled being \$47,947.88,) in part adjustment of such defalcation the said lands were conveyed by him to one George Taylor, to have and hold the same in trust for the city of Chicago; that afterwards the said George Taylor, in the discharge of his duty as said trustee, conveyed the said lands to the city of Chicago to replace, *pro tanto*, the money of the city for which the defaulting city treasurer has failed to account; that the title to said lands was received by the city to liquidate in part the said indebtedness from said Gage to the said city; that the city money which this property represents amounts in large part of school funds, and the rental obtained by the city from the property is divided up and credited to the several funds which said property represents; that when the property is sold, as it must be eventually, under the provision of the trust, the proceeds of the sales must be divided among the several funds of the city which were depleted by the defalcations of the said Gage; and that the defalcation largely exceeds the value of all the property held by the city to meet the same; that the said lands lie wholly in the corporate limits of the towns of Riverside and Cicero, and outside the corporate limits of the city of Chicago; that part only of said lands are leased by the city of Chicago to certain parties for a stipulated yearly rental of \$300, and that such portion of said lands as are so leased are used by the tenants for farm purposes, and that such portions as are not leased are vacant and unoccupied lands; that the revenue derived from the lands is used and applied as above stated, and that the lands rented by the city are described as follows: (describing lands.) It is understood and agreed, however, that the funds above referred to were derived either by special assessment or taxation, including the school funds above mentioned; that said school funds are no part of the funds derived from the state for school purposes. Section 3 of article 9 of our constitution declares: "The property of the state, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law." Under this provision of the constitution the legislature incorporated in the revenue law a section under which certain property is exempt from taxation. See paragraph 2, § 2, Starr & C. St. 2027. Paragraph 1 of the statute cited above declares that the property named in this section shall be assessed and taxed, except so much thereof as may be in this act exempted. Then follows the property, and first "all real and personal property in this state." Under the plain language here employed the lands involved in this suit are liable to taxation, unless exempted by some provision which follows. We will then examine these provisions which have relation to property belonging to cities and incorporated towns, in

order to determine whether the lands involved fell within them. Under clause 6 of the article all property belonging to a town, village, or city used exclusively for the maintenance of the poor, and all public buildings belonging to a city or incorporated town, with the ground on which such buildings are erected, not exceeding 10 acres, is exempt; under clause 8 all fire-engines with the building used for the safe-keeping thereof, and the lot on which the building is located, when belonging to any city, town, and village, are exempt. Under clause 9 all market-houses, public squares, or other public grounds used exclusively for public purposes; all works, machinery, and fixtures belonging exclusively to any town, village, or city, and used exclusively for conveying water to such town, village, or city are exempt. We find no other provision of the statute exempting from taxation any other property held or owned by a city or incorporated town, and if there is any other provision it has escaped our attention. No argument is needed to show that lands like the Gage farm, held or owned by a city or incorporated town do not fall within any one of the provisions of the statute above exempting property from taxation. Indeed, we do not understand that counsel for the city claim that the property falls within any one clause of the statute which we have cited; but to use their own language: The position of the city of Chicago in the case at bar is that the property is public land, held by the city exclusively for public purposes. The land represents and takes the place of so much public money. It is held by the city, not in its "social or commercial capacity" as a private corporation, and for its own benefit, but it is held by the municipality in its governmental capacity, as one of the agencies of state government. It is true, the city obtained this property from Gage in payment of money he had appropriated to his own use, which had been raised by taxation; but that fact does not exempt the property from taxation. All property of every description in the state, except such as has been specifically exempted, is required to bear its just proportion of the burden of taxation; and as held in *Re Swigert*, 119 Ill. 83, 6 N. E. Rep. 469, all laws exempting property from taxation will be subject to a strict construction by the courts when called upon to enforce them, and hence nothing will be held to come within the exemption which does not clearly appear to be so, and all reasonable intendments will be indulged in favor of the state. The difficulty with the position of appellee is that the legislature has nowhere provided that a city or incorporated town may acquire a large tract of land and hold it for years free from taxation. There is a necessity for exempting from taxation the public buildings of a city and the grounds upon which they stand not exceeding 10 acres, but why a large tract of land located remote from the city should be held by a city free from the burdens of taxation for years it may be difficult to understand. *City of Chicago v. People*, 80 Ill. 384, has been cited as authority, but the case has no bearing here. In that case it was held, where moneys belonging to the school fund derived from sale of sixteenth section are loaned on mortgage security, and the title to real estate is thus acquired on foreclosure of such mortgage, and held in name of the city for school purposes, such lands are not subject to taxation. The decision is predicated on the ground that real estate thus acquired in fact belongs to the state in trust for school purposes, which is expressly exempted from taxation by section 2, *supra*. Under the stipulation of facts shown by the record, the school funds which went into the lands here involved were not derived from sale of section 16, but arose from general taxation. The fact, therefore, that a portion of the money which paid for the lands was school funds has no bearing on the case. It is also suggested that the funds embezzled by the city treasurer were not and would not be subject to taxation, had they remained in the treasury, and as these lands represent the embezzled funds they are also exempt. But the funds which were in the treasurer's hands, were not placed there to remain as a permanent fund. Those funds were raised to be paid out to defray the

expenses of the city, and of course it was not a fund liable to taxation; but if a city had the power to accumulate a large fund, and hold it from year to year in its treasury, or kept it at interest, no reason is perceived why such fund might not be taxed. These lands have been held for a number of years. It is not claimed that they now or ever will be needed for any municipal use of the city; on the other hand, they are held for profit for the annual increase in price, and we perceive no reason why the city should not pay taxes where lands are so held, in like manner as an individual who purchases and holds lands as an investment. The judgment will be reversed, and the cause remanded for further proceedings consistent with this opinion.

(124 Ill. 587)

EINSTEIN et al. v. HASKELL et al.

(Supreme Court of Illinois. May 9, 1888.)

APPEAL—REVIEW—TRIAL BY THE COURT.

When a case, after being tried by the court without submitting written propositions to be held as law, as allowed by Rev. St. Ill. c. 110, § 42, is appealed to the appellate court, and thence to the supreme court, the latter court has nothing to consider, the decision of the trial court upon the law and that of the appellate court upon the facts being final.

Appeal from appellate court, First district.

Suit by attachment brought by Simon D. Haskell and Henry Brown against Mellors & Son to recover a debt due them. Defendants made no defense, judgment passed by default, and the First National Bank of Michigan City and Einstein & Rosenthal, who had been served with garnishee process, were held liable. From a judgment of affirmance in the appellate court the garnishees further appeal to the supreme court.

Hervey H. Anderson, for appellants. *Tenney, Bashford & Tenney*, for appellees.

MAGRUDER, J. On October 13, 1884, appellees commenced a suit in attachment in the superior court of Cook county against William Mellors & Son, residents of the state of Indiana, to recover an indebtedness of \$2,074.02 for goods sold and delivered. The attachment writ was served upon the appellants as garnishees, the bank having been served October 18, 1884, and Einstein & Rosenthal October 13, 1884. Interrogatories were filed to be answered by the garnishees. The garnishees filed their answers, and the answers were traversed by the plaintiffs. Mellors & Son made no defense to the claim, and judgment by default was rendered against them for the full amount of their indebtedness to the plaintiffs. Upon the issues made by the interrogatories, and the answers thereto, the cause was submitted, by agreement to the court, for trial without a jury. The finding was in favor of the plaintiffs. New trial was refused, and judgment rendered against the bank for \$1,683.68, and against Einstein & Rosenthal for \$1,540.08, the latter to be satisfied on payment of the former. Upon appeal to the appellate court of the First district, the latter court has affirmed the judgment of the superior court, and the case comes before us upon the appeal of the garnishees from the judgment of the appellate court.

Einstein & Rosenthal, who lived in the city of Chicago, held, as bailees, certain money and property belonging to Mellors & Son. It is claimed that Mellors & Son, being indebted, on October 7, 1884, to the First National Bank of Michigan City, in the sum of \$1,780, on their note for that amount, executed to the bank on the latter day a transfer assignment or bill of sale of all the money and effects belonging to them, which were then in the hands of Einstein & Rosenthal, and directed the latter to deliver possession of such money and effects to the bank. On October 8, 1884, Einstein & Rosenthal paid the bank \$143.60, which sum was credited on the note for \$1,780 on

October 11th, and sold the goods, which they held for the bank after October 7th for \$1,540.08, but were garnished before the money was paid over. The \$1,540.08 was paid to the bank on October 17th, and credited on the note on October 18, 1884, leaving a small balance still unpaid. On October 8, 1884, Mellors & Son also gave the bank a chattel mortgage on chattels in Michigan City, Ind., to secure what remained unpaid of the \$1,780, after applying the Chicago property. On the same day Mellors & Son, in Indiana, and under Indiana law, made an assignment for the benefit of creditors to one Blinks, including in such assignment the property embraced in the chattel mortgage, and leaving out the money and property in Chicago. The question before the trial court was whether the bank was the owner of the money and effects in the hands of the bailees in Chicago, or whether such money and effects belonged to Mellors & Son, so as to entitle appellees to subject them to the payment of their debt through the attachment suit. Involved in the question thus stated was the validity of the transfer from Mellors & Son to the bank, and the assignment to Blinks, and also of the chattel mortgage. We are obliged to hold in this case, as we have held in a number of other cases, that there is nothing before us for our consideration. We cannot consider any of the questions of fact, because they are all settled by the judgment of the appellate court. We cannot consider the questions of law suggested by counsel, because the trial in this case took place before the court without a jury, and no "written propositions to be held as law in the decision of the case," were submitted to the trial judge in accordance with section 42 of the practice act, (Rev. St. Ill. c. 110, § 42.) This point is made by the appellees, so that we cannot avoid passing upon it, and we must adhere to our former ruling. Where there is a trial before the court without a jury, in order to present a question of law to this court, the party should submit propositions of law to the trial court, as provided for in the section referred to. *Association v. Hall*, 118 Ill. 169, 8 N. E. Rep. 764.

The judgment of the appellate court is affirmed.

(126 Ill. 85)

TARDING v. GIBBS.

(*Supreme Court of Illinois*. May 9, 1888.)

VENDOR AND VENDEE—OPTION TO PURCHASE—NOTICE.

The parties to a lease indorsed upon it an agreement that the lessee should have the privilege of purchasing the premises during the first year, on certain terms therein stated; but that if the lessor should have an offer for the property, 10 days' notice thereof should be given to the lessee, who should have the privilege of buying at such offer, and if he did not decide to purchase, the lessor should have the privilege of selling. Within the year the lessor sold the property, and, after the deed was given, notice of the offer signed by the lessor was served on the lessee, who made no election to purchase. *Held*, that this terminated the lessee's option, and that he could not thereafter maintain a suit for specific performance.

Appeal from superior court, Cook county; G. GARNETT, Judge,
George R. Grant and *C. H. Morse*, for appellant. *Pliny B. Smith* and *Walter B. Gibbs*, for appellee.

SHELDON, C. J. This was a bill for specific performance of an agreement for the sale of certain real estate. Frederick C. Gibbs, on March 25, 1885, took a lease from Uzziel P. Smith of the premises in question for the term of five years from May 1, 1885. At the same time there was indorsed on the lease an agreement, signed by both parties, that during the first year of the tenancy the lessee was to have the privilege to purchase the premises at the sum of \$9,500, of which \$2,250 was to be paid in cash; \$2,250 on or before one year after date of delivery of a warranty deed, to be secured by note and trust deed, and the balance by the assumption of a note and trust deed already on the premises for the sum of \$5,000. But if the lessor should have an offer

for the property, 10 days' notice thereof was to be given to the lessee, and he was to have the privilege of buying at said offer. Said price in any event not to exceed \$9,500, and if the lessee did not decide to purchase the property, the lessor should have the privilege of selling the same. But if the lessee should decide to purchase, he should be allowed 30 days to close the purchase; and in the event of the lessor having an offer for the property after the expiration of the first year, the lessee was to have the first privilege of buying at said offer. George F. Harding offered Smith for the property \$9,500, assuming the mortgage and canceling some indebtedness, the balance, \$100, to be paid in cash. Harding took the property on those terms. A quitclaim deed of the property, bearing date April 1, 1885, was made to him by Abner C. Harding, who held the legal title to the property in his name in trust for Smith. On May 9, 1885, a written notice, signed by Smith, was served on Gibbs that Smith had an offer of \$9,500 for the property, and Gibbs did not make any election to purchase the same. A previous notice had been given some two or three weeks before, having signed to it the name of Smith by Harding. On February 15, 1886, Gibbs made a tender to Harding of the money and note and trust deed provided for in the contract, and offered to assume the \$5,000 mortgage then on the premises, and demanded a deed from Harding, which the latter declined to execute on the ground that Gibbs' option had been determined by the notice of May 9th. Gibbs then filed this bill against Smith & Harding for the specific performance of the contract. The superior court granted the relief prayed, and Harding took this appeal.

There is essentially no dispute as to the facts in the case, and the justification of the decree is rested by appellee's counsel on but the one point; that the notice of the offer of purchase of the property should have been given by Harding instead of by Smith. As there had been a deed of the property made by Smith to Harding before the giving of the notice, it is insisted that by such conveyance all right in the property passed from Smith and vested in Harding; that at the time of the giving of the notice Smith had no right or interest with respect to the property, but that it was all in Harding, and that he alone could give the notice. At the time Harding took his conveyance of the property he also took an assignment of the lease between Smith and Gibbs, with an agreement indorsed thereon, signed by himself, that he does not accept the assignment of the lease except upon the understanding and agreement that Smith shall give Gibbs notice of his offer for the property, and his purchase shall not be effectual until Gibbs' right to buy shall terminate under such notice. It is said Gibbs had no notice of the agreement. This may be. It does not appear by the record that he had, and we will consider the case irrespective of this agreement. There was here but an option to purchase. The obligation was on only one side. Smith was obliged to sell, but Gibbs was not bound to purchase. Where the contract is in any wise unilateral, as in the case of an option to purchase, any delay in the party in whose favor the contract is binding is looked at with especial strictness. Fry, Spec. Perf. § 733. Smith was willing to give Gibbs the privilege of buying the property during the first year of his tenancy, but he was not willing to lose the opportunity of making a sale during that time. So he does not give Gibbs an absolute option of purchase within one year at the price named, but gives the option with this express proviso, that if during the year Smith should have an offer for the property, and should notify Gibbs of it, that Gibbs should thereupon have 10 days in which to make an election whether he would purchase the land upon the terms offered by such third party, and that if he should elect to so purchase, he should have 30 days in which to close the transaction. If, however, he did not so elect, then Smith was to be at liberty to sell the property. To avail himself of this option, required strict compliance on the part of Gibbs. The precise condition had occurred here which terminated this option. There was an offer to purchase, notice by Smith to Gibbs of the offer,

and failure of Gibbs to make an election to purchase at the price offered within 10 days after the notice. The fact that there had been a deed made under the offer was of no consequence to Gibbs. His was the superior right, and the exercise of his option within the time limited would have avoided the conveyance which had been made. The conveyance rather strengthened the case of appellant. It showed not only an offer to purchase, but demonstrated that the offer was a real one. Had there been but a mere offer to purchase, there might have been doubts as to its genuineness. Whether the notice was given by Smith or Harding seems but a matter of so merely a technical character that it should not have favor in a court of equity. There is no substantial equity in it. The terms of the agreement required the notice to be given by Smith, as it was; but, whether given by Smith or Harding, Gibbs knew there was a chance to sell the land, and his plain duty under the agreement was to exercise his option at once within the 10 days, and not let pass the opportunity to make a sale of the land. He could not consistently with any principle of fair and honest dealing, under the contract which he had made, destroy the opportunity of making a sale, wait until the expiration of the year to see if there might not be an increase in value of the land, and then exercise his option to purchase. We conceive too, that Smith had the right, under the agreement, to give the notice, in order to the protection of his interest under the agreement. If only the purchaser from him, where there had been a sale, could give the notice, then, on the purchaser's omission to give the notice, Smith might lose the benefit of such sale, as Gibbs could avoid it by the exercise of his option thereafter.

The decree of the superior court will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

(125 Ill. 82)

ELLIS v. ROCK ISLAND & M. C. R. Co.

(Supreme Court of Illinois. May 9, 1889.)

EMINENT DOMAIN—MEASURE OF DAMAGES—IMPROVEMENTS.

Where a railroad company, under agreement with one in possession of land under a mortgage lien, and other claims apparently valid, and supposed to equal the value of the property, was to receive a deed as soon as the lienor's title was perfected, and in good faith took possession, built its road-bed, side tracks, depot buildings, stock-yards, etc., and another was afterwards discovered to have a superior title, on proceedings by the company to condemn the property the owner is not entitled to its value as enhanced by the improvements.

Appeal from circuit court, Mercer county; T. T. GLUM, Judge.

J. C. Pepper and *George W. Spahr*, for appellant. *Henry Curtis*, for appellee.

MULKEY, J. In the spring of 1887, the Rock Island & Mercer County Railroad Company commenced proceedings, under the eminent domain act, in the Mercer county circuit court, to condemn for right of way, depot grounds, etc., a part of a certain tract of land belonging to the appellant, Thomas B. Ellis. After settling the pleadings, which were unusually prolix, the cause was heard before the court and jury, resulting in a finding and judgment in favor of Ellis, and against the company, for \$1,050. Ellis brings the record here, and asks a reversal on a number of grounds. The greater portion of the matter which has found its way into the record throws but little light upon the real issue in the case; and it might therefore, with profit to all parties, have been dispensed with altogether. As in most cases of this kind, the main question is, how much shall the petitioner pay to the land-owner as compensation for the land actually taken, and what, if anything, on account of damages to the portion not taken? The company does not deny its liability, but simply questions its extent.

We do not propose to enter upon a discussion of the evidence, or of the rulings of the court upon the vast amount of collateral and foreign matter that has been dragged into the record, but will content ourselves with stating in general terms the conclusion we have reached, after a very careful consideration of the evidence. Whatever difficulty is encountered in the case grows out of the fact that the railroad improvements and structures on the land sought to be condemned were made by the company years ago, at its own costs and charges. In 1876, P. L. Cable was in possession of the land under a mortgage lien and other claims upon it, apparently valid, amounting, it was then supposed, to the full value of the property. While things were in this condition, the company, during the year just stated, made an arrangement with Cable by which it took possession of the land for the purposes indicated in the petition, and was to receive a conveyance therefor when he had perfected his title. Under this arrangement, the company in good faith, so far as we can see, located and built at great expense its road-bed, side tracks, switches, depot buildings, stock-yards, etc., which for the purposes it is sought to be condemned greatly enhanced its value. It has since turned out, however, that the appellant, Thomas B. Ellis, had the superior title to the land; and he now insists that he is entitled, not only to what the land itself is worth, but to its value as enhanced by the improvements put upon it by the company. Whether this claim is well founded or not presents the only question of any importance in the case. Upon the authority of the case *Railroad Co. v. Goodwin*, 111 Ill. 273, the lower court ruled against the appellant on this question, and it is not perceived how it could have done otherwise without disregarding the rule therein laid down. This court is fully satisfied with the decision in that case, both in principle and authority. It is also objected that the damages allowed by the jury, outside of the question just discussed, are inadequate and altogether too small. We are unable to say that the damages are so grossly inadequate as to justify this court in interposing on that ground. In short, we find no sufficient cause to reverse the judgment of the court below. Judgment affirmed.

(124 Ill. 642)

PEOPLE *ex rel.* HUNT, Atty. Gen., *v.* MACFALL *et al.*

(Supreme Court of Illinois. May 9, 1888.)

QUO WARRANTO—PRACTICE—RULE NISI.

Upon petition, in term-time, for leave to file an information in the nature of a *quo warranto*, the court may enter a rule *nisi*, and permit the respondents to file counter-affidavits.

Appeal from appellate court, Third district.

Petition to the circuit court of Adams county was filed by George Hunt, attorney general, asking leave to file an information in the nature of a *quo warranto* against Thomas W. MacFall and others, officers and members of the board of education of the city of Quincy. Leave being denied, an appeal was taken to the appellate court, which sustained the judgment of the circuit court, and the relator again appeals.

George Hunt, Atty. Gen., (*J. N. Sprigg*, of counsel,) for appellants. *L. E. Emmons* and *Carter & Govert*, for respondents.

MULKEY, J. On the 25th day of September, 1886, the attorney general filed in the circuit court of Adams county, the same being then in session, a petition for leave to file an information in the nature of a *quo warranto* against Thomas MacFall and others, "requiring them to show by what authority they claim to have, use, and exercise certain powers and privileges as members and officers of the board of education of the city of Quincy, in said county," as set forth in the petition therewith presented. The information proposed to be filed, after setting out the incorporation of the board of education, its powers, duties,

etc., proceeds to charge the members thereof with official misconduct and abuse of their franchises, by illegally and unjustly discriminating in various ways against the negro children and pupils within their jurisdiction on account of their race and color. The affidavits of a number of colored persons were presented, tending to support these charges, but in many respects they were vague and unsatisfactory. Upon the showing made, the court, as it would seem, was disinclined, without further inquiry, to either allow or disallow the information to be filed, and therefore ordered a rule *nisi* to be entered against the respondents, requiring them to appear on a certain day of the then term of the court, and show cause why the information should not be filed. A formal and full hearing was had under the rule in open court on the 14th of October following, resulting in the entry of an order denying leave to file the information. On appeal from this order, the appellate court, in an exhaustive review of the various charges, and the evidence bearing upon them, affirmed the order.

On the present appeal, the case is brought within very narrow limits. It is assigned for error that the appellate court erred in affirming, and in not reversing, the judgment of the circuit court. So far as this assignment of error questions the appellate court's findings upon the facts, we cannot review it. The only ruling of the circuit court complained of, and which is open to review here, is its refusal to allow the information to be filed on the *ex parte* showing of the attorney general; its entering a rule *nisi* against the respondents, and permitting them to file counter-affidavits. This very question was passed upon in *People v. Moore*, 73 Ill. 132, and decided adversely to the claim now made by appellant. In that case the trial court, against the objections of the state's attorney, placed the respondents under a rule to show cause, as was done here; and this court sustained its action. The counterpart of this ruling is found in *People v. Golden Rule*, 114 Ill. 34, where it is held that the court may grant such leave without a rule *nisi*. Taking the two cases together, it follows that the court may or may not dispense with the rule *nisi* as in its opinion the exigencies of the case demand. Of course, this rule could not be applied to a case of this kind, where the application is made, as it may be, to a judge in vacation; for a judge can exercise no judicial functions in vacation, unless expressly authorized to do so. Upon the whole record, we think it clear there are no merits in the case, and that the judgment of the appellate court should therefore be affirmed.

(125 Ill. 28)

BOWEN v. POPE *et al.*

(Supreme Court of Illinois. May 9, 1888.)

GARNISHMENT—PROPERTY SUBJECT TO PROCESS—NOTES IN ANOTHER STATE.

Summons of garnishment served upon one of a firm while another partner is without the state does not hold notes belonging to the defendant then in the absent partner's hands, and surrendered by him to said defendant before returning to the state, although he was previously informed by his partner of the process served.

Appeal from appellate court, Third district.

Action by the Simmons Hardware Company against Benjamin Bowen, defendant, with Thomas Pope, William R. Lockwood, and John W. Heitz, co-partners under the firm name of Pope, Lockwood & Co., garnishees, in the circuit court of Adams county. A jury trial of the issue on the answer of the garnishees resulted in a verdict and judgment for plaintiff, which did not include the value of certain property of the defendant not accounted for in said answer. The judgment of the appellate court, from which plaintiff now appeals, sustained that of the circuit court.

J. C. Broady, for appellant. *William McFadon*, for appellees.

MULKEY, J. On the 12th day of October, 1885, the Simmons Hardware Company, a business corporation of St. Louis, Mo., sued an attachment out

of the circuit court of Adams county against the estate of Benjamin Bowen, a resident of and doing business in the state of Missouri, to which the sheriff of the county, three days afterwards, made the following return: "I have been unable to find property of the within-named defendant, Benjamin Bowen, to satisfy the within attachment; and I have served the within writ upon the within-named garnishees, Thomas Pope, William R. Lockwood, and John W. Heitz, copartners under the name and style of Pope, Lockwood & Co., by reading the within to said John W. Heitz on the 12th day of October, A. D. 1885, and giving to said Heitz one dollar and ten cents, and by reading the within writ to within-named Thomas Pope on the 18th day of October, 1885, and by reading the within writ to the within-named William R. Lockwood on the 14th day of October, A. D. 1885. I cannot, in my county, find the within-named Benjamin Bowen this 15th day of October, A. D. 1885." The garnishees answered, admitting an indebtedness to Bowen of \$141.49, and also that, at the time of the service of the writ on Heitz, Lockwood had in his possession, in the state of Missouri, certain promissory notes, belonging to Bowen, on various parties then in and residents of that state; and that, before service of said writ on Lockwood, the said notes were delivered by him to Bowen, in pursuance of a demand made therefor. The notes in question amounted, in the aggregate, to \$336, and are conceded to have been worth as much as \$100. It is an undisputed fact that the notes neither at the time of the service of the writ on Heitz, nor afterwards, were outside of the state of Missouri. Upon the service of the writ on him, it appears that the firm sent a dispatch to Lockwood, who was temporarily in Missouri for the purpose of making a settlement with Bowen, informing him of the service of the writ. The latter, after taking legal advice, delivered the notes to Bowen, notwithstanding the service upon his firm; but, on the same advice, he declined to pay over to him the \$141.49 cash, and hence there is no controversy as to that. The plaintiff filed a replication to the answer of the garnishees, and the issues of fact thus formed were tried before the court and a jury, resulting in a verdict for the plaintiff for the \$141.49 only, upon which the court entered judgment. On the plaintiff's appeal, the appellate court affirmed the judgment.

The only question to be determined on the present appeal arises on the instructions given to the jury. The court, in a number of instructions, told the jury, in effect, that, if they found the facts respecting the notes as above stated, they should find, as to them, for the defendants. The question thus raised is simply this: Can one be charged as garnishee in respect to promissory notes or other evidences of indebtedness executed by third parties, and belonging to defendant in the attachment, which at the time of the service of the garnishee process, and during the pendency of the suit, were in another state? So far as we are advised, this question is now before this court for the first time, though the courts of other states, in giving a construction to their own statutes on the subject of garnishment, have frequently had occasion to pass upon it, and a number of them have answered the question directly in the negative. On the other hand, the case of *Childs v. Digby*, 24 Pa. St. 23, is the only one to which we have been referred which seems to hold to the contrary; and the rule as laid down in that case appears to have been since changed by statute so as to make it conform to the holdings of the courts in the other states. We perceive nothing in this case to justify a departure from the general rule on the subject as just indicated. That the rule has the merit of convenience and certainty is clear, and that it is sound on principle will fully appear from the following authorities: *Bates v. Railway Co.*, 60 Wis. 302, 19 N. W. Rep. 72; *Sutherland v. Bank*, 78 Ky. 253; *Plimpton v. Bigelow*, 98 N. Y. 596; *Pennoyer v. Neff*, 95 U. S. 724; *Wap. Attachm. & Garn.* 226, 227, 249, 334. The case of *Railroad Co. v. Cobb*, 48 Ill. 404, also has more or less bearing on the question. The conclusion reached by the

courts below appearing to be in conformity with the general current of authority, we perceive no cause for disturbing the judgment. It will therefore be affirmed.

(125 Ill. 33)

BRACE et al. v. BLACK et al.

(Supreme Court of Illinois. May 9, 1888.)

1. **WILLS—TESTAMENTARY CAPACITY—AVERSION TO NATURAL OBJECTS OF BOUNTY.**

Upon the trial of an issue as to testator's sanity, it being in evidence that testator entertained great prejudice against the husband of his daughter, a plaintiff, to whom he had given nothing by his will, an instruction that the husband was not a natural object of the testator's bounty, and that, while he might entertain such prejudice towards him as to be under an insane delusion as to him, yet, if such delusion did not prevent him from properly understanding and appreciating his relation towards those who had such natural claim on his bounty, said will would not thereby be invalidated, was held correct; especially where construed together with another to the effect that if testator was laboring under partial insanity at the time of making the will, and entertained an insane delusion regarding said husband, which influenced him in the disposition of his property, so far as the daughter was concerned, then such insane delusion would invalidate the will.

2. **TRIAL—INSTRUCTIONS—REPETITION.**

It is not error to refuse to give an instruction, whether correct or not, if the jury have already been fully and properly instructed upon every phase of the case, both law and fact.

3. **WITNESS—COMPETENCY—INTEREST.**

In a suit by an heir at law against a devisee to contest the validity of the will under which defendant claims, the heir is not a competent witness to testify as to the sanity of testator.

4. **EVIDENCE—REBUTTAL.**

In a suit by the heirs to contest the validity of the ancestor's will on the ground of insanity, a witness testified that the testator had told him that one of the plaintiffs, a daughter of testator, had requested him (testator) to convey to her certain property, which he was then unwilling to do; this evidence being offered as tending to prove testator's knowledge of his own property, and the absence of any insane delusion in that respect. *Held*, that the daughter was incompetent to testify that she had not made such a request.

Error to circuit court, Greene county; GEORGE W. HERDMAN, Judge.

This was an issue out of chancery in a suit by Catherine Brace, Alice E. Cullimore, and John W. Black, children and heirs at law of William Black, deceased, and Caroline Black, widow of said William Black, against Edward B. Cullimore, Grace L. Cullimore, and Laura Black, devisees under the will of said William Black, and Curtis W. Brace, executor of said will. The object of the bill was to contest the validity of said will, on the ground of insanity of the testator. The jury found the testator sane, and that the instrument in controversy was his last will and testament, and the court decreed accordingly. Plaintiffs thereupon sued out this writ of error.

John G. Henderson, for plaintiffs in error. *E. A. Doolittle*, for defendants in error.

PER CURIAM. This was a proceeding by bill in equity to contest the validity of an instrument purporting to be the last will and testament of William Black, deceased. Two issues at law were made up, and submitted to a jury: *First*. Was the writing purporting to be the last will and testament of William Black, deceased, the last will and testament of the said William Black or not? *Second*. Was the said William Black, at the time of the execution and attestation of the said writing, purporting to be the last will and testament of said William Black, of sound mind and memory? The verdict of the jury was: "We, the jury, find the writing offered in evidence to be the last will and testament of William Black, and that he was at the time of executing it of sound mind and memory."

The court below, after overruling a motion for a new trial, entered a decree upon this verdict. The will devised real estate in fee, and a freehold is

therefore involved, and the writ of error is properly sued out of this court. William Black left surviving him children, to whom his property would have descended, as his heirs at law, had he made no will; but, by the terms of his will, he devised a considerable portion of his property to grandchildren, and to one of his children he devised nothing.

Upon the trial, the complainants in the bill, Alice E. Cullimore and Catherine M. Brace, daughters of William Black, were offered as witnesses, on their own behalf, to prove the insanity of their father at and prior to the time he executed the instrument in suit, purporting to be his last will and testament; but the court, upon the objection of the guardian *ad litem* for the minor grandchildren who are legatees, refused to allow them to testify, and a material question to be now considered is whether this ruling is right. It is clear enough that at common law these parties would be excluded by reason of their interest; and it would seem to hardly admit of a rational doubt that they are not rendered competent by the statute. The adverse parties defend as legatees, and that to which they were called to testify occurred before the death of the testator. The object of the suit is not merely to adjust rights between heirs at law, as in *Pigg v. Carroll*, 89 Ill. 205; it is to take the estate from the legatees, some of whom are not heirs at law, and vest it in the heirs at law. There was therefore no error in refusing to allow these parties to testify.

Dr. Turner, who was called and examined as a witness on behalf of complainants, stated, in his direct examination, that he could make a statement that would throw light on the question whether the testator was laboring under the delusion that he had no property, and that he and his wife would eventually go to the poor-house, and show that he did not have that delusion. Complainants' counsel asked the witness no further questions in this respect; but the counsel for the defendants, on cross-examination, asked the witness to make that statement, and the witness then said: "He [meaning the testator] said that Mrs. Cullimore demanded him to make her a deed to a part of the property, which he was unwilling to do at that time. Another reason was that he referred to the incumbrance, etc." Complainants then offered to prove by Mrs. Cullimore that she had never demanded him to make a deed; and the court, on objection, refused to allow her to so testify, and this is claimed also to have been error. We think the court ruled properly. Suppose, as the offered testimony would have tended to prove, that he was either willfully or ignorantly mistaken as to the fact that she had demanded a deed, still his declaration showed that he knew he had the property that he did have, and hence that he was laboring under no delusion in that respect; and this was the sole purpose of offering the testimony.

The court, at the instance of the defendants, among other things, instructed the jury: "The court instructs the jury, for the defendants, that the natural objects of a testator's bounty are those persons who, by reason of kinship or ties of gratitude, may reasonably be supposed to have some claim upon him; but that no one, however nearly related he may be, has any natural right that can be asserted against the will of the testator. So, in this case, the mere fact, if it be a fact, that James Cullimore was the son-in-law of William Black did not of itself entitle him to be regarded as a natural object of the bounty of William Black; and although the jury may believe, from the evidence, that William Black was prejudiced against James Cullimore, yet unless they further believe, from the evidence, that James Cullimore had so conducted himself as to be entitled to the gratitude of his father-in-law, and to be regarded as a natural object of his bounty, such prejudice, although morbid, and amounting to an insane delusion, would not in itself invalidate his will: provided, such insane delusion did not prevent the testator, William Black, from understanding and appreciating his relation to those who had a claim upon his bounty, and who were the natural objects of his bounty." It is con-

tended that this instruction was calculated to mislead, because—*First*, a question not in the case, namely, whether Cullimore had a claim on the testator's bounty; *second*, the testator might understand and appreciate his relation to his daughter, that she was his child, and had just claim upon his bounty, and yet the insane prejudice of the testator against the husband enter into the making of the will, and prevent him from making that provision for her that he otherwise would. But this fails to give due effect to the words "understand" and "appreciate." If the insane delusion did not prevent the testator from understanding and appreciating his relation to his daughter, then it must have been—*First*, that he knew that she was not responsible, and ought not to be held responsible, for anything that her husband did or said; and, *second*, that he was able to estimate justly (for, in this connection, that is the sense of "appreciate") his relation towards her. Having full knowledge and full capacity to reason, there is left no place for delusion to operate. Moreover, the court, in the sixteenth instruction given at the instance of the complainants, told the jury as follows: "That if the jury should believe, from the evidence, that William Black was capable of transacting ordinary business, where there was no intricacy about it or complication, yet if the jury further believe, from the evidence, that he was laboring under partial insanity from the time that he was adjudged insane down to the time of his death, and that he entertained an insane prejudice against James Cullimore, which entered into and influenced him in the disposition of his property, so far as Alice Cullimore was concerned, then the jury should find that the paper read in evidence is not the will of William Black, and that he was not of sound mind and disposing memory at the time of the execution of said paper." With this instruction, so fully supplementing the others, it is not presumable that the jury were misled.

We think it needful only to add, upon the subject of instructions, that 21 instructions, some of them quite lengthy, were given on behalf of the complainants, presenting, fully and fairly, as we think, every contention of the complainants, both of law and of fact. There was therefore no error in refusing other instructions asked by complainants.

We have carefully considered all of the evidence in this record, which is quite voluminous, and, having done so, we are unable to say that there was error in not setting aside the verdict of the jury as unsupported by the evidence. To discuss the facts at length would require many pages, and could subserve no useful end. We concede the question of the testator's sanity is a close one; but we cannot say that there is a clear and decided preponderance in the evidence that he did not possess what the law contemplates as a sufficiently sound mind to dispose of his property when he made his will. The judgment is affirmed.

(124 Ill. 607)

HENDERSON et al. v. PEOPLE.

(Supreme Court of Illinois. May 10, 1888.)

1. ABDUCTION—WHAT CONSTITUTES.

Defendants were indicted under Crim. Code Ill. § 1, which provides that whoever entices an unmarried female of chaste life from her home for the purpose of prostitution or concubinage shall be punished, etc. It was proved that the principal defendant, a dissolute and impecunious young man, induced the prosecutrix, a girl of 15, to elope with him by promises of marriage, but no arrangements had been made or suggested as to time and place of such marriage, and the defendant was without means to defray traveling expenses. For the avowed purpose of taking a night train, defendant took her to a neighboring city, where they slept together at an hotel, he representing her to be his wife, keeping her hid until late the next day, when, without any effort to take a train, they returned to the town where the girl lived, and, still keeping secluded, slept together that night until aroused by the approach of the girl's parents and the police, when they fled together, and were still together when arrested, two or three days later. *Held*, an enticing for the purpose of concubinage, within the meaning of said statute.

2. SAME.

Under Crim. Code III. § 1, providing for the punishment of a person enticing an unmarried female from her home for the purpose of prostitution or concubinage, no length of time nor long continuance of illicit intercourse is necessary to constitute concubinage. That relation is formed when a single woman consents to unlawfully cohabit with a man generally, as though the marriage relation existed between them, without any limit as to the duration of such intercourse, and actually commences such cohabitation, in pursuance of such understanding.

3. CRIMINAL LAW—INSTRUCTIONS—DEFINITION OF WORDS IN STATUTE.

It is not error for the court, in giving a general charge to a jury upon its own motion, to omit to give a definition of words used in the statute and indictment under which the trial is had; such words being of general use, and not technical terms nor words of art. A party desiring such words defined to the jury should prepare and submit instructions for that purpose.

Error to circuit court, Champaign county; C. B. SMITH, Judge.

John M. & John Mayo Palmer and Patton & Hamilton, for plaintiffs in error. *George Hunt*, Atty. Gen., for defendants in error.

MULKEY, J. At the September term, 1887, of the Champaign circuit court, the grand jury returned into open court an indictment founded upon the first section of the Criminal Code against William Henderson, John Henderson, Carroll Shutt, and Julia Shutt. The first count charges that the defendants on the 2d day of September, 1886, unlawfully and feloniously enticed and took away one Joanna Carman, then and there being an unmarried female of chaste life and conversation, from her parents' house, for the purpose of prostitution. In one other count of the indictment the defendants are charged with enticing and taking away the prosecutrix for the purpose of concubinage. In other respects the latter count is like the first. Upon consideration of the evidence in the light of the court's charge, the jury returned a verdict of guilty against all the defendants, fixing their respective times in the penitentiary as follows: William Henderson at eight years, Carroll Shutt at two, John Henderson at one, and Julia Shutt at one. A motion for a new trial having been made and overruled, the court pronounced sentence and judgment upon the defendants in conformity with the verdict.

The question to be considered is whether the finding of the jury and the judgment and sentence of the court are warranted by the law and the evidence. The defendants William and John Henderson are brothers. Julia Shutt is their sister, and the wife of Carroll Shutt. The prosecutrix, Joanna Carman, is the daughter of Benjamin F. and Eliza Carman, and at the time of the alleged abduction was about 15 years old. The Shutt and Carmans lived near each other in the city of Urbana, and had been on visiting terms some three years prior to this occurrence. William Henderson, the principal in the affair, is a barber by trade, and a dissolute, drunken character, who spent most of his time in the vicinity of Urbana, and was frequently at Shutt's house, with whom his brother John was temporarily stopping at the time in question. About the 1st of July, 1887, William Henderson commenced making calls at Carman's house, and paying his attentions to the prosecutrix. It was not long before Mrs. Carman, her mother, became acquainted with his dissolute habits and bad reputation, and forbade his coming to her house any more. He nevertheless managed to meet with the daughter at Shutt's and other places, and finally, by means of promises, threats, etc., induced her to consent to an elopement for the purpose, as he put it, of getting married, and she doubtless so understood it. In settling the preliminaries, he told her that they could start from Mrs. Shutt's, his sister's; "that she would not give them away." They accordingly did start from there on the evening of the 2d of September, a little after dark. John Henderson, about dark of that evening, went to Carman's house, where he found Joanna out in the yard, and, without attracting the attention of any of the family, told her that William was ready to go, and was upon the corner of the street waiting for her. After joining

him on the street, the two repaired to Shutt's house, where all four of the defendants met together, and talked over the matter of the elopement, which was accelerated by the approach of Joanna's sister; upon discovering which John remarked, in the presence of them all: "Will, I tell you what is the matter. You want to hurry up and get out of here, because here comes Stell, and she is long-nosed, and will give it away." It was understood by all present that the two were to go to the Doyle House, in Champaign city, a short distance from Shutt's, for the purpose, as was stated to her, of waiting for the night train. But nothing seems to have been said about where they were to go beyond there, or their ultimate plans or purposes. On arriving at the hotel about 8 o'clock, instead of sitting up for the train or ordering separate rooms, and making arrangements to be called for the train, Henderson engaged a single room "for [as he put it] himself and wife;" and the two were at once conducted to it, where they lodged together as husband and wife. They remained at the hotel together, under that assumed relation, until next evening about 5 o'clock, when they returned a-foot to Shutt's house; John Shutt going back with them. They reached Shutt's some time before night. John had visited them at the Doyle House three times that day,—in the morning, at noon, and in the evening,—and told them that they would have to keep hid, or they would be found. After their return to Shutt's on Saturday evening, Joanna's father came to the front gate, and was engaged in a conversation with Carroll Shutt. She was at the time in the back yard, though she recognized her father's voice, and heard him make the remark, "That girl is in this town, and I am going to find her." The parties, however, were not speaking sufficiently loud to enable her to understand anything else that passed between them while this conversation was going on. Mrs. Shutt and John and William Henderson were most of the time out in the back yard with Joanna, all of whom knew of the conversation, and that the object of Carman's call there was to find his daughter. Occasionally John Henderson would go around in front, and participate in the conversation for a short time, and then return and caution the parties to speak lower, or they would be discovered. After Carman had left, and about 11 o'clock at night, the party out of doors, being informed the coast was clear, went into the house; whereupon Mrs. Shutt brought some bedding into the bedroom adjoining the kitchen, and threw it down on the floor, telling William to fix his bed, and he and Joanna were left in that room by themselves, where they slept together until about 2 o'clock in the morning, when John Henderson, Mrs. Shutt, her daughter and mother, rushed into the room where William and Joanna were sleeping, and told them to jump up; that her father and mother, with the police, were at the gate. Being thus warned, they hastily retreated through a door leading to the rear of the building, whence, by means of an alley, they made their escape; John accompanying them to the fair grounds, but a short distance from the house. The latter, on parting with them, remarked, "I will bet before to-morrow night I will be taken up for this." The two fugitives, after parting with John, proceeded a-foot to Talona, thence to Sadonis, thence to Ivesdale, and thence towards Bement. On Sunday night they lodged in a corn-field within about a mile and a half of that place. Monday morning Henderson went into the town, and brought back with him a young man, who, by his direction, took her to Bement, and left her at an hotel, where, in a short time afterwards, she was taken into custody by an officer. Henderson, who had gone to the town by another route, was soon afterwards discovered, and placed under arrest. This statement presents the substance of the prosecutrix's testimony, and we do not think its force or effect is materially impaired by the other evidence in the record.

The section of the statute above referred to, and on which indictment is founded, is as follows: "Whoever entices or takes away an unmarried female of chaste life and conversation from her parents' house, or wherever she may

be found, for the purpose of prostitution or concubinage, and whoever aids and assists in such abduction for such purpose, shall be imprisoned in the penitentiary not less than one nor more than ten years." The elements which go to make up the offense created by this section of the statute are so plainly and concisely expressed that it would be useless to attempt to make any change in the language used, with the hope of presenting them in a more concise or perspicuous form. Indeed, the section in both these respects may be regarded as a specimen of model legislation.

But two questions are made in the brief of counsel for plaintiffs in error, and they will be considered in the order made. It is contended—*First*, that the evidence fails to show that the prosecutrix was enticed and taken away from her father's house for the purpose either of prostitution or concubinage, but, on the contrary, for the purpose of marriage only. In other words, the enticing and taking away is confessed, but the purpose of intent with which it is alleged to have been done is denied. While the proofs satisfactorily show that the prosecutrix left her father's house with the intent and expectation of being married to the accused, and while it is equally clear that he professed to be taking her away for the purpose of marrying her, yet we agree with the jury and court below that that was not his real intention. On the contrary, we are of opinion that his expressed purpose to marry her was a mere subterfuge and pretense to enable him to get her completely within his power, that he might the more certainly and effectually overcome all scruples of modesty and virtue, and finally induce her to surrender her person and honor as a willing sacrifice to his licentious passion and beastly lust. That marriage was not seriously intended on his part we think is shown by the decided weight of testimony. As a general rule, the safest way of judging one's intention about a particular matter is to look to his acts, rather than his professions respecting it, especially when they are found to be in conflict, as was the case here. The night train upon which Henderson pretended he wanted to leave did not reach the depot in Champaign city until about 1 o'clock in the night. It was in the light of the moon, and not a very long walk over to the depot, which was but a few steps from the Doyle House. Had his intentions been honorable, he would most likely have remained with his intended wife at his brother-in-law's until near train-time, and then walked over to the depot; at least, this would have been the more natural and appropriate course to pursue. So far as the record shows, neither the place nor time of the marriage was prearranged, nor even so much as talked about, either before or after their departure. The evidence shows that Henderson personally knew that he could not get license authorizing their marriage in this state without some one committing perjury; and the conclusion is warranted, from the evidence, that he was destitute of means to defray their traveling expenses out of the state or anywhere else. Although his bill at the Doyle House was only one dollar, he was not able to pay that, and was compelled to pledge his satchel and contents, consisting of a few old razors, as security for the amount, and they were still unredeemed at the time of the trial. It is reasonable to suppose his impecunious condition was known to his brother and the Shutt family; and the fact that John went over to the Doyle House Saturday morning, and called upon the prosecutrix at her room, is a circumstance tending strongly to show that he did not expect them to leave on the night train. All day Saturday, when not in or about the Doyle House, the accused was out on the streets, drinking and speering around as usual. At 5 in the evening, as heretofore seen, he and the prosecutrix, accompanied by John, returned to Schutt's in broad day-light, and deliberately took up their quarters there, both occupying the same bed at night, in utter defiance of law, decency, and public morals. Is there anything in all this tending to show that his object in taking her from the home of her parents was to make her his wife, rather than his kept mistress? If there is, we con-

fess we have not been able to discover it. As before indicated, the *gravamen* of the offense is the purpose or intent with which the enticing and abduction is done; and hence the offense, if committed at all, is complete the moment the subject of the crime is removed beyond the power and control of her parents, or of others having lawful charge of her, whether any illicit intercourse ever takes place or not. Subsequent acts are only important as affording the most reliable means of forming a correct conclusion with respect to the original purpose and intention of the accused. It is with this view we have gone so minutely into the history and details of the case as we have.

The remaining point to be considered is whether there is any material error in the court's charge to the jury for which the case should be reversed. The record shows that the court gave a general charge to the jury, on its own motion, and that no other instructions were asked or given. One of the objections taken to the charge is that the court should have explained to the jury what is meant by the terms "prostitution" and "concubinage," as they occur in the statute. The court was not asked to give an explanation of these terms, and no reason is perceived why it should have done so, in the absence of such request. At any rate, it would be going much further than we are prepared to go to reverse the judgment on that ground. The words in question are in general use, and we have no doubt that they were used by the legislature in their general or popular signification. They are in no sense words of art or technical terms; and, if it were apprehended that they would not be correctly understood by the jury, counsel should have prepared an instruction defining the words, and submitted it to the court, to be ruled upon in the usual way. It is but a fair presumption that the jury understood the words in the sense in which they are used in the statute, and that they were used by the court in its charge in the same sense. It is said that "nothing short of continuous and regular illicit intercourse would constitute concubinage," within the meaning of the statute; and *Slocum v. People*, 90 Ill. 274, is cited in support of the statement. Conceding this to be so, it does not follow that the court erred in neglecting to give an instruction that was not asked for. With respect to the case cited, it was clearly decided right. Yet we think there are certain expressions in the opinion which were not necessary to a decision of the case, that is, applied to cases under the statute that might be suggested, would need modification. If, by the above statement, it is intended to assert that any great length of time, or long-continued illicit intercourse, is necessary to the establishment of that relation which results in concubinage, the proposition, in our judgment, is unsound. The relation which gives rise to the disreputable state of woman indicated by that term may, like that of marriage, be contracted or assumed in a day as easily as in a year. When a single woman consents to unlawfully cohabit with a man, generally, as though the marriage relation existed between them, without any limit as to the duration of such illicit intercourse, and actually commences cohabiting with him, in pursuance of that understanding, she becomes his concubine, or, as it is usually expressed in modern times, "his kept mistress," which amounts to the same thing. So we hold in this case that when the heartless libertine, by his seductive arts or other means, induces his confiding or intimidated victim, as the case may be, to abandon home, and the wholesome restraints of parental authority, to accompany him whithersoever he may see proper to take her, without limit as to time or place, for the purpose of submitting to his licentious embraces, and ministering to his unbridled lust, he clearly brings himself within the provisions of the section of the statute we are now considering, and subjects himself to the punishment therein demanded. In short, we do not think any of the objections pointed out to the court's charge materially affected the result, or are in any view of so serious a character as to require a reversal of the judgment. Upon the whole, we think the charge was fully as fair to the accused as it ought to have been.

In our opinion, a clear case is made out against William Henderson, and, if it be possible to make out a case of aiding and assisting in the commission of an offense, it must be admitted that it has been done in this as to the other defendants. The evidence not only shows them guilty, but demonstrates that they knew at the time they were violating the law. Judgment affirmed.

(45 Ohio St. 653)

ALSDORF v. REED *et al.*

(*Supreme Court of Ohio. March 27, 1888.*)

1. GARNISHMENT—OF MORTGAGOR—EFFECT—FORECLOSURE—PARTIES.

Where, in proceedings in attachment, the process of garnishment is served upon one who is indebted to the defendant upon notes secured by mortgage, and judgment is rendered for the plaintiff, the notes and mortgage are, in legal effect, assigned to the plaintiff, and he may maintain an action to foreclose the mortgage; and this is so whether the garnishee admits or denies the indebtedness in his answer. If it is denied, the plaintiff may proceed against him for an unsatisfactory answer, and the foreclosure of the mortgage in the same action.

2. SAME—JURY TRIAL—APPEAL.

Where, in such action, the prayer is for an ordinary decree of foreclosure and order of sale, the action is one for relief other than money only; and, although an issue of fact may be joined on a plea by the garnishee that he had paid the mortgage indebtedness before notice of garnishment was served on him, neither party is entitled to demand a jury for the trial of the issue, and either may appeal from a final judgment rendered against him in the action.

(*Syllabus by the Court.*)

Error to circuit court, Licking county.

The judgment sought to be reversed was one dismissing an appeal taken by Alsdorf from a judgment of the court of common pleas. The action in which the judgment of the common pleas was rendered, was begun in that court by Alsdorf against John Reed, Isaac Vanatta, Florence Vanatta, his wife, Joseph Conrad, and Joseph H. Conrad. Alsdorf alleged in his petition that on May 26, 1880, he commenced a suit in that court against Reed on a note that had been made to him by Reed; that he caused an order of attachment to issue therein against Reed, and process of garnishment to be served upon Vanatta and his wife; that Florence Vanatta, the wife, answered as garnishee, saying that she and her husband had made their notes to Reed; that she did not remember their amount, date, or when payable; that they were secured by mortgage on the land they lived on; that her husband had told her that the notes were paid; and that she was satisfied that they had been paid; that afterwards, in April, 1882, he recovered in his action a judgment against Reed for \$2,015.80, and costs of suit, to be satisfied from the moneys and credits garnished, including such moneys as may be owing by Florence Vanatta; that her answer as garnishee was not satisfactory; that at the time she and her husband were served with notice, and when the judgment was rendered in his favor against Reed, she was indebted to Reed in the sum of \$2,200, or more, on the notes in her answer mentioned. It is further averred in the petition that on February 16, 1870, Reed sold and conveyed to Florence in fee 200 acres of land situated in said county for \$13,000, for which, in part, she made to Reed nine notes of \$1,000 each, dated September 1, 1869, and payable, one in two years, and the others, one annually until 1879, with interest; and that she and her husband executed a mortgage upon the same lands to secure the notes, which was recorded, and a full description is given of the land. It is then averred that, when she was served with notice as garnishee, the notes were all due, but not all paid, and that the condition of the mortgage is broken, and that the said Conrads had or claimed some interest in the land. The prayer of the petition is that an account may be taken of the amount remaining due upon the mortgage indebtedness of the Vanattas to Reed, and that an amount not exceeding the sum due on plaintiff's judgment may be ordered to be paid to him by said Florence Van-

atta, and that in default of such payment the lands, or so much thereof as may be necessary, may be ordered sold for the payment of the same. The Vanattas answered, not denying the making of the notes and mortgage, but alleging that the notes had been paid. The Conrads answered, alleging that they had bought the lands from the Vanattas, and that Reed had released the mortgage. Alsdorf filed replies, denying both the payment and the release. The issue of payment was submitted by the court to a jury, which found in favor of the defendants, on which the common pleas rendered judgment dismissing the action. The plaintiff appealed to the district court, and, on motion, the cause was dismissed by the circuit court on the ground that the case is not appealable; and this is the only question presented in the case in review.

J. Buckingham and Dennis & Dennis, for plaintiff in error. *J. W. Owens, Kibler & Kibler*, and *Charles H. Follett*, for defendants in error.

MINSHALL, J., (*after stating the facts as above.*) The legal effect of the garnishment of a debtor of the defendant is, where judgment is rendered for the plaintiff, to transfer the indebtedness of the garnishee to the plaintiff in the attachment so far as the same may be necessary to satisfy his judgment, (*Secor v. Witter*, 39 Ohio St. 218;) and, as a security is always regarded as an incident to the debt, it follows that, where the indebtedness of the garnishee is secured by mortgage, the garnishment of the indebtedness carries with it the mortgage, (*Edwards v. Edwards*, 24 Ohio St. 411.) It is true that this was the case of a creditor's bill, but no reason is perceived why a creditor should not be entitled to the securities held by his debtor in the one case as well as in the other. The garnishee may be insolvent, but his indebtedness to the plaintiff's debtor may be amply secured by mortgage, and, for such reason, of the same value as if the debtor was entirely solvent; and it is this value that, as a part of the effects of the debtor, the creditor is entitled to have applied to the satisfaction of his claim. So that in this case, Alsdorf, by the garnishment of the Vanattas, acquired the right to foreclose the mortgage they had executed to Reed, unless the indebtedness had been paid before the process was served on them. This is what, as appears from his petition, Alsdorf sought to do. He set forth the proceedings in his suit in attachment against Reed, the garnishment of the Vanattas, and the judgment and order in his favor, the execution and record of the mortgage, with a description of the property, and averred that the notes were all due, but not all paid, and prayed for a foreclosure and order of sale. He might have ignored the existence of the mortgage, and have asked for a personal judgment only against the garnishee, upon the averment that her answer was unsatisfactory; in other words, that, as a matter of fact, she was indebted to Reed. In such case there would be but little room for doubt that neither party could have appealed from the judgment that might have been rendered in the action. In saying this, we ignore, for the time being, the coverture of Florence Vanatta. He has, however, omitted the pursuit of this remedy, and seeks a foreclosure of the mortgage and an order of sale. Prudential reasons might, and no doubt did determine him in taking this course. A judgment for money only would have simply placed him upon a footing with the general creditors of the garnishee, and so might have been of no avail; but, in foreclosing the mortgage, he succeeds to the rights of Reed, and is entitled to be paid according to the priority of the mortgage as a lien upon the land. If, instead of having acquired his right to foreclose the mortgage by process of garnishment, it had been assigned to him by Reed as a security for his debt, it will not be claimed that, in a suit to foreclose it and for an order of sale, without a prayer for a personal judgment upon the notes, either party would have been entitled to a jury trial upon any issue of fact that might have been joined; and, as a consequence, neither could have appealed from any judgment against him in the action. *Ladd v. James*, 10 Ohio St. 437. But the right to appeal does

not depend upon the manner in which the title to the mortgage may have been acquired. This right is determined by the nature of the relief that is sought and obtained. When a money judgment will answer the demand of the plaintiff, is all that is sought, and all that is obtained, either party is entitled to a jury trial upon any issue of fact joined in the action, and no appeal can be had from the judgment rendered. *Dunn v. Kanmacher*, 26 Ohio St. 497; *Chapman v. Lee*, 45 Ohio St. 356, 13 N. E. Rep. 736; *Brundridge v. Goodlove*, 30 Ohio St. 374; *Oil Co. v. Verner*, 22 Ohio St. 372. Where, however, other relief is required, as the reformation of an instrument preparatory to a recovery of damages for a breach of it, as was the case in *Rowland v. Entrekin*, 27 Ohio St. 47, and so, also, in *Ellsworth v. Holcomb*, 28 Ohio St. 66; or where an order of sale and a distribution of the fund is required, as in the foreclosure of a mortgage,—the relief sought goes beyond a mere money judgment, and either party may appeal from the judgment against him. *Ladd v. James*, *supra*, and *Fleming v. Kerkendall*, 31 Ohio St. 568. But in this case, the garnishee, Florence Vanatta, who appeared and answered, was a married woman. She seems to have been the principal in the indebtedness, as the land mortgaged had been sold and conveyed to her. No personal judgment could at that time have been rendered against her as garnishee. The most that could have been done, as against her, would have been to make the amount found due a charge upon her separate estate, and have ordered it sold unless paid, (*Phillips v. Graves*, 20 Ohio St. 371;) and this is another reason for holding that the action was appealable, (*Avery v. Vansickle*, 35 Ohio St. 270.)

We think the circuit court erred in dismissing the appeal. Judgment reversed, and cause remanded for further proceedings.

(147 Mass. 81)

MCCANN v. RANDALL *et al.*

WILLARD v. SAME.

(Supreme Judicial Court of Massachusetts. Suffolk. May 7, 1888.)

1. GARNISHMENT—PROPERTY SUBJECT TO PROCESS—SERVICE ON PRINCIPAL DEFENDANT.

A draft on the United States assistant treasurer, in payment of an Alabama claim, payable to the order of a citizen of New York, was attached in Massachusetts, by equitable trustee process in the hands of a citizen of Massachusetts, and an injunction issued against its transfer or collection, but no service was made on the citizen of New York. *Held*, that the draft having been collected by the trustee, he was liable for the amount after deducting a lien which he held on it. FIELD and W. ALLEN, JJ., dissenting.

2. LIMITATION OF ACTIONS—EXCEPTIONS—NON-RESIDENCE—CONFLICT OF LAWS.

Plaintiff and defendant were both citizens of Maine when a cause of action accrued, but defendant removed to New York before the time of limitation had run, and lived there till the New York statute of limitations had run. *Held*, that under Pub. St. Mass. c. 197, § 11, providing that no action shall be brought by any person whose claim is barred in the state where he resided, and the laws of Maine providing that time when a defendant is out of the state shall not be counted in the time of limitation, the cause of action was not barred.

Appeal from superior court, Suffolk county.

Plaintiff William McCann sued the defendant Simon F. Randall upon a promissory note made by defendant, and in his bill alleged that defendant Manning had in his possession a certain negotiable draft issued by the treasury department of the United States in payment of a judgment of the court of commissioners of Alabama claims, payable to Randall at the assistant treasury in Boston. The bill also asked for an injunction to restrain defendant Manning from disposing of the draft, or negotiating the same; and an injunction issued, as prayed for; but defendant Manning afterwards sent the draft to Randall, who was in New York; and, the latter having indorsed it,

it was paid, and the amount received by Randall or his agents. The superior court, upon plaintiff's petition, decreed the defendant Manning guilty of contempt, and ordered him to pay to the plaintiff the amount of the draft, less his fees as attorney for Randall in securing the judgment. Defendant Randall was not a citizen of Massachusetts, and was never personally served with process. From the decree of the court the defendants appealed. Other facts appear in the opinion. The facts in the case of *Willard v. Randall et al.* were substantially the same as in *McCann's Case*.

Charles Cowley, for defendants.

Defendant Manning appears generally; defendant Randall appears specially only,—both demurring to the jurisdiction. Prayers 1, 2, and 3 of report should have been granted; it appearing that "service by publication only" was made on Randall. *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. Rep. 165; *Wilbur v. Abbot*, 60 N. H. 40; *Eastman v. Dearborn*, 63 N. H. 364; *Elliott v. McCormick*, 141 Mass. 194, 6 N. E. Rep. 375. By Rev. St. Me. 1883, c. 81, § 103, the note sued on in this case was barred at the expiration of six years from its maturity, unless Randall returned to Maine, which he has never done since the expiration of said six years. *Drew v. Drew*, 37 Me. 389, 392. The Massachusetts statute of limitations governs this case. *Pearson v. Dwight*, 2 Mass. 84, 89; *Wood, Lim.* 17, 20; *Ang. Lim.* 56; *Byrne v. Crowninshield*, 17 Mass. 55. The note is barred in New York. It was barred in Massachusetts under Gen. St. c. 155, § 1. It was not revived by St. 1880, c. 98, re-enacted in Pub. St. c. 197, § 11; for "where a statute of limitations has taken effect, and become a bar, a subsequent alteration of the law of limitations will not operate retroactively, so as to remove such bar." *Page v. Melvin*, 10 Gray, 210; *Dodge v. Insurance Co.*, 12 Gray, 71; *Wright v. Oakley*, 5 Metc. 407; *Farnam v. Brooks*, 9 Pick. 212. The effect of the learned judge's assumption is to provide different periods of time within which different classes of citizens must sue, and he therefore erred. Chapter 223, Acts 1883, conferring equity powers on the superior court, is unconstitutional. Randall had no "property, right, title, or interest" in the draft, within the meaning of Pub. St. c. 151, § 1, cl. 11. *Spurr v. Scoville*, 3 Cush. 578; *Moody v. Gay*, 15 Gray, 457; *Walling v. Beers*, 120 Mass. 548, 550; *Bodurtha v. Goodrich*, 3 Gray, 508, 510; *Macomber v. Jaffray*, 4 Gray, 82; *Wap. Attachm.* 468, and cases cited. Prayers three, four, and five should have been granted. *Cush. Trustee Process*, 12, 13; *Buchanan v. Alexander*, 4 How. 20; *Owen v. Miller*, 10 Ohio St. 144; *Keyser's Case*, 4 Lawr. Dec. 269, 325, and cases cited; *Biggs v. Light-Boat*, 11 Allen, 162; *Case of Giddings*, 16 Op. Atty. Gen. 366. Prayers 6 and 8 should have been granted. Prayer 9 should have been granted. Until the draft was paid, the money which it represented remained the money of the United States. A draft has no locality. It is like a patent-right. *Carver v. Peck*, 131 Mass. 291; *Dana v. Bank*, 13 Allen, 445; *Hancock v. Colyer*, 99 Mass. 187. See *Hayward v. Clark*, 50 Vt. 612. Prayers 5, 6, and 10 should have been granted. *Chealy v. Brewer*, 7 Mass. 259; *Insurance Co. v. Weeks*, Id. 438; *Rundlet v. Jordan*, 3 Greenl. 47; *Haven v. Wentworth*, 2 N. H. 93; *Grant v. Shaw*, 16 Mass. 841. The treasurer, from whom Manning received this draft, might at any time recall it, and pay the claim in money. This suit cannot be maintained against Manning. *Averill v. Tucker*, 2 Cranch, C. C. 544. Manning's lien as Randall's attorney was superior to any right of Randall's creditors. *Weed v. Boutelle*, 56 Vt. 570, and cases cited. The United States treasury draft is, in law, the same as a promissory note, and is not, therefore, subject to trustee or equitable trustee process, as it cannot be seized and sold on execution. *Insurance Co. v. Weeks*, 7 Mass. 438; *Rundlet v. Jordan*, 3 Greenl. 47; *Cush. Trustee Process*, 12; *Perry v. Coates*, 9 Mass. 537; *Andrews v. Ludlow*, 5 Pick. 28; *Weil v. Raymond*, 142 Mass. 206, 213, 7 N. E. Rep. 860. Plaintiff

has not exhausted his common-law remedies, and hence has no remedy in equity, by creditors' bill or otherwise. Plaintiff's bill must negative such possibility. *Travis v. Tyler*, 7 Gray, 146; *Jones v. Newhall*, 115 Mass. 244. The judgment of the court of commissioners of Alabama claims was equivalent to an appropriation by congress to Randall, and no court can intervene to divert that appropriation to any creditor while it exists in the form of a draft to Randall. *Carr v. U. S.*, 98 U. S. 437; *Draft Case*, 1 Lawr. Dec. 15. Until paid over to Randall, this fund cannot, in any legal sense, be considered a part of his effects. *Owen v. Miller*, 10 Ohio St. 144; *Hansard v. Robinson*, 7 Barn. & C. 90; *Morrison v. Bailey*, 5 Ohio St. 18; *Story, Bills*, § 419. The order of attachment was void for want of jurisdiction, and disobedience of it is not contempt. *Haines v. Haines*, 35 Mich. 138; *Perry v. Mitchell*, 5 Denio, 537; *People v. O'Neil*, 47 Cal. 109; *Brown v. Moore*, 61 Cal. 432; *In re Morton*, 10 Mich. 208; *People v. Sturtevant*, 9 N. Y. 263; *Sparks v. Martyn*, Vent. 1; *Ex parte Grace*, 12 Iowa, 208; *Walton v. Develing*, 61 Ill. 201; *Darst v. People*, 62 Ill. 306; *Lewis v. Waite*, 70 Ill. 25; *Dickey v. Reed*, 78 Ill. 261; *Fretwin v. Lewis*, 4 Mylne & C. 249; *Moors v. Smedley*, 6 Johns. Ch. 28; 1 High, Inj. § 1425, p. 928. If the order disregarded is doubtful as to its validity or scope, the court has no lawful authority to punish the disobedience of it as a contempt. *State v. Bridge Co.*, 18 How. 421; *Weeks v. Smith*, 3 Abb. Pr. 211; *U. S. v. Stanwood*, 13 Int. Rev. Rec. 77; *In re Cary* 10 Fed. Rep. 622.

E. P. Payson and W. E. Spear, for plaintiff.

The statute of limitations was not a defense under the demurrer or upon the merits. Pub. St. c. 197, § 11; *Thomas v. Waterman*, 7 Metc. 227; *Cozine v. Graham*, 2 Paige, 181; *Sullivan v. Railroad Co.*, 94 U. S. 806; Langd. Eq. Pl. §§ 111, 129, and cases; *Murphy v. Collins*, 121 Mass. 7; *Knapp v. Abell*, 10 Allen, 488; *Miller v. McIntyre*, 6 Pet. 61; Equity Rule, 21; *Putnam v. Dike*, 13 Gray, 535; *Haggood v. Watson*, 65 Me. 510. The superior court acquired jurisdiction. A case within the court's equitable jurisdiction is within its territorial jurisdiction, if either the defendant or the subject-matter be found within. *Cookney v. Anderson*, 31 Beav. 452. See *Picquet v. Swan*, 5 Mason, 35; *Bissell v. Briggs*, 9 Mass. 468, 478; *Eastman v. Dearborn*, 20 Reporter, 694; *Boswell v. Otis*, 9 How. 336; *Cooper v. Reynolds*, 10 Wall. 308; *Pennoyer v. Neff*, 95 U. S. 714; *Heidritter v. Oil-Cloth Co.*, 112 U. S. 294, 5 Sup. Ct. Rep. 135; *Story, Conf. Law*, § 549. That a bill to apply to a valid claim property not attachable at law of a defendant not within the reach of the court, without a judgment at law or circumstances of fraud or trust, is within the equitable jurisdiction, was asserted by Lord HARDWICKE, (*Anon.*, 1 Atk. 19; *Kinaston v. Clark*, 2 Atk. 205;) and either after judgment, or with circumstances of fraud or trust, by Lord KING, Lord NOTTINGHAM, Sir W. FORTESCUE, M. R., and Lord ELLENBOROUGH, (1686, *Smithier v. Lewis*, 1 Vern. 399; 1686, *Angell v. Draper*, Id.; 1718, *Balch v. Wastall*, 1 P. Wms. 445; 1743, *Taylor v. Jones*, 2 Atk. 600; 1744, *King v. Dupine*, Id. 603, and note; 1749, *Horn v. Horn*, Amb. 79; 1758, *Partridge v. Gopp*, Id. 596; 1807, *Scott v. Scholey*, 8 East, 467;) but doubted or denied in, 1790, *Dundas v. Dutens*, 1 Ves. Jr. 196; 1794, *Caillaud v. Estwick*, 2 Anstr. 381; 1799, *Simmonds v. Kinnaid*, 4 Ves. 735; 1802, *Nantes v. Corrock*, 9 Ves. 189; 1811, *Guy v. Peurkes*, 18 Ves. 196; 1810, *McCarthy v. Gould*, 1 Ball & B. 387; 1812, *Grogan v. Cooke*, 2 Ball & B. 233,—by Lord THURLOW, Lord LOUGHBOROUGH, Lord ELDON, and Lord MANNERS; and also by Lord BROUGHAM, in parliament, in 1828. A foundation for the negative view is found in the want of process in equity, by Lewin, Trusts, (Ed. 1885,) 796. But if the origin of the court of chancery is correctly traced by Mr. Spence (Eq. Jur. 325, 337, 338, *et seq.*) and by Prof. Langdell, (Eq. Pl. §§ 36-43,) Lord HARDWICKE was nearer right than his successors. Positive statutes have embod-

ied his views in England. Spence, Eq. Jur. 295, 392; Lewin, Trusts, 796-799, 804, 815, and cases. In this country the equitable jurisdiction being the same as that of the English chancery, (*Wheeling Bridge Case*, 13 How. 519; *Jones v. Mill Corp.*, 4 Pick. 507; *Fiske v. Insurance Co.*, 15 Pick. 312,) its only test is the "absence of a plain and adequate remedy at law," (*Watson v. Southerland*, 5 Wall. 74.) Such absence, when arising from inadequacy of legal process to appropriate property within the jurisdiction, either from its nature or its *locus*, has been held to confer jurisdiction aside from fraud or trust, (*Bayard v. Hoffman*, 4 Johns. Ch. 450; *McDermutt v. Strong*, Id. 687; *Hadden v. Spader*, 20 Johns. 554; *Edmeston v. Lyde*, 1 Paige, 637; *Tarbell v. Griggs*, 3 Paige, 207; *Storm v. Waddell*, 2 Sandf. Ch. 510 *et seq.*; *Bigelow v. Society*, 11 Vt. 283; *Williams v. Hubbard*, Walk. Ch. 28; *Tappan v. Evans*, 11 N. H. 311;) and without a judgment at law, if the debtor be absent, *Scott v. M'Millen*, 1 Litt. 302; *Kipper v. Glancey*, 2 Blackf. 356; *Peay v. Morrison's Ex'rs*, 10 Grat. 149; *Farrar v. Farrar*, 9 Rich. Eq. 331; *Greenway v. Thomas*, 14 Ill. 272; *Pope v. Solomons*, 36 Ga. 541; *Russell v. Clark's Ex'rs*, 7 Cranch, 89; *Pendleton v. Perkins*, 49 Mo. 565; Will. Eq. Jur. 237. Express statutes, in many states, as in England, have finally established the jurisdiction under various forms of procedure. St. N. Y. 1828; followed, *Donovan v. Finn*, 1 Hopk. Ch. 67; disagreeing with *Hadden v. Spader*, *supra*; *Tarbell v. Griggs*, *supra*. See *Edmeston v. Lyde*, *supra*; *In re Coates*, 3 Abb. Dec. 237; 3 Pom. Eq. Jur. 465, § 1415; 3 Rev. St. N. Y. 1875, 190, §§ 56, 57; 2 Rev. St. Ohio 1880, (2d Ed. Revised,) § 5464; also 3 Supp. Rev. St. 1884, § 5048; Comp. Laws Kan. 1885, § 481, p. 665; also, Id. § 53, p. 611 *et seq.*; Rev. St. Me. 1883, c. 77, § 6, subd. 10; Act Ky. Dec. 19, 1796, § 4; 2 Kent, Comm. 443, note *e*. Such laws have the approval of the United States supreme court, (*Grignon's Lessee v. Astor*, 2 How. 338; *Applegate v. Mining Co.*, 117 U. S. 255, 6 Sup. Ct. Rep. 742; *Goodman v. Niblack*, 102 U. S. 556,) and of the Massachusetts supreme judicial court, (*May v. Breed*, 7 Cush. 34, 42.) See Massachusetts acts: Acts 1851, c. 206; Acts 1858, c. 34; Pub. St. c. 151, § 2, cl. 11; Acts 1884, c. 285, § 1; Acts 1883, c. 223. And citizens of other states are, equally with citizens of Massachusetts, entitled to its benefit. *Barrell v. Benjamin*, 15 Mass. 358; *Peabody v. Hamilton*, 106 Mass. 217; *Hoyt v. Thompson*, 5 N. Y. 320; Wells, Jur. § 521. Although not the subject of trustee process, negotiable paper is "property." 2 Ames, Bills, 799; Pub. St. c. 203, § 20; *Baldwin v. Williams*, 3 Metc. 367, and cases; *Otisfield v. Mayberry*, 63 Me. 197; *Frost v. Naylor*, 68 N. C. 325. The language of the Massachusetts statutes, however, includes "any property, right, title, or interest, legal or equitable," and has been applied to promissory notes, (*Silloway v. Insurance Co.*, 8 Gray, 199; *Davis v. Werden*, 13 Gray, 305; *Barry v. Abbot*, 100 Mass. 396,) insurance policies, (*Insurance Co. v. Sears*, 109 Mass. 383; *Troy v. Sargent*, 132 Mass. 408; *Norris v. Insurance Co.*, 131 Mass. 294,) judgments, (*Rice v. Stone*, 1 Allen, 566,) agreement to pay a mortgage, (*Tucker v. McDonald*, 105 Mass. 424,) interest of *cestui que trust*, (*Forbes v. Lothrop*, 137 Mass. 523,) a mortgagee's interest, (*Moody v. Gay*, 15 Gray, 457,) and royalty contract, (*Lord v. Harte*, 118 Mass. 271.) The following cases would not be in point under the amendatory act of 1884: *Insurance Co. v. Abbott*, 127 Mass. 558; *Walker v. Brooks*, 125 Mass. 248; *Crompton v. Anthony*, 13 Allen, 33, 37; *Russell v. Milton*, 133 Mass. 181; *Bartholomew v. Weld*, 127 Mass. 210; *Tobey v. McFarlin*, 115 Mass. 101. See *Phelps v. McDonald*, 99 U. S. 301. The statute does not apply where there is a remedy at law, (*Schlesinger v. Sherman*, 127 Mass. 206; *Emery v. Bidwell*, 140 Mass. 271, 3 N. E. Rep. 24;) or if the property to be reached is in the hands of another court, (*Com. v. Insurance Co.*, 119 Mass. 157;) or to reach letters patent, (*Carver v. Peck*, 131 Mass. 291; *Desper v. Water-Meter Co.*, 137 Mass. 254.) That a patent is not within the present statute would have no relevancy to the case at bar, because such grant is

not analogous to negotiable paper. Curt. Pat. § 167; Rev. St. U. S. § 4898; Bankrupt Act 1867; 2 Drone, Copyr. 97; *Hales v. Shaftoe*, 1 Ves. Jr. 86, note 4; *Wilder v. Kent*, 15 Fed. Rep. 217; *Ager v. Murray*, 105 U. S. 126, 181; *Somerby v. Buntin*, 118 Mass. 279, 285. Legal appropriation of negotiable paper may be accomplished without indorsement by sequestration, a receiver, a sale, transfer by order of court, or with indorsement by an appointee. *Jones v. Witter*, 13 Mass. 307; *Norton v. Insurance Co.*, 111 Mass. 535; 1 Daniel, Neg. Inst. § 741; *Grew v. Breed*, 12 Metc. 370, and cases; *Hales v. Shaftoe*, 1 Ves. Jr. 86 note; *Anon. v. Bennet*, Id. 89; *Shaw v. Wright*, 3 Ves. 22; *Hide v. Pettit*, 1 Ch. Cas. 81; High, Rec. §§ 9, 159, 192, 432, 443; *Taylor v. Eckersley*, 25 Wkly. Rep. 528; *Iddings v. Bruen*, 4 Sandf. Ch. 223; *Weed v. Smull*, 3 Sandf. Ch. 273; *Case v. Marchand*, 23 La. Ann. 60; *Edmeston v. Lyde*, 1 Paige, 637; *Newberry v. Trowbridge*, 13 Mich. 277; Pub. St. c. 151, § 2, cl. 11; Perry, Trusts, §§ 202 et seq., 820a; Pub. St. c. 141, § 22; *Robinson v. Robinson*, 9 Gray, 450; *Felch v. Hooper*, 119 Mass. 52; *Walsh v. Walsh*, 116 Mass. 382; *Jones v. Mill Corp.*, 4 Pick. 509; Langd. Eq. Pl. § 44. Government, as party to a contract, corporation, trust, or negotiable instrument, stands as a private party. *Pennsylvania v. Bridge Co.*, 13 How. 560; *U. S. v. Bank*, 15 Pet. 392; *Walker v. Smith*, 21 How. 579; *Bank v. Millard*, 10 Wall. 158; 1 Daniel, Neg. Inst. §§ 436, 437a; *Pingree v. Coffin*, 12 Gray, 321; *Pierces v. U. S.*, 7 Ct. Cl. 68; *Floyd Acceptances*, 7 Wall. 666; *Milnor v. Melz*, 16 Pet. 221; *Erwin v. U. S.*, 97 U. S. 395; *Railroad Co. v. U. S.*, 112 U. S. 737, 5 Sup. Ct. Rep. 368; *Goodman v. Niblack*, 102 U. S. 556. The draft in suit constituted payment. *Gibbons v. U. S.*, 2 Ct. Cl. 421; *Tyers v. U. S.*, 5 Ct. Cl. 509; *McKnight v. U. S.*, 13 Ct. Cl. 305, 98 U. S. 186; *Cushman v. Libbey*, 15 Gray, 361; *Getchell v. Chase*, 124 Mass. 366; *Leonard v. Nye*, 125 Mass. 469; *Comegys v. Vasse*, 1 Pet. 196; *Bachman v. Lawson*, 109 U. S. 659, 3 Sup. Ct. Rep. 479; *Clark v. Clark*, 17 How. 315. Personal property has no domicile. Its transfer or alienation, voluntary or *in invitum*, is governed by laws of owner's domicile, unless there is some positive or customary law of the country where found, or where a trust in it is created or to be administered. *Black v. Zacharie*, 3 How. 514; *May v. Breed*, *supra*; *Spindle v. Shreve*, 111 U. S. 542, 4 Sup. Ct. Rep. 522. Debts are administration assets where debtor resides. Debts of the United States are therefore administration assets, equally throughout the land, and payable to an administrator of the domicile or to an ancillary administrator requiring them for local creditors. *Vaughan v. Northup*, 15 Pet. 1; *Wyman v. Halstead*, 109 U. S. 654, 3 Sup. Ct. Rep. 417; *Fay v. Haven*, 3 Metc. 114; *Railroad Co. v. U. S.*, 16 Ct. Cl. 246; *Brown's Case*, 6 Ct. Cl. 171; *O'Grady's Case*, 10 Ct. Cl. 134, 22 Wall. 641. The decree of the superior court is proper. *Thweatt v. Gammell*, 56 Ga. 98; *Stimpson v. Putnam*, 41 Vt. 238; *In re Chiles*, 22 Wall. 168; Foth. 31; *Matthews v. Spangenberg*, 15 Fed. Rep. 813; *Cartwright's Case*, 114 Mass. 234; *Pitt v. Davison*, 37 N. Y. 235; *People v. Kingsland*, *42 N. Y. 325; *Field v. Hunt*, 22 How. Pr. 337; *De Manneville v. De Manneville*, 12 Ves. 205. Aside from the injunction, "the bill operates as an equitable attachment." *Maxwell v. Cochran*, 136 Mass. 74; *Squire v. Lincoln*, 137 Mass. 403, and cases *supra*; *Spader v. Davis*, 5 Johns. Ch. 280, 20 Johns. 554. Defendant's demurrers and motions were properly overruled, and the requested rulings refused.

DEVENS, J. The defendant Randall is not entitled to a defense by virtue of our statute of limitations against the promissory note now held by the plaintiff McCann, upon the ground that the bill was not brought within six years from the time the cause of action accrued. He is not, and never has been, an inhabitant of this state, and our statute never began to run in his favor. No personal service has been made upon him, but a suit against him, with an effectual attachment of his property in this state, or of his goods, effects, or

credits here, situate in the hands of others, by trustee process, or proceeding similar to that in the case at bar, would be binding upon him to the extent to which property was attached or sequestered; sufficient notice having been given to him, by publication or otherwise, of its pendency. *Putnam v. Dike*, 18 Gray, 535.

It is the contention of the defendant Randall (who has appeared specially) that the complainant is within the disability imposed by St. 1880, c. 98, (Pub. St. c. 197, § 11,) which provides that "no action shall be brought by any person whose cause of action has been barred by the laws of any state, territory, or country, while he has resided therein." He urges that the note in suit is now outlawed, as against the complainant, by the statute of Maine, (in which state the complainant resided when the note was given, and where he has ever since resided,) unless the defendant Randall should return within the limits of that state, and that there is and can be no presumption that he will so return. It is found as a fact that Randall made the note in suit on January 18, 1869, he being then a resident in the state of Maine; that on November 1, 1874, he removed his residence and domicile to the state of New York, where he has resided continuously, and since that time has never been in the state of Maine. It is further found that, by the laws of Maine, suits upon promissory notes must be brought within six years after the cause of action accrues, and suits brought after the expiration of said years are barred, except that, "if a person is absent from and resides out of the state" (of Maine) after a cause of action has accrued against him, "the time of his absence shall not be taken as a part of the time limited for the commencement of the action against him." Rev. St. Me. 1883, c. 81, § 103. Upon this evidence the presiding judge was justified in finding as a fact that the plaintiff's claim was not barred by the statutes of Maine. By the departure of defendant Randall from Maine, and his residence elsewhere, the statute of limitations then ceased to run in favor of the defendant and against the plaintiff. This has prevented the outlawing of the note; and, so far as the statutes of Maine are before us, we cannot see why an action might not now be maintained by the plaintiff against Randall in that state, if he could find property there to attach, and thus enable the court to obtain jurisdiction in the absence of Randall personally. When this bill was brought, any action by the complainant in the courts of New York was there barred, as the statutes of limitations of that state are found to exist; Randall having resided there more than six years. But, as the complainant never resided in New York, his action against Randall is not barred by the law of any state or country while the complainant has resided therein, which is the condition provided by our own statute that would prevent his maintaining an action in this commonwealth. It is contended that the draft mentioned in the complainant's bill is not of the property, or goods, effects, or credits, or of any right, title, or interest, of the defendant Randall, and that neither it nor its proceeds can be reached by this proceeding in the nature of an equitable trustee process or otherwise. We proceed to consider this question without regard to the character of the draft, which was one issued by authority of the United States, payable to the order of Randall, at the assistant treasury of the United States in Boston. The draft was itself in the actual custody of the defendant Manning, who was entitled to a lien upon the same, and its proceeds, for certain services and disbursements, which lien was for a smaller amount than the draft, and to the overplus Randall was entitled. It will be unnecessary to consider what would be the powers of the superior court, under the general equity jurisdiction conferred upon it by St. 1883, c. 223, as the case at bar comes within the express legislation of Pub. St. c. 151, § 2, cl. 11, which permits "bills by creditors to reach and apply, in payment of a debt, any property, right, title, or interest, legal or equitable, of a debtor within this state, which cannot be come at to be attached or taken on execution in a suit at law against such debtor. This clause was amended by St. 1884, c. 285,—the pur-

pose of the amendment being to extend its construction to certain cases to which it had been held that it did not apply; and its intention, when taken in connection with Pub. St. c. 151, § 2, is seen to be to make "any property of a debtor" applicable to the payment of his debts, whether he is personally within the jurisdiction or not. That the right or property of Randall in the treasury draft could not be come at, be attached or taken on execution, will be conceded; and the property, title, or interest of Randall therein is of the same character as that which has been repeatedly held to make the actual holder, in whose custody such securities are found, liable to this process as the equitable trustee of the party sued. While notes, drafts, etc., are often said to be evidences of debts, rather than the debts themselves, they represent the debts; and the right to collect such debts is, by means of them, transferred from one to another. Under the clause of the statute of frauds relating to contracts for the sale of goods, wares, and merchandise, it has been held that contracts for the sale of notes were included. *Baldwin v. Williams*, 3 Metc. 367. Such securities are themselves the subjects of common sale and barter, have a market value, are intended to be transferable, and, when transferred, to convey the debts secured, by a visible and tangible form. *Somerby v. Buntin*, 118 Mass. 279. The cases in which it has been decided that the possessor of promissory notes signed by third persons, in which a debtor against whom suit had been brought had a valuable interest might be held, by the equitable trustee process, to apply them, when collected, to the payment of the creditor's debt, are quite numerous. *Davis v. Werden*, 13 Gray, 305; *Moody v. Gay*, 15 Gray, 457; *Crompton v. Anthony*, 13 Allen, 33; *Barry v. Abbott*, 100 Mass. 396. "The plaintiff," says Mr. Justice BIGELOW, in *Davis v. Werden*, *ubi supra*, in speaking of St. 1851, c. 206, on which the clause we are considering is founded, "has a claim against one of the defendants who resides out of the commonwealth, and who is the owner of choses in action which are in the hands of an agent residing here. This is the case provided for by the statute." If the possessor of the notes has himself a just claim or lien upon them, or the proceeds to be derived from them, on the most obvious principles of justice this claim or lien has been provided for in any decree that has been made as to the application of them. *Silloway v. Insurance Co.*, 8 Gray, 199; *Barry v. Abbott*, *ubi supra*. Nor can it be important that the party liable on the note is not a resident of this state, or served with process. While the remedy of the creditor may be less convenient, or, perhaps, less effectual, on this account, he should not, therefore, lose the benefit he is entitled to, by reason of the possession in a third person's hands, in this state, of a valuable security, in which his debtor has a property or interest, even if such security be realized or suit brought upon it without the state.

The defendants contend that as no personal service was made upon Randall, and he is not before the court except as he has specially appeared to object to the jurisdiction, there could be no assignment or transfer of any right or property which he may have in the draft. The draft, although negotiable in form, had not been indorsed by him; but delivery of it to Manning, or the possession of it by him, with Randall's consent, operated as an equitable assignment of it. It is true that no order could have been passed which would compel Randall personally to indorse it; but means are, by necessary implication from the statute, to be found by which the creditor should obtain the benefit of it; whether by an order appropriating it to the benefit of the creditor, by sequestration to his use, by a sale on execution, by a sale with a transfer thereof by an order made by authority of this court, or by a trustee specially ordered to transfer it, or, perhaps, by an order that the property shall be held until the debtor shall himself (even if not personally within the jurisdiction of the court) consent to apply it to the payment of his creditor, we need not now determine. The property sought to be reached and applied is to be so appropriated by "means," to use the phrase of the statute, "within the ordinary procedure of

the court." In any order relating to such application, proper provision would have been made for the just claim which the defendant Manning had upon it *Grew v. Breed*, 12 Metc. 363, 370; *Norton v. Insurance Co.*, 111 Mass. 535; *Felch v. Hooper*, 119 Mass. 52; *Robinson v. Robinson*, 9 Gray, 450; *Walsh v. Walsh*, 116 Mass. 382; 1 Perry, Trusts, 202, 220; 1 Daniel, Neg. Inst. § 741.

It is further urged that as the draft in question was one drawn by the treasurer of the United States upon the subtreasury in Boston, and was what is known as a "Treasury Draft," there could be no appropriation of it, by any legal proceeding, to the benefit of the creditor. The proposition mainly relied on is that, as the government of the United States could not be sued, as the sovereign power, and that as the assistant treasurer, upon whom the draft was drawn, at Boston, had he seen fit to refuse to recognize the judicial transfer of the draft, in whatever form made, could not have been compelled, by any order of this court, to pay the money due thereon, there could be no transfer of it, or of Randall's right therein, made. The government of the United States, as a party to a contract, agreement, trust, or bond, or instrument, as a note, draft, or order, is like a private party, except so far as it regulates by laws its liability. It may make, and has made, many contracts, with it, unassignable, sometimes partially, sometimes entirely so, as its own convenience seemed to dictate, in the administration of public affairs, although even in these cases transfers by operation of law—by assignment to creditors, by will, by descent—have usually been recognized as constituting sufficient assignment of the claim or contract. *Milnor v. Metz*, 16 Pet. 221; *Erwin v. U. S.*, 97 U. S. 392; *Goodman v. Niblack*, 102 U. S. 556. When the United States becomes a party to negotiable paper, whether note, bill of exchange, or draft, the responsibility which it assumes is the same as that assumed by any private person. It cannot, indeed, be sued, except as it consents to be, and it may not be possible to reach and control its officers by the same processes that may be applied to private individuals. It was held, in the celebrated case of *The Floyd Acceptances*, 7 Wall. 666, that the government of the United States had the right to use bills of exchange for the purpose of conducting its operations, as an appropriate means, and that it was bound by the same principles that govern individuals in their relations to such paper. The only important question was whether Mr. Floyd, the secretary of war, had authority, as the agent of the United States, by virtue of his office, to accept the bills drawn upon him. In *Bank v. Millard*, 10 Wall. 152, where the question was whether the holder of a bank-check could sue the bank under the circumstances stated, the court remarks: "It is hardly necessary to say that the check in question, having been drawn upon a public depository by an officer of the government in favor of a public creditor, cannot change the rights of the parties to the suit. The check was commercial paper, and subject to the laws which govern such paper, and it can make no difference whether the parties to it are private persons or public agents." This is but a restatement of what had been often previously decided. *U. S. v. Bank*, 15 Pet. 392; *Walker v. Smith*, 21 How. 579; *Pennsylvania v. Bridge Co.*, 13 How. 560; *Pierce v. U. S.*, 7 Ct. Cl. 68. A suit to compel the assignment of a bond or other security of a state in no way affects the sovereignty of such state. *Pingree v. Coffin*, 12 Gray, 321.

That the draft in the case at bar was drawn by authority of law, and in the usual course of business, cannot be disputed. It operated as a payment of Randall's claim, and constituted a new contract with the government, in which any previous claim was merged. It was valid and binding on the United States, in the hands of any *bona fide* holder thereof by indorsement for a valuable consideration, whether suit could have been brought upon it or not, as commercial bills of exchange and promissory notes are between individuals, whatever objections there may have been to the original settlements or claims on which they are issued. *McKnight v. U. S.*, 13 Ct. Cl. 305, 98

U. S. 186; Rev. St. U. S. § 308. The claim originally held by the defendant Randall was not, properly speaking, a debt due from the United States, but arose from the fact that the United States held certain funds received from Great Britain under a treaty with that power, which were to be distributed, through appropriate channels, to those who had suffered from depredations upon our commerce during the late civil war. This in no way affected the character of the draft, which was given in pursuance of an adjudication in favor of Randall by the commissioners of Alabama claims. Even before merger in the draft, the equitable interest in such a claim would have passed to an assignee in bankruptcy. *Leonard v. Nye*, 125 Mass. 455. It cannot be assumed that the assistant treasurer of the United States would have disregarded any transfer of the draft by operation of law, or in the course of judicial proceedings, conducted by a court having jurisdiction over the person of the actual holder thereof, who was in possession of it by virtue of his relation to or authority from Randall, to whose order it was payable. Nor, had payment thereof been refused, would the transferee have been remediless. The court of claims of the United States would have been open to him, and it has the right, under statutes which give it jurisdiction for the purpose, to hear and determine all claims "founded upon any contract, express or implied, with the government of the United States." *Milford v. Com.*, 144 Mass. 64, 10 N. E. Rep. 516, and cases cited.

It has been found that the debt was actually due from Randall to the complainant; and after service of process in this case upon Manning, and after service of an injunction upon him, forbidding its transfer to Randall, the draft being at that time in Boston, the amount claimed by Manning as due upon his alleged lien was settled by mutual agreement, and the draft was sent to Randall, in New York, and was there indorsed by him. Payment of it was made at the subtreasury in Boston, thereafter, and the amount received by Randall, or his agents, was the sum of \$1,852.21, which was the amount due, over and above \$793.81, which had been settled as the amount of Manning's lien, and which Manning then or previously received. As the rights of the parties were fixed at the time of notice of the *lis mota*, no temporary injunction was perhaps necessary forbidding any transfer of property until the final decree. *Maxwell v. Cochran*, 186 Mass. 73. But it is found that the indorsement and payment of the draft was procured by Manning in willful disobedience of the order of the superior court, and in contempt of its lawful authority. Under these circumstances, he has incurred a liability commensurate with the value of the property which he has thus succeeded in withdrawing from the control of the court, and prevented from being applied to the lawful claims of Randall's creditors. Proceedings for contempt may be either for the purpose of inflicting punishment upon one who has willfully disobeyed a lawful order of the court, or for the purpose of obtaining the result which might have been reached by the enforcement of its decree but for the intervention of the wrongful act of the party violating its order, or, in appropriate cases, for both purposes. *Cartwright's Case*, 114 Mass. 234; *Maxwell v. Cochran*, *ubi supra*; *Stimpson v. Putnam*, 41 Vt. 238; *Thweatt v. Gammell*, 56 Ga. 98; *Matthews v. Spangenberg*, 15 Fed. Rep. 813.

With the suit brought by the complainant McCann was also heard one brought by one Willard, under precisely similar circumstances, which, for that reason, does not require any separate consideration, as there was no dispute between McCann and Willard as to the proportions in which they were to receive the fund if it was afterwards appropriated to them.

We are of opinion that the presiding judge in the superior court rightfully held that Manning was bound to make up and pay to the complainant, and others standing in like relation, the balance of the draft over and above the sum of \$793.81, namely, the sum of \$1,852.21, with interest thereon from the 28th day of March, 1885, (which was the day of payment of the draft,) to

passing of the final decree. A majority of the court is of opinion that the decree should be affirmed.

FIELD, J., (*dissenting*.) Mr. Justice W. ALLEN and myself are unable to assent to the opinion of the court. The decree in this case is not a decree in the proceedings for contempt against Manning, and the question need not be considered whether Manning could not be punished for violating the injunction, although the bill should be dismissed. The decree is the final decree in the cause, and it proceeds against Manning on the ground that he has, during the pendency of the suit, put wrongfully out of his possession property of Randall which had been equitably attached in the suit, and which he could have been compelled to deliver to the court or to the plaintiff, to be applied in satisfaction of the debt due from Randall to the plaintiff.

The first questions of law arise upon the appeal from the orders overruling the demurrers of each of the defendants, but the same questions of law were raised upon rulings requested, which were refused. The fundamental question in the case is whether the superior court had any jurisdiction over the draft to apply it to the payment of the debt due to the plaintiff from Randall. Manning's interest in the draft could not be so applied, because he was not indebted to the plaintiff. After Manning had been paid the amount of his claim, he held the draft as an agent or bailee of Randall. The court had no jurisdiction to render a personal decree against Randall, as he had never been a resident of the commonwealth, or served with process within the commonwealth, or appeared generally in the suit. This is now the settled law, under the constitution of the United States; and, before the adoption of the fourteenth amendment of that constitution, it was settled here that no decree in equity could be rendered against such a defendant which could bind him personally to do anything. *Eliot v. McCormick*, 144 Mass. 10, 10 N. E. Rep. 705; *Walling v. Beers*, 120 Mass. 549; *Spurr v. Scoville*, 3 Cush. 578; *Moody v. Gay*, 15 Gr. y. 457. As was said in *Moody v. Gay*, *ubi supra*: "A court of equity can only deal with persons who can be compelled by process to perform its decrees, and with property which is either situated within the limits to which its jurisdiction extends, or which can be reached through the action of parties who are amenable to its authority." The draft was drawn by one officer of the United States upon another officer, payable out of the moneys of the United States, and it was, in effect, a negotiable promissory note of the United States. *Com. v. Butterick*, 100 Mass. 12; *Miller v. Thompson*, 3 Mann. & G. 576. The United States were not and could not have been made parties to the suit. If this draft had been drawn by a private person upon himself, and he had been a resident of this commonwealth, it might be contended that he would have been liable to trustee process in an action at law against Randall; for, although a complete copy of the draft does not appear in the papers, it is not contended that the draft was payable on time. But whether this could have been done in the case supposed, and Manning have been admitted as a claimant to the extent of his interest, is immaterial, because the United States are not amenable to trustee process, and this remedy at law does not exist. Pub. St. c. 183, § 34, cl. 1; *Scott v. Hawkins*, 99 Mass. 550; *Fay v. Sears*, 111 Mass. 154; *Macomber v. Doane*, 2 Allen, 541; *Darling v. Andrews*, 9 Allen, 106. As the United States are not amenable to any process issuing from a state court, the inquiry is whether there is any procedure in this commonwealth whereby a creditor can reach and apply to the payment of a debt due to him from the defendant a debt due to the defendant from another person, when neither the defendant nor that other person is amenable to the process of the court. The case may be considered as if the facts were that a citizen of Maryland, in payment of a debt, had given his promissory note to a citizen of New York, payable to him or his order, and had intrusted the note to a citizen of Massachusetts for delivery to the

payee, and a citizen of Maine had attached the note, by the equitable process used in the suit, while it was within the commonwealth and held by the citizen of Massachusetts for the purpose of delivering it to the payee. It is conceded that a state has jurisdiction over all persons and property within its limits, and may subject all property found within its limits to the payment of debts due, not only to its citizens, but to the citizens or subjects of other states whom it permits to sue in its courts. To what extent and in what manner such property may be taken, depends upon the laws of the state. Other states may or may not recognize titles to property acquired in this manner, but the courts of a state must proceed according to the statutes of the state, if they are constitutional and valid statutes, and according to its customary law. It is now considered that a person who has never been a citizen of a state, or domiciled within it, and who is not personally found within it and served with process, or who has not, by an appearance in the suit, or by contract, or in some other manner, submitted himself to its jurisdiction, owes no duty to the state to appear before, and submit himself personally to the decisions of, its court. *Schibsbey v. Westenholz*, L. R. 6 Q. B. 155; *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. Rep. 165.

It has been suggested that, even if this court could not directly apply this draft to the payment of the debt due from Randall to the plaintiff, it could sequester it for the purpose of compelling Randall to perform any decree it might have rendered against him. No such attempt, however, was made in this case. A writ or commission of sequestration is a process of contempt against the property of the defendant, for the purpose of compelling him to obey or perform some order or decree of the court. After the subpoena has been served, it may be issued to compel him to appear or to put in his defense, or to obey any decree, interlocutory or final, which the court may make. Chattels and choses in action may be sequestered, and the debtors of the defendant, if parties to the suit, or, if not, by ancillary proceedings making them parties, may be compelled to pay the money they owe to the defendant into court. *Grew v. Breed*, 12 Metc. 363. A sufficient reason why no writ of sequestration, as distinct from process of execution, ought to issue in this case against Randall, is that he has never been in contempt, because the court can make no order or decree which he is personally bound to perform. A writ of sequestration ought only to issue after the defendant has been served with such process as makes him subject to the jurisdiction of the court, according to the law of the tribunal. A writ of sequestration may, perhaps, issue against a defendant who is without the jurisdiction, but resident within it, and who has absconded to avoid the service of process; but there is no satisfactory authority for issuing such a writ against a defendant who has never been subject to the jurisdiction, in order to compel him to appear in a suit brought for the collection of a debt. If this draft can be seized, it must be by some process whereby it, or the proceeds of it, or the debt of which it is evidence, can be taken and held, and ultimately applied to the payment of the debt due to the plaintiff, and not by any sequestration of it, if it cannot be so taken and applied, in order to compel Randall personally to appear in the suit, and pay the debt established by the decree.

It is argued that this draft is a chattel found within the commonwealth, and therefore may be taken and applied to the payment of the plaintiff's debt. It may be assumed, without consideration, that there is nothing in the fourteenth amendment of the constitution of the United States which prevents this from being done. The question is whether such a proceeding is authorized by our laws. For certain purposes, bills and notes are regarded in this commonwealth as chattels. They may be the subject of conversion. *King v. Ham*, 6 Allen, 298. They were not the subject of larceny at common law; but have been made so by statute, in connection with books of account, and written contracts, receipts, and releases, etc. Pub. St. c. 208, § 20. They

are goods, wares, and merchandise, within the meaning of the statute of frauds, (*Baldwin v. Williams*, 3 Metc. 365;) and they may be the subject of a gift, either *inter vivos* or *causa mortis*, and so may savings bank books, and some other evidences of debt, (*Sessions v. Moseley*, 4 Cush. 87; *Bates v. Kempton*, 7 Gray, 382; *Chase v. Redding*, 13 Gray, 418; *Sheedy v. Rouch*, 124 Mass. 472; *Pierce v. Bank*, 129 Mass. 425; *Grover v. Grover*, 24 Pick. 261; *Hunt v. Hunt*, 119 Mass. 474; *Taft v. Bowker*, 132 Mass. 277.) They were not liable to be taken on execution at common law, and they have not been made liable by statute. *Insurance Co. v. Weeks*, 7 Mass. 438; *Perry v. Coates*, 9 Mass. 536. Pub. St. c. 171, § 33, provides that "bank-notes and all other bills or evidences of debt issued by a moneyed corporation, and circulated as money, may be taken on execution, and paid to the creditor at their par value, as money collected, if he will accept them; otherwise they shall be sold like other chattels." But bills of exchange and promissory notes, which do not circulate as money, are not included in the statute. In England, by statute, an execution may be levied upon bills of exchange, promissory notes, bonds, and other securities for money, and the sheriff or other officer is authorized to sue for and recover the sums secured. 1 & 2 Vict. c. 110, § 12. Promissory notes of third persons are not goods, effects, and credits within the meaning of our statutes relating to trustee process. The maker of the note may be summoned as the trustee of the holder if the note is not payable on time, or is overdue. *Lupton v. Cutter*, 8 Pick. 298; *Lane v. Felt*, 7 Gray, 491; *Hancock v. Colyer*, 99 Mass. 187. Promissory notes were admissible in evidence under the money counts in the old forms of pleading; and an action at law can be maintained against the maker of a promissory note which has been lost or destroyed when a bond of indemnity will afford complete protection to the defendant; and, when it will not, a writ in equity can be maintained. The loss or destruction of the note is not an extinguishment of the debt of which it is evidence. *Fales v. Russell*, 16 Pick. 315; *Almy v. Reed*, 10 Cush. 421; *McGregory v. McGregor*, 107 Mass. 543; *Tower v. Bank*, 3 Allen, 387; *Tuttle v. Standish*, 4 Allen, 481; *Bank v. Harkins*, 101 Mass. 370; *Tucker v. Tucker*, 119 Mass. 79; *Hinckley v. Railroad Co.*, 129 Mass. 52. For the purpose, therefore, of reaching and applying the promissory note of a third person, to the payment of a debt due to the plaintiff from the owner of the note, the note, in this commonwealth, is not regarded as a chattel, but as the evidence of a debt, although, by reason of the law-merchant, it is evidence of a peculiar character. There are only two methods in this commonwealth whereby a note has been so applied. One is by making the persons liable on the note parties to the suit, and compelling them to pay what they owe into court, or to the plaintiff in the suit; and the other is by compelling the owner of the note to assign it, that it may be delivered to the plaintiff, or may be sold or collected, and the proceeds paid into court, or to the plaintiff. It is because there is no remedy at law that the plaintiff brings this suit in equity; and, as his debt has not been reduced to a judgment, his bill is not within the general equity jurisdiction, and he must rely upon the statutes. Pub. St. c. 151, § 2, cl. 11; St. 1884, c. 285, § 1; St. 1851, c. 206; St. 1858, c. 34; Gen. St. c. 113, § 2. In all the cases reported under these statutes, in which a promissory note has been reached and applied in equity, either the persons liable on the note have been parties defendant, and brought by process within the jurisdiction of the court, and compelled to pay the amount due into court or to the plaintiff; or the principal defendant, owner of the note, has been made a party, and brought within the jurisdiction of the court, and compelled to deliver up the note, and, in effect, to assign it; or all these persons have been brought before the court.

The first case reported is *Silloway v. Insurance Co.*, 8 Gray, 199. The defendant was a foreign insurance company, doing business in this commonwealth, under the statutes, and Edwards was its general agent in this com-

monwealth, appointed in pursuance of the statutes. Both defendants were served with process, appeared, and answered, and the company in its answer set up certain objections to the bill by way of demurrer. The case was heard by the full court on the bill and answer. The plaintiff was a creditor of the company on policies of insurance which it had issued, under which losses had occurred, and he had brought an action at law, but was unable to find property which could be attached; and the bill alleged that Edwards had in his hands property of the company, "consisting of promissory notes given to the company in payment of premiums or policies of insurance issued by" it "in this commonwealth." In this case the court had full jurisdiction over both defendants for the purpose of collecting a debt due from the principal defendant; and, although the company was a foreign corporation, it had, under the statutes, appointed a citizen of the commonwealth "a general agent upon which all lawful process against the company may be served, with like effect as if the company existed in this state," and the process against the company had been served upon this general agent. The next case is *Sanger v. Bancroft*, 12 Gray, 365. The bill was brought to collect a debt due to the plaintiff from Bancroft, who resided in California, and to reach a mortgage of land in this commonwealth given by Brigham to Bancroft to secure the payment of a promissory note, and the mortgage had been assigned, without consideration, to Tubbs. The note secured by the mortgage had not been assigned. Apparently, Bancroft was not served with process, but Brigham and Tubbs were. The note was not within the commonwealth, and was held by Bancroft, or some person unknown. The bill was dismissed. The third case is *Davis v. Werden*, 13 Gray, 305. It does not appear by the report whether Couch was a party to the suit, but the papers on file show that he was served with a subpoena within the commonwealth. It was a bill brought by a creditor of Couch & Werden, formerly copartners in this commonwealth, where the plaintiff and Couch continued to reside, to attach certain promissory notes given by Couch to Werden, and put by Werden into the hands of Royce, in this commonwealth, for collection. Werden, at the date of the bill, resided in Illinois. There was a decree for the plaintiff, but the form of it does not appear. Royce, as well as Couch, the maker of the notes, was within the jurisdiction of the court, and was served with process within the commonwealth. In *Moody v. Gay*, 15 Gray, 457, the principal defendants, Gay and Pitkin, debtors of the plaintiff, were inhabitants of this commonwealth, and parties to the suit, and the property reached was a mortgage to Pitkin of real estate in this commonwealth. In *Barry v. Abbott*, 100 Mass. 896, the original papers show that Abbott, Blood, and Chamberlain were all residents within the commonwealth, and duly served with process, and appeared and answered. In *Tucker v. McDonald*, 105 Mass. 423, all the parties to the chose in action were before the court. In *Insurance Co. v. Sears*, 109 Mass. 383, Sears, the owner of the policy of insurance, was a party served with process, and subject to the jurisdiction of the court. *Insurance Co. v. Abbott*, 127 Mass. 558, decides that proceedings under Gen. St. c. 113, § 2, now Pub. St. c. 151, § 2, cl. 11, are in the nature of an equitable trustee process, and that some other person than the plaintiff's debtor must be made a defendant, and that a bill cannot be maintained for the purpose of compelling a defendant by injunction to hold in his own possession his property until a decree be obtained against him, in order that the property may be taken and applied to the payment of the debt established by the decree. Some of the earlier cases in which there was no equitable trustee before the court are criticised and explained in the opinion.

The plaintiff relies especially upon St. 1884, c. 285, § 1, passed since the decision in *Insurance Co. v. Abbott*. That statute was apparently passed to change the law as declared by the following decisions of this court: *Chapman v. Publishing Co.*, 123 Mass. 478; *Insurance Co. v. Abbott*, *ubi supra*;

Carver v. Peck, 131 Mass. 291; *Russell v. Milton*, 133 Mass. 181. The only provisions of this statute which concern this case are those which relate to property which is in the hands, possession, or control of the debtor, independently of any other person, or is not within the state. These provisions do not indicate any intention to extend the jurisdiction given by Pub. St. c. 151, § 2, cl. 11, beyond the general jurisdiction of courts of equity to subject property which cannot be taken on execution to the payment of a judgment obtained at law. The nature of this general jurisdiction in equity is stated in *Carver v. Peck*, *ubi supra*, as follows: "As the process of a court of chancery operates *in personam*, it is within the power of such a court, having jurisdiction of the person of the defendant, to compel or restrain a conveyance of his interest in personal property, or even in real property, although the property or estate is itself outside the territory to which the jurisdiction of the court is limited." I have found no case decided by any court where, under this general jurisdiction, choses in action have been taken and applied in payment of a judgment, where none of the parties to the choses in action were amenable to the jurisdiction of the court, and when the statutes did not authorize the choses in action to be levied upon and sold. *Ager v. Murray*, 105 U. S. 126, is a suit on a judgment at law, and shows the procedure when, under this general jurisdiction, letters patent, or other intangible property, is taken and applied to the payment of a judgment. The authority to appoint a trustee to execute an assignment for the defendant, instead of compelling him to execute one, is derived from statute. Our statutes permit a bill in equity to be inserted in a writ, and attachments of property to be made as in actions at law, and also permit writs of seizin or of execution in common form to issue when such process appears to be an appropriate method of enforcing a decree in equity. Pub. St. c. 151, § 29. Pub. St. c. 141, § 22, authorize the court to appoint some suitable person in the place of a trustee, under an express or implied trust, of real or personal estate, to sell, convey, or transfer the property, when the trustee is "under the age of twenty-one years, insane, out of the commonwealth, or not amenable to the process of any court therein which has equity powers." And there are statutes relating to the appointment of a person to act for others in certain cases, and for the appointment of receivers, and the vesting in them of the title to property; but the case at bar is within none of these statutes. Independently of statute, a court of equity cannot appoint a person to execute a transfer of the property of another in his name. It may compel a creditor of the principal defendant, if it have jurisdiction over him, to pay to the plaintiff the debt he owes to this defendant, but it does this only when it has jurisdiction over the person of that creditor; and it may compel an assignment of choses in action, but it does this only when it has jurisdiction over the owner of the choses in action. Courts of law can transfer the title to property. In real actions, they declare the title, and transfer the possession; in personal actions, by virtue of a levy of execution, they transfer both title and possession. But decrees of courts of equity, except where statutes have made other provisions, operate only *in personam*. "This power of creating and extinguishing titles the chancellor never had, nor claimed to have, except when it was given him by statute. It is true that he frequently directed the sale of property, but it was by his control over the person of the owner that he made the sale effective,—*i. e.*, when the sale had been made, he compelled the owner to execute a deed pursuant to the sale; and hence when the owner was out of the jurisdiction, or labored under any incapacity, *e. g.*, that of infancy, the chancellor was powerless." Langd. Eq. Pl. (2d Ed.) § 43, note 4; 3 Pom. Eq. Jur. § 1317; *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. Rep. 586. It is for want of this power, independently of statute, that the bill was dismissed in *Spurr v. Scoville*, *ubi supra*. It was under the statute passed to supply this want of power that *Felch v. Hooper*, 119 Mass. 52, was decided. In *Shaw v. Wright*,

§ Ves. 22, Lord Chancellor LOUGHBOROUGH said that "you will not find any instance of an order to sell, under a sequestration, a subject which passes by title, and not by delivery;" and St. 36 Geo. III., c. 90, was passed. The power of a court of equity to appoint or direct its clerk or master to make conveyance of property rests, where it exists, upon statute. If any power is now exercised by courts of equity, independently of statute, to vest the title to property in receivers, except by conveyance from the owner, it is exercised only when the court has acquired full jurisdiction over the person of the owner.

This case is not one in which the plaintiff claims title to the draft, and where a decree can be entered declaring his title. He claims that the draft is the property of Randall, and that the title should be transferred to him, or to some person for him; so that it or its proceeds may be applied to the payment of the debt which Randall owes him. The draft cannot be taken on execution. The United States cannot be compelled to pay the debt into court or to the plaintiff. The court is not authorized by any statute to appoint any person to assign the draft, either by indorsing it, or by transferring Randall's property in it by delivering it to any person; and it has no jurisdiction over Randall to compel him to do these things. To compel the delivery of the draft to the plaintiff, without transferring the title to him, would be an abuse of process, and would give the plaintiff no right to collect the draft. Whether it were wise to subject such a chose in action as this is, when neither of the parties to it is within the jurisdiction of the court, to judicial sale at the instance of any person who sues to collect a debt of a non-resident defendant, is, if there be no constitutional objection, a question for the legislature. It is to be noticed that the statutes do not permit a person to be summoned as trustee, in trustee process, "who is not a resident of the commonwealth," or a corporation "which is not established under its laws," "unless he or it has a usual place of business in the commonwealth." Pub. St. c. 183, § 1. If the statutes relating to equity jurisdiction, which are relied on, were intended to give to a creditor whose debt has not been reduced to a judgment means of collecting it which are analogous to those which are afforded by an arrest of the debtor, they would not authorize these proceedings against a non-resident debtor, who has never been served with process within the commonwealth, and has never appeared in the suit.

I think that the existing statutes confer no jurisdiction over this draft to apply it to the payment of the debt due to the plaintiff, and that the bill should be dismissed.

(147 Mass. 25)

OLD COLONY R. CO. v. TRIPP.

(*Supreme Judicial Court of Massachusetts. Plymouth. June 1, 1883.*)

1. CARRIERS OF PASSENGERS—USE OF PREMISES—DISCRIMINATION.

Under Pub. St. Mass. c. 112, § 188, providing that "every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property, upon its railroad, and for the use of its depot and other buildings and grounds, and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange," *held*, that a railroad company might make a contract giving to a particular person the exclusive right to come upon its premises, and solicit patronage from passengers arriving at or leaving the station, and could maintain an action of tort for trespass against the owner of express teams,—a common carrier of passengers and their baggage to and from a railroad station,—for using, without the consent of the company, the latter's grounds, buildings, and platforms for the purpose of soliciting the patronage of passengers.

2. SAME—EXPRESSMEN.

A common carrier of passengers and their baggage to and from railroad stations, in the business of soliciting the patronage of passengers at a railroad station, holds no relation with the railroad company as a common carrier, and has no right, without its consent, to use its station grounds and buildings.

MORTON, C. J., and FIELD and DEVENS, JJ., dissenting.

Reported case from superior court, Plymouth county; THOMPSON, Judge. This was an action of tort, by the Old Colony Railroad Company against George D. Tripp, for trespass upon plaintiff's close. At the trial in the superior court there was evidence that the plaintiff was a railroad corporation, with all the powers and subject to all the duties of railroad corporations in this commonwealth; that Brockton was one of the largest stations on its road; that it had been the practice of the defendant, and other proprietors of job wagons, for four or five years prior to August 1, 1886, to go to the Brockton station, and wait for trains, and to ascertain if the passengers had any baggage or other merchandise for them to carry; that the plaintiff, on or about August 1, 1886, made a contract with A. S. Porter & Sons, of Brockton, to carry all baggage and merchandise brought by passengers to the station in trains to such places in the city of Brockton as such passengers might desire, and to provide all necessary and sufficient means therefor, to be paid for by the passengers employing them; that afterwards the plaintiff notified the defendant, and all other proprietors of job-wagons, not to come upon the plaintiff's premises in Brockton for the purpose of soliciting baggage or merchandise from passengers arriving in trains at the station, and informed them of the contract made with Porter & Sons, but allowing them, however, to come to the station to deliver baggage and merchandise for passengers, and to take away baggage and merchandise for passengers for which they might have previous orders, but not to solicit baggage or merchandise to be carried away; that defendant, after receiving said notice, continued to come upon the premises, and solicit baggage and merchandise, upon the platform of the station, from passengers, upon the arrival of trains, and refused to depart therefrom when requested, although he was not there at the time to carry baggage or merchandise for passengers going in the trains, or to take baggage or merchandise for passengers upon orders received away from the premises. Upon the foregoing facts, the presiding judge ordered a verdict for the plaintiff for a nominal sum, and reported the case to the supreme judicial court.

J. M. & T. C. Day and Hosea Kingman, for defendant.

That, in common with all citizens of the commonwealth, whose business or avocation is necessarily connected with the business of the plaintiff company, he had the right, at all reasonable and proper times, to go upon the plaintiff's premises when necessary to the transaction of his business, unless by so doing he in some way interfered with or obstructed said company in the discharge of its legitimate business, or interfered with the convenience of its patrons. This proposition is based upon the relation declared as existing between the railroads of this commonwealth and the public in *Inhabitants of Worcester v. Railroad Corp.*, 4 Metc. 564; *Com. v. Power*, 7 Metc. 596; *Camblos v. Railroad Co.*, 9 Phila. 411. In the first case, SHAW, C. J., declares that an incorporated railroad is a "public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community;" and that, though "the real and personal property necessary to the establishment and management of the railroad is vested in the corporation," "it is in trust for the public." In the second case cited the court says: "The opening of depots and platforms for the sale of tickets," etc., "amounts in law to a license to all persons, *prima facie*, to enter the depot." Can it be contended that this "trust" and "license" are in favor only of passengers—or freighters? If so, the result would seem to be that a railroad company may, at its will, practically monopolize the business of transporting both passengers and freight from its stations, or that it may for its own profit sell and dispose of such business. That the doing of such a business by a railroad company would be *ultra vires*, see *Summit v. State*, 9 Amer. & Eng. R. Cas. 302; *Camblos v. Railroad Co.*, 9 Phila. 411; and to permit such a disposal would be contrary to public policy. Assuming that the defendant is within the terms of the implied license on the part of the plaintiff to "all per-

sons," he contends that the plaintiff had no right to revoke the same, inasmuch as it does not appear that he in any way or degree interfered with the convenience of either passengers or freighters, or in any way whatever interfered with or obstructed the plaintiff company in the discharge of its duties or the exercise of its rights. It (the revocation) is not shown to be either "reasonable or useful." *Com. v. Power, ubi supra*, 601, 603; *Summit v. State, supra*. The regulation or order excluding the defendant was without authority. It was not made or authorized by the directors of the plaintiff corporation. The incidental power of a subordinate of the plaintiff to make such a regulation or order extends only to cases in which the same may be necessary in order to protect the comfort and convenience of the public, or to enable the company to discharge its duties or exercise its rights. *Com. v. Power, ubi supra*, 601, 602. The regulation or order excluding the defendant was unreasonable, and against the rights of the public, whether made with or without the authority of the plaintiff. The contract made with the Messrs. Porter for the transportation of passengers to any part of the city of Brockton in no way provided for other passengers leaving the cars at the Brockton station, or for the transportation of their baggage or merchandise. As the report does not find that the defendant, at any time after the notice to him not to come upon the plaintiff's premises, ever came upon them, prepared to carry or carried therefrom either baggage or merchandise for any parties whatever, there was no such violation by him of the order of the plaintiff's agent as to amount to a forcible breaking and entering of the plaintiff's close, for which damages are alone claimed. Plaintiff does not claim that the acts of the defendant either obstructed it in the discharge of its duties, or annoyed the traveling public, or tended to do either. It does not appear by the report that the order to the defendant not to come upon the plaintiff's premises was given to him until after December 20, 1886; and plaintiff's declaration alleges trespass only between August 1 and December 20, 1886.

J. H. Benton, Jr., and C. W. Sumner, for plaintiff.

A person cannot go on another's land without his permission, express or implied. He commits a trespass by so doing, and an action will lie whether the land be inclosed or not, and although no actual injury be done. *Merest v. Harvey*, 5 Taunt. 442; *Dougherty v. Stepp*, 1 Dev. & B. 371; *Pierce v. Hosmer*, 66 Barb. 345; *Brown v. Perkins*, 1 Allen, 89. The law entitles every one to recovery against every willful and intentional intruder. *Sears v. Lyons*, 2 Starkie, 318; *Rogers v. Spence*, 13 Mees. & W. 571; *Viall v. Carpenter*, 16 Gray, 285. Every proprietor of lands or buildings has the right to control them, and may even expel by force other persons after ordering them to remove. *Com. v. Clark*, 2 Metc. 25; *Com. v. Power*, 7 Metc. 598. The plaintiff company has the same right as an individual to the exclusive control of its premises, and may remove all persons therefrom who seek to remain against its will, with this exception only: that those who come there to go upon its trains, or to have their goods transported thereon, have a right to enter and remain on its premises so far as may be necessary to secure their rights of transportation, subject to such reasonable regulations for such use as the railroad company may impose. The defendant, Tripp, at the time of the alleged trespass, was upon the premises of the company without any intention to take any of its trains, or deliver any goods for transportation, but with the express intent to further his own private business by soliciting of passengers, upon their arrival at the station, baggage to be carried by him. Under such circumstances, he had no right to remain against the will of the plaintiff, and in so doing he was a willful trespasser. *Barker v. Railway Co.*, 18 C. B. 46; *Foulger v. Steadman*, L. R. 8 Q. B. 65; *Gillis v. Railroad Co.*, 59 Pa. St. 129; *Harris v. Stevens*, 31 Vt. 79; *Railway Co. v. Bingham*, 29 Ohio St. 364; *Landrigan v. State*, 31 Ark. 50; *Com. v. Power*, 7 Metc.

598; *Hall v. Power*, 12 Metc. 482. If the defendant could claim that a prior use by him of the premises of the plaintiff, with its assent and knowledge, for the purpose of soliciting baggage for his private business and advantage, conferred upon him a license to enter thereon, such license was in its nature revocable, and, at the time of the alleged trespass, had been revoked by the action of the plaintiff, and the notice given to the defendant. *Wood v. Lead-bitter*, 13 Mees. & W. 838; *Wingar v. Tift*, 24 Ga. 179; *Hetfield v. Railroad Co.*, 29 N. J. Law, 571; *Burton v. Scherpf*, 1 Allen, 135. Regulations are made by railroad companies with reference to their public duties in transportation of passengers and freights, and the reasonableness of them is always a question of law where the facts are not in dispute; but the prohibition of the defendant from plaintiff's premises, whenever coming upon the same for the transactions of his private business, is not a regulation as to any duties it owes the defendant, but is the exercise of a legal right. 41 Amer. Dec. 472, notes to *Com. v. Power*. Common carriers may even refuse to receive passengers, and eject them from their conveyances or stations, whenever their conduct is such as to annoy or endanger the safety of others, or to injuriously affect their own business interests. *Jencks v. Coleman*, 2 Sum. 221. If it be held that this was a regulation made by the plaintiff company, then it was a reasonable regulation, properly made; and, after notice to the defendant, Tripp, for its violation, it had a right to expel him from its premises whenever he, said Tripp, came thereon to solicit baggage, or so long as it might reasonably apprehend that he was there for that purpose. 41 Amer. Dec. 472, notes to *Com. v. Power*, 7 Metc. 598; *Howell v. Jackson*, 6 Car. & P. 723; *Story*, Bailm. 476; *Chit. Cont.* (5th Amer. Ed.) 478. The defendant in this case was a willful trespasser, and the plaintiff might either eject him by force, or sue him for damages for thus invading their rights of property. The verdict directed by the superior court shall be affirmed. *Com. v. Power*, 7 Metc. 598.

W. ALLEN, J. Whatever implied license the defendant may have had to enter the plaintiff's close had been revoked by the regulations made by the plaintiff for the management of its business, and the use of its property in its business. The defendant entered under a claim of right, and can justify his entry only by showing a right superior to that of the plaintiff. The plaintiff has all the rights of an owner in possession, except such as are inconsistent with the public use for which it holds its franchise; that is, with its duties as a common carrier of persons and merchandise. As concerns the case at bar, the plaintiff is obliged to be a common carrier of passengers. It is its duty to furnish reasonable facilities and accommodations for the use of all persons who seek for transportation over its road. It provided its depot for the use of persons who were transported on its cars to or from the station, and holds it for that use, and it has no right to exclude from it persons seeking access to it for the use for which it was intended and is held. It can subject the use to rules and regulations; but by statute, if not by common law, the regulations must be such as to secure reasonable and equal use of the premises to all having such right to use them. See Pub. St. c. 112, § 188, *Railroad Co. v. Gage*, 12 Gray, 398; *Spofford v. Railroad Co.*, 128 Mass. 326. The station was a passenger station. Passengers taking and leaving the cars at the station, and persons setting down passengers or delivering merchandise or baggage for transportation from the station, or taking up passengers or receiving merchandise that had been transported to the station, had a right to use the station buildings and grounds, superior to the right of the plaintiff to exclusive occupancy. All such persons had business with the plaintiff which it was bound to attend to in the place and manner which it had provided for all who had like business with it. The defendant was allowed to use the depot for any business that he had with the plaintiff. But he had no business to transact with

the plaintiff. He had no merchandise or baggage to deliver to the plaintiff, or to receive from it. His purpose was to use the depot as a place for soliciting contracts with incoming passengers for the transportation of their baggage. The railroad company may be under obligation to the passenger to see that he has reasonable facilities for procuring transportation for himself and his baggage from the station, when his transit ends. What conveniences shall be furnished to passengers within the station for that purpose is a matter wholly between them and the company. The defendant is a stranger both to the plaintiff and to its passengers, and can claim no rights against the plaintiff to the use of its station, either in his own right or in the right of passengers. The fact that he is willing to assume relations with any passenger which will give him relations with the plaintiff which will involve the right to use the depot, does not establish such relations or such right; and the right of passengers to be solicited by drivers of hacks and job-wagons is not such as to give to all such drivers a right to occupy the platforms and depots of railroads. If such right exists, it exists, under the statute, equally for all, and railroad companies are obliged to admit to their depots, not only persons having business there to deliver or receive passengers or merchandise, but all persons seeking such business, and to furnish reasonable and equal facilities and conveniences for all such.

The only case we have seen which seems to lend any countenance to the position that a railroad company has no right to exclude persons from occupying its depots for the purpose of soliciting the patronage of passengers is *Markham v. Brown*, 8 N. H. 523, in which it was held that an inn-holder had no right to exclude from his inn a stage-driver who entered it to solicit guests to patronize his stage, in opposition to a driver of a rival line who had been admitted for a like purpose. It was said to rest upon the right of the passengers, rather than that of the driver. However it may be with a guest at an inn, we do not think that passengers in a railroad depot have such possession of a right in the premises as will give to carriers of baggage, soliciting their patronage, an implied license to enter, irrevocable by the railroad company. *Barney v. Steam-Boat Co.*, 67 N. Y. 301, and *Jencks v. Coleman*, 2 Sum. 221, are cases directly in point. See, also, *Com. v. Power*, 7 Metc. 596, and *Harris v. Stevens*, 31 Vt. 79.

It is argued that the statute gave to the defendant the same right to enter upon and use the buildings and platforms of the plaintiff which the plaintiff gave to Porter & Sons. The plaintiff made a contract with Porter & Sons to do all the service required by incoming passengers in receiving from the plaintiff, and delivering in the town, baggage and merchandise brought by them; and prohibited the defendant and all other owners of job-wagons from entering the station for the purpose of soliciting from passengers the carriage of their baggage and merchandise, but allowed them to enter for the purpose of delivering baggage or merchandise, or of receiving any for which they had orders. The statute (Pub. St. c. 112, § 188) is in these words: "Every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property, upon its railroad, and for the use of its depot and other buildings and grounds, and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange." A penalty is prescribed in section 191 for violations of the statute. The statute, in providing that railroad corporations shall give to all persons equal facilities for the use of its depot, obviously means a use of right. It does not intend to prescribe who shall have the use of the depot, but to provide that all who have the right to use it shall be furnished by the railroad company with equal conveniences. The statute applies only to relations between railroads, as common carriers, and their patrons. It does not enact that a license given by a railroad company to a

stranger shall be a license to all the world. If a railroad company allows a person to sell refreshments or newspapers in its depot, or to cultivate flowers on its station grounds, the statute does not extend the same right to all persons. If a railroad company, for the convenience of its passengers, allows a baggage expressman to travel in its cars to solicit the carriage of the baggage of passengers, or to keep a stand in its depot for receiving orders from passengers, the statute does not require it to furnish equal facilities and conveniences to all persons. The fact that the defendant, as the owner of a job-wagon, is a common carrier, gives him no special right under the statute. It only shows that it is possible for him to perform for passengers the service which he wishes to solicit of them.

The English railway and canal traffic act (17 & 18 Vict. c. 31) requires every railway and canal company to afford all reasonable facilities for traffic, and provides that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever." *In re Marriott v. Railway Co.*, 1 C. B. (N. S.) 499, was under this statute. The complaint was, that the omnibus of Marriott, in which he brought passengers to the railroad, was excluded by the railway company from its station grounds, when other omnibuses, which brought passengers, were admitted. An injunction was ordered. *In re Beadell v. Railway Co.*, 2 C. B. (N. S.) 509, was a complaint, under the statute, that the railway company refused to allow the complainant to ply for passengers at its station; it having granted the exclusive right of taking up passengers within the station to one Clark. The respondent allowed the complainant's cabs to enter the station for the purpose of putting down passengers, and then required him to leave the yard. An injunction was refused. One ground on which the case was distinguished from Marriott's is that the complainant was allowed to enter the yard to set down passengers, and was only prohibited from remaining to ply for passengers. See, also, *In re Painter v. Railway Co.*, 2 C. B. (N. S.) 702; *Barker v. Railway Co.*, 18 C. B. 46. Besides Marriott's Case, *ubi supra*, *Palmer v. Railway Co.*, L. R. 6 C. P. 194, and *Parkinson v. Railway Co.*, Id. 554, are cases in which injunctions were granted under the statute; in the former case, for refusing to admit to the station yard vans containing goods for delivery to the railway company for transportation by it; in the latter case, for refusing to deliver at the station, to a carrier authorized to receive them, goods which had been transported on the railroad.

We have not been referred to any decision or *dictum* in England or in this country that a common carrier of passengers and their baggage to and from a railroad station has any right, without the consent of the railroad company, to use the grounds, buildings, and platforms of the station for the purpose of soliciting the patronage of passengers, or that a regulation of the company which allows such use by particular persons, and denies it to others, violates any right of the latter. Cases, at common law or under statutes, to determine whether railroad companies, in particular instances, gave equal terms and facilities to different parties to whom they furnished transportation, and with whom they dealt as common carriers, have no bearing on the case at bar. The defendant, in his business of solicitor of the patronage of passengers, had no relations with the plaintiff as a common carrier, and had no right to use its station grounds and buildings.

A majority of the court are of the opinion that there should be judgment on the verdict.

FIELD, J. (*dissenting*.) The chief justice, Mr. Justice DEVENS, and myself think that our statutes should receive a different construction from that given to them by a majority of the court. Pub. St. c. 112, § 188, provides that "every railroad corporation shall give to all persons or companies reason-

able and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property, upon its railroad, and for the use of its depot and other buildings and grounds, and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange." Section 189 of the same chapter provides that "every railroad corporation shall promptly forward merchandise consigned or directed to be sent over another road connecting with its road, according to the directions contained thereon, or accompanying the same, and shall not receive and forward over its road merchandise consigned, ordered, or expressly directed to be received and forwarded by a different route." By section 191, *Id.*, a railroad corporation which violates these provisions is liable for all damages sustained by reason of such violation, and to a penalty of \$200, which may be recovered to the use of the party aggrieved, or to the use of the commonwealth. These sections are taken from St. 1874, c. 372, §§ 138, 139, 141, and St. 1880, c. 258. Section 188, Pub. St. c. 112, was first enacted by St. 1867, c. 339. This section does not, in terms, require that the persons or companies to which the corporation is required to give "reasonable and equal terms, facilities, and accommodations," shall own the merchandise which is transported; nor is it limited to the delivery of merchandise to be transported by the railroad corporation. In the clause relating to connecting railroads, the section plainly means that railroads shall give to other railroads connecting with them, and shall receive from such other railroads, reasonable and equal terms and facilities of interchange, both in delivering passengers and merchandise to and in receiving them from the railroads with which they connect. The provision that every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the use of the depot and other buildings and grounds, must include the use of the depot and other buildings and grounds for receiving passengers and merchandise from a railroad at the terminus where the transportation on the railroad ends, as well as for delivering passengers and merchandise to a railroad at the terminus where such transportation begins. As the last clause of the section makes provision for carriers connecting by railroad, we think that the preceding clause was intended to make provision for other connecting carriers, and to include public or common carriers, as well as private carriers actually employed by passengers, or by the owners or consignees of merchandise. Stages and expresses are the only common carriers of passengers and of merchandise to and from many places in the commonwealth, and, in connection with railroads, often form a continuous line of transportation. The statute, we think, was intended to prevent unjust discrimination by a railroad corporation between common carriers connected with it in any manner, and to require that the railroad corporation should furnish to such carriers reasonable and equal terms, facilities, and accommodations in the use of its depot and other buildings and grounds for the interchange of traffic.

A railroad corporation can make reasonable rules and regulations concerning the use of its depot and other buildings and grounds, and can exclude all persons therefrom who have no business with the railroad, and it can probably prohibit all persons from soliciting business for themselves on its premises. Whatever may be its right to exclude all common carriers of passengers or of merchandise from its depot and grounds who have not an order to enter, given by persons who are or who intend to become passengers, or who own or are entitled to the possession of merchandise which has been or is to be transported, it cannot arbitrarily admit to its depot and grounds one common carrier, and exclude all others. The effect of such a regulation would be to enable a railroad corporation largely to control the transportation of passengers and merchandise beyond its own line, and to establish a monopoly not granted by its charter, which might be solely for its own benefit, and not for the benefit of the public. Such a regulation does not give "to all persons or companies

reasonable and equal terms, facilities, and accommodations," "for the use of its depot and other buildings and grounds," in the transportation of persons and property. See *Parkinson v. Railway Co.*, L. R. 6 C. P. 554; *In re Palmer v. Railway Co.*, Id. 194; *Express Co. v. Railroad Co.*, 57 Me. 188.

In re Marriott v. Railway Co., 1 C. B. (N. S.) 499, was an application for an injunction under St. 17 and 18 Vict. c. 81, § 2, and an injunction was issued compelling the company to admit the complainant's omnibuses into its yard, "at all reasonable times, for the purpose of forwarding, receiving, and delivering traffic upon and from its said railway, and in the same manner, and to the same extent, as other public vehicles of a similar description are admitted into the said yard for that purpose." In that case the company had made arrangements with one Williams to provide sufficient accommodations, by means of omnibuses, for passengers over a part of the route on which the complainant's omnibuses ran, but it appears that there were passengers from Twickenham and Hampton Wick, whose sole reliance was upon the complainant's omnibuses. Williams' omnibuses were admitted within the yard, to set down and to receive passengers, but the complainant's omnibuses were not permitted to enter the yard for either purpose. The court held that, as it did not appear that there was any public benefit which justified the course pursued by the company, the arrangement with Williams was an "undue and unreasonable preference and advantage" in his favor within the meaning of the statute. *In re Beadell v. Railway Co.*, 2 C. B. (N. S.) 509, and *In re Painter v. Railway Co.*, 2 C. B. (N. S.) 702, were both applications under the same statute. In one of these cases the railway company had agreed with a cab proprietor, in consideration of £600, to allow him the exclusive liberty of plying for hire within its station; and in the other, similar exclusive privileges had been granted to a limited number of cab proprietors. The application of a cab proprietor to be admitted on equal terms was refused in each case, on the ground that it was not shown that the arrangement made by the companies was not beneficial to the public, and it was said that "the statute in question was passed for the benefit of the public, and not for that of individuals." The later English cases we have cited seem to show that, under the English statute, the public convenience or inconvenience is not exclusively the test, but is only one element to be taken into account in considering what is an undue and unreasonable preference, and that a common carrier may be regarded as representing all those persons who choose to employ him. While the English statute provides against undue and unreasonable preferences and advantages, it does not, in terms, provide that all persons and companies shall have reasonable and equal terms, facilities, and accommodations for the use of the depot and other buildings and grounds of a railroad corporation. The statute relating to expressmen, construed in *Express Co. v. Railroad Co.*, *ubi supra*, is, in this respect, similar in terms to Pub. St. c. 112, § 188.

It is, undoubtedly, a convenience to passengers on a railroad that common carriers of passengers, or of baggage and other merchandise, should be in waiting on the arrival of trains at a station, although no order requiring the attendance of such carriers has been previously given. While the statute requiring a railroad corporation to give to all persons and companies reasonable and equal terms, facilities, and accommodations for the use of its depot and other buildings and grounds, must, from the nature of the subject, be so construed as to permit the corporation to make such reasonable regulations as are necessary to enable it to perform, without inconvenience, its duties as a common carrier, and as the size and condition of its depot and other buildings and grounds require, yet the facts stated in the report cannot be held sufficient to warrant the plaintiff in admitting one company of expressmen to, and in excluding all others from, the advantages of bringing express wagons within its grounds, and of accepting or of soliciting employment as a common

carrier of baggage from the passengers arriving at its depot. The report does not show that any inconvenience to the railroad company, or to the public using the railroad, was occasioned by the defendant's entering the grounds of the company for the purpose of soliciting employment as a common carrier of baggage. Upon the facts as they appear in the report, it cannot be said that, within any reasonable construction of the statute, reasonable and equal facilities were granted to the defendant, and to A. S. Porter & Sons, or that any necessity existed for giving a preference to the latter.

In *Hale v. Digby*, 27 Wkly. Rep. 884, it was held that, if a railway company licensed one person to ply with carriages within its station yard, a person not so licensed commits a trespass in entering the yard, against the prohibition of the company, although the license given was an undue preference within the meaning of St. 17 & 18 Vict. c. 31, § 2. See *Barker v. Railway Co.*, 18 C. B. 46. That statute authorized an application to the court or judge of common pleas, or to a judge of that court, by any person complaining of a violation of the act, and authorized the court or judge to issue a writ of injunction restraining the company from continuing to violate the act. (section 3;) and in case of disobedience by the company, authorized the court or judge to issue a writ of attachment, and to direct the payment of a sum of money not exceeding £200 for every day during which, after a day to be named, the company failed to obey the injunction; and by section 6 it was provided that "no proceeding shall be taken for any violation or contravention of the above enactment, except in the manner provided," saving, however, all rights under existing laws. By St. 36 & 37 Vict. c. 48, § 6, the jurisdiction given to the court of common pleas was transferred to railway commissioners. The ground of the decision in *Hale v. Digby* is that the sole remedy of a person aggrieved by the action of the railway company is by an application to the railway commissioners.

The remedies provided by our statutes (Pub. St. c. 112, § 191) are an action for damages, and also an action of tort for a penalty which may be recovered by the party aggrieved to his own use. If then the railroad company, upon the facts appearing in the report, had no right absolutely to exclude the defendant, as a common carrier, from entering its depot and grounds to solicit employment from passengers, while it permitted A. S. Porter & Sons to enter for this purpose, and, if it would be liable to the defendant in an action for excluding him, the defendant could not be guilty of a tort in entering, for this purpose, in a reasonable manner and at reasonable times.

(147 Mass. 40)

COMMONWEALTH v. CAREY.

(*Supreme Judicial Court of Massachusetts. Suffolk. June 2, 1888.*)

CARRIERS OF PASSENGERS—USE OF PREMISES—DISCRIMINATION.

A common carrier of passengers and their baggage to and from a railroad station has no right, without the consent of the railroad company, to use the grounds, buildings, or platforms of the station for the purpose of soliciting the patronage of passengers, and the company may make a contract giving such right exclusively to a particular person or corporation. Following *Railroad Co. v. Tripp*, ante, 80. MORTON, C. J., FIELD and DEVENS, JJ., dissenting.

Exceptions from superior court, Suffolk county; SHERMAN, Judge.

Complaint, under Pub. St. c. 112, § 196, against John Carey, alleging that the defendant did, "without right, loiter and remain within the passenger station-house of the New York & New England Railroad Company," in Boston. At the trial in the superior court it appeared that the defendant was a licensed hackman in the city of Boston; that, on the day mentioned in the complaint, he visited the premises of the railroad company, about 9 o'clock in the evening, and entered the inclosure owned by said company, with his hack, which he permitted to remain near the platform, within the inclosure, and remained himself upon the platform, and inside the station-house. It further

v.17N.E.no.1—7

appeared that the railroad company had instructed its officers not to permit any hack to enter the inclosure except such as were owned or in the service of the Boston Cab Company; that the defendant was not in such service; and that an officer of the railroad company requested him to leave the premises, and that defendant refused and failed so to do, but remained upon the premises, and inside the station, for some minutes after being requested to leave. The judge instructed the jury that, if they found the facts as above, the defendant was upon the premises of the company without right, after he received the request to leave; and, if he remained and loitered thereafter, the jury would be authorized to find a violation of the statute; and the company had the lawful right to request him to leave, and he was bound to go within a reasonable time. The jury returned a verdict of guilty, and the defendant excepted.

John P. Leahy, for defendant.

It is well settled that "the opening of depots and platforms for the sale of tickets, for the assembling of persons going to take passage or landing from the cars, amounts in law to a license to all persons, *prima facie*, to enter the depot." *Com. v. Power*, 7 Metc. 603. The defendant, therefore, had the legal right to enter the premises of the railroad company under this implied license. The fact that the defendant was a hack-driver, and engaged in that occupation at the time he was on the premises, does not alter this question. If, in the opinion of the court, it does, we respectfully submit the following as a correct statement of law: The opening of an inclosure for hacks for the accommodation and convenience of patrons of the railroad amounts in law to a license to all owners of hacks, *prima facie*, to drive their vehicles within said inclosure. If this proposition is correct, then there can be no doubt about defendant's license to enter. After the defendant entered, the license was executed, and, so far as that particular entry was concerned, irrevocable. "A license is, technically, an authority given to do some act, or a series of acts, on the land of another, without passing any estate in the land." "These are held to be revocable when executory, * * * but irrevocable when executed." PARKER, C. J., in *Cook v. Stearns*, 11 Mass. 533-537. See also *Cheever v. Pearson*, 16 Pick. 273. The railroad police officer, therefore, had no right to request the defendant to leave, because he was then rightfully upon the premises under an implied license already executed and irrevocable. Only some breach of the implied conditions of that license would have warranted a forcible removal. There is no contention that such a breach took place. As to what constitutes a breach, see *Markham v. Brown*, 8 N. H. 523; *Hall v. Power*, 12 Metc. 482; *Com. v. Power*, *supra*. The commonwealth will undoubtedly argue that the instruction given to the railroad public officer "not to permit any hack to enter the inclosure, except such as were owned or in the service of the Boston Cab Company," amounts to a depot regulation which the defendant was bound to obey. We respectfully submit that every such regulation must be "reasonable and useful," (see *Com. v. Power*, *supra*.) and have for its object "the public convenience, and the quiet and safety of passengers," (*Hall v. Power*, *supra*;) and a person who is charged in any proceeding with violating it must be shown to have had actual or constructive notice of its existence. The regulation mentioned was unreasonable and unjust, because intended to discriminate in favor of one owner of hacks against every other owner, besides preventing competition; and against public policy to discriminate against a certain class of patrons of the road who do not want the service of the Boston Cab Company, but desire that of hack-drivers of their own selection. These patrons are greatly inconvenienced,—forced to walk a long distance beyond others, into the public street, while the patrons of the Boston Cab Company receive attention close at hand,—to increase the revenue of the Boston Cab Company, or the railroad company, or of both, by

forcing the passengers of the road to use the vehicles of the cab company, or suffer great inconvenience to secure others, even though these other vehicles are better or preferable for personal reasons. We respectfully invite attention to the language of the court in *Markham v. Brown*, 8 N. H. 530, 531, which, we submit, is a true statement of the law, for in this matter there is no distinction between an innkeeper and a railroad. We submit that there was no sufficient evidence of any depot regulation; that the regulation, so called, discussed, was not for "the public convenience, and the quiet and safety of passengers," and that the question whether such regulation was reasonable should have been submitted as a question of fact to the jury. The presiding judge erred in deciding this as a question of law. He could not have decided the defendant's right without first deciding this question. The defendant cannot be held under chapter 112, § 196, unless he had "actual or constructive notice" of the regulation. There was no proof of such a notice. We submit that the defendant had a legal right to remain upon the premises after having been requested to leave by the railroad police officer under the statute alleged to have been violated.

Andrew J. Waterman, Atty. Gen., for the Commonwealth.

The ruling of the court was correct. It is well settled that a proprietor of lands or buildings has a right to the control of them, and may put out other persons, after ordering them to remove. *Com. v. Clark*, 2 Metc. 25. It is clear, also, that a railroad corporation may make reasonable and suitable regulations for the conduct of its own business, and the business of others who frequent its buildings and grounds, and that these regulations may be enforced by the proper officers of the company. While a railroad corporation, as a common carrier, is bound to afford and give a public service, its duty in that respect is not unlimited, and is in many respects to be governed as a private individual would be. The company, when open for business, gives an implied license to any and all persons to enter its building and grounds. But a license of this nature is revocable; and if legally and actually revoked, for sufficient cause, and due notice given to an individual, or class of individuals, and they still persist in entering, it is without a license, and they may be prosecuted for trespass, forcibly removed, or, under the statute, fined. *Com. v. Power*, 7 Metc. 596; *Hall v. Power*, 12 Metc. 482.

W. ALLEN, J. The only exception taken was to the instruction that the defendant had no right to remain on the premises of the railroad company after being requested to leave. The recent case of *Railroad Co. v. Tripp, ante*, 89, is decisive of the question. Exceptions overruled.

(114 Ind. 451)

KERNODLE v. GIBSON.

(*Supreme Court of Indiana*. May 10, 1888.)

1. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

Where the overruling of plaintiff's motion for a new trial is the only error assigned, the appellate court will not consider causes for a new trial which were not presented to the trial court in such motion.

2. SAME—MATTERS NOT APPARENT OF RECORD.

Where the evidence is not in the record, an appellate court will not reverse a judgment for alleged error in overruling plaintiff's motion for a new trial; but it must appear from the record that such error might, and probably did, injure the plaintiff.

3. SAME.

Where the record does not show that plaintiff, in an action on a promissory note, which, his complaint alleged, was "so mutilated and partially lost as to be impossible of copy," proved, after a general denial by defendant, the existence, destruction, loss, and contents of such note, an appellate court cannot, for alleged errors of the trial court, reverse its judgment given for defendant.

Appeal from circuit court, Boone county; THOMAS J. TERHUNE, Judge.

Action by John W. Kernodle on a promissory note, against George W. Gibson and John McLean. Defendant Gibson alone appeared. Jury trial, and verdict for defendant. Plaintiff appealed.

Julian & Jultan, for appellant. *W. J. Darnell* and *C. S. Wesner*, for appellee.

HOWK, J. This was a suit by appellant Kernodle, as plaintiff, against appellee Gibson and one John McLean, as defendants. Plaintiff's complaint counted upon a promissory note for \$1,000, alleged to have been executed by the defendants on the 12th day of February, 1871, to the plaintiff herein, and to have been payable 10 months after the date thereof, with 10 per cent. interest thereon from date, and with reasonable attorney's fees if suit should be brought thereon. It was averred in the complaint, among other things, that the note in suit was "so mutilated and partially lost as to be impossible of copy." Defendant Gibson alone appeared, and separately answered in four paragraphs, of which the first three stated special defenses, and the fourth paragraph was a general denial of the complaint. Plaintiff replied by a general denial of the special defenses. The issues joined were tried by a jury, and a verdict was returned for defendant, and over plaintiff's motion for a new trial the court adjudged that he take nothing by his suit herein, and that defendant recover his costs, etc.

The only error properly assigned here by plaintiff is the overruling of his motion for a new trial. He has also assigned here as errors several matters which would have constituted proper causes for a new trial. If these matters were assigned as causes for a new trial, in plaintiff's motion therefor, they are properly presented for our consideration by the error predicated upon the overruling of such motion; and if they were not so assigned, it is useless to assign them here as errors, because this court will not consider causes for a new trial which have not been presented to and considered by the trial court. *Walls v. Railroad Co.*, 60 Ind. 56; *Bake v. Smiley*, 84 Ind. 212; *Todd v. Jackson*, 75 Ind. 272. The evidence is not in the record, and it does not appear that plaintiff attempted even to make the evidence a part of the record. In the absence of the evidence, we cannot reverse the judgment for the alleged error of the court below in overruling plaintiff's motion for a new trial, for, even if it seemed to us that some of the matters complained of here by plaintiff's counsel might possibly be erroneous, the record wholly fails to show, in the absence of the evidence, that the error, if any, could or did injure the plaintiff. It is not enough that the record may show possible error in the rulings or proceedings of the trial court, but it must also appear from the record that such error might, and probably did, injure the plaintiff. Plaintiff's suit, as we have seen, was upon a promissory note alleged to have been "so mutilated and partially lost as to be impossible of copy." The issues in the case did not require proof of the execution of such note by the defendants, but it was incumbent on plaintiff, under the general denial of his complaint, to prove that such a note had existed as the one described in his complaint, and the destruction or loss of such note, and the contents thereof. *Millikan v. State*, 70 Ind. 310. We cannot say, from the record of this cause, in the absence of the evidence, whether the plaintiff did or did not prove these fundamental facts in his case by a fair preponderance of the evidence. If he did not prove such facts, and we may assume that he did not, in the state of the record, in aid of the judgment of the trial court, it is certain that we could not reverse such judgment, even though it might seem to us that each of the matters complained of here by plaintiff's counsel, was clearly erroneous. This is so, because the record wholly fails to show that any of such matters, even if erroneous, could or did harm or injure the plaintiff herein. All the presumptions are in favor of the correctness of the rulings of the trial court, and these presumptions will be indulged here until

they are affirmatively overcome or excluded by the record, or, until then, such rulings, even though erroneous, will not be available for the reversal of the judgment. *Myers v. Murphy*, 60 Ind. 282; *Becknell v. Becknell*, 110 Ind. 42, 10 N. E. Rep. 414; *Stewart v. State*, 111 Ind. 554, 13 N. E. Rep. 59; *Whisler v. Lawrence*, 112 Ind. 229, 13 N. E. Rep. 576.

We have found no error in the record of this cause. The judgment is affirmed, with costs.

(115 Ind. 450)

EVANSVILLE & T. H. R. CO. v. GUYTON.*

(*Supreme Court of Indiana*. May 10, 1888.)

1. MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT—INCOMPETENCE.

Appellant employed as freight train conductor one whose general competence and trustworthiness for such duty were fully established by his previous service with them as brakeman, but omitted to test his qualifications by any special examination. They afterwards assigned him to run a "wild" freight train, under telegraphic orders, a service demanding special skill and aptitude. Appellee was injured in a collision, resulting from such conductor's neglect of an order which he understood when he received it. *Held*, that the conductor was incompetent to run a "wild" train, and that appellants were remiss in their duty in selecting him for that service.¹

2. SAME.

Whether or not it is wise for a railroad company to fill all vacancies by advancing from lower positions employees known to be skillful and deserving, is a question of fact for the jury.

3. SAME—EVIDENCE.

To determine the qualification of a person whose competence for a particular service is in question, evidence of a specific act of such person indicating incompetency, together with evidence of the accompanying circumstances, is admissible.

4. SAME—INSTRUCTIONS.

Appellant being sued for damages in consequence of a railroad collision, admitted its employee's neglect, but denied that he was incompetent, and asked the court to charge that specific acts of negligence on other occasions are not competent to show negligence on this occasion. *Held*, that such instruction is correct in law, but inapplicable to the defense set up, and that it was properly refused.

5. DAMAGES—PERSONAL INJURIES—EVIDENCE.

Appellee, a brakeman, was permitted to show at the trial that immediately after the collision in which he was injured he performed with great pain and effort the duty of flagging an approaching passenger train, and then fell and became unconscious. *Held*, that the evidence was admissible to show the extent of his injuries and suffering, and was not an improper appeal to the feeling of the jury.

Appeal from circuit court, Gibson county; O. M. WELBORN, Judge.

Action by an employe for damages, brought by William Guyton against the Evansville & Terre Haute Railroad Company. Judgment for plaintiff. Defendant appealed.

Iglehart & Taylor for appellant. *Gilchrist & De Bruler* and *D. B. Kummer*, for appellee.

MITCHELL, J. Guyton was severely injured in a collision which occurred on the appellant railway company's road on the 20th day of August, 1882, while serving in the capacity of brakeman on one of the company's trains. He brought an action to recover damages for the injuries sustained, and recovered a judgment in the Gibson circuit court, from which this appeal is prosecuted. His case proceeded upon the theory that the collision resulted from the incompetency of Charles Stice, the conductor, who had control of the train upon which the plaintiff was at the time employed as brakeman, and that the liability of the company grew out of its failure to exercise proper care

¹A master must, at his peril, exercise reasonable care in the selection of co-servants. *Pilkenton v. Railway Co.* (Tex.) 7 S. W. Rep. 805; *Railroad Co. v. McMannon*, (Ky.) 3 S. W. Rep. 18. Upon the question of who are fellow-servants within the rule exempting the master from liability, see *Wolcott v. Studebaker*, 34 Fed. Rep. 8, and note.

*Rehearing denied.

in the selection of conductor Stice, whose alleged incapacity resulted in the collision.

There are certain undisputed facts in the case. For instance, there is no dispute but that the railway company put Charles Stice in charge of a wild train, as conductor, to run from Terre Haute to Evansville, on the date above mentioned, and that the train was being run upon telegraphic orders, and not upon schedule time. The plaintiff was a brakeman on this train, which was called the "C. & E. Train. Special." Some 14 miles from Vincennes, at a station called "Oaktown," Stice received a message from the train dispatcher, of the following tenor: "C. & E. Train. Special: Run to Vincennes freight station regardless second section train twenty, (20,) and to Smith's regardless eighteen, (18.) C. J. H." Smith's is a station between Oaktown and Vincennes. It is conceded that the meaning of the dispatch, as it would or should have been understood by a competent conductor, in connection with the schedule for regular trains, with which train dispatchers assume conductors are familiar, was, that Stice should run his train to Smith's, and wait there until No. 18, a schedule train, and until the first section of No. 20, another schedule train, should pass, and then run to Vincennes, regardless of the second section of train 20. Instead of properly interpreting and executing the order, which is shown to have been correctly given, the conductor ran his train to Smith's, waited until No. 18 passed, and then, although it was within a few minutes of the regular schedule time of No. 20, started out with his wild train under the mistaken impression that he was to run to Vincennes, regardless of train 20. The result was a collision between the wild train and the first section of 20, which was on its regular time, within a few miles of Smith's. The evidence tends to show that Stice had been in the service of the company, as brakeman, for a period of six or seven years prior to the accident, and that he had been promoted to the position of freight conductor within a period of less than a month before the collision. The testimony preponderates strongly, we may say overwhelmingly, in favor of the general good character, competency, and skill of the conductor, while serving in the capacity of brakeman, and of his general qualifications to act as conductor of a freight train. He testified that he understood the order above set out, and that his pulling out his train in disobedience of it was the result of thoughtlessness and a mistake. There was some testimony, however, from which the jury may have found that he was not possessed of sufficient familiarity with the time cards, and with the technical language of train orders, and was not sufficiently quick of apprehension to be able to construe and interpret an order in connection with a time card so as to be competent to act as the conductor of a wild train. In view of the fact that Stice had been promoted to the position of conductor but recently before the accident, and that more than ordinary vigilance and aptitude were required for the control and safe management of trains such as the one he was entrusted with, and in view of the further fact that there is some evidence which tends to show that contrary to the requirements of the general rules of the company, Stice had been assigned to duty as a conductor without the usual inquiry or examination in respect to his qualifications, we are constrained to hold that the evidence tends to support, what must have been the conclusions of the jury, viz., that Stice was incompetent to act as conductor of a wild train, and that the railroad company was remiss in its duty in selecting him for that service. While the railroad company, in relation to the plaintiff, was not bound to guarantee the absolute fitness of the conductor, it was its duty, nevertheless, to exercise reasonable and ordinary diligence, having respect for the exigencies of the particular service, to the end that it might ascertain the qualification and competency of the conductor, and whether or not he was fit to be intrusted with the responsible station to which he was assigned. *Railway Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. Rep. 932; *Patterson v. Ry. Accident Laws*, 813. In em-

ploying its subordinates, it was the duty of the company to exercise a degree of care commensurate with the responsibilities of the position in which they were to be placed, and with the consequences which might ensue from incompetence or unskillfulness on the part of those employed. In case peculiar fitness was required, or special qualifications demanded for the service to be performed, unless it was assured, by the previous like service of the conductor, of his fitness, the duty of the company required it to institute affirmative inquiries in order to ascertain his qualification in that regard. In case an employe proves to be incompetent for the duty assigned him, and ordinary care has not been used in his selection, or if he be retained after notice of his incompetency, the employer will be liable to a co-employe, whose injury results proximately from the lack of qualification of the fellow-servant, unless the person injured had notice of the incompetency, or had equal opportunities with the employer to obtain notice. *Pennsylvania Co. v. Roney*, 89 Ind. 453; *Railway Co. v. Stupak*, 108 Ind. 1, 8 N. E. Rep. 630; *Railway Co. v. Ruby*, 38 Ind. 294; *Chapman v. Railway Co.*, 55 N. Y. 579; *Mann v. President, etc.*, 91 N. Y. 495; *Baulec v. Railroad Co.*, 59 N. Y. 356.

It may be conceded that the evidence in the record fully establishes the fact that Stice had been for years a faithful, vigilant, and competent brakeman, and that he had fairly earned his recent promotion to the position of freight conductor by long and diligent service for the company, and the idea is not to be tolerated that the law will pronounce a person, who is shown to be qualified by years of efficient service, incompetent because of a single mistake or act of forgetfulness. The facts cannot, however, be disguised that a single act, with the circumstances surrounding it, where the consequences are so overwhelming as the bringing of two trains of cars, running at a high rate of speed into collision on the same railroad track, may tend very strongly to show the incompetency of the actor to perform the service to which he was assigned. It should be remembered that Stice had served the company as brakeman until quite recently before the unfortunate accident, and while his service as brakeman is not to be disregarded in determining his competency to act in the more responsible position of conductor, it does not follow without more that, because he was an efficient and competent brakeman, and fit for promotion, he was also competent to take charge of and run a wild train. These considerations lead us to conclude that we cannot disturb the verdict and judgment on the evidence. At the trial, the plaintiff, after stating how the accident occurred, and the manner and extent of his injury, was permitted to state, over objection, that as soon as he had extricated himself from the wreck produced by the collision, it occurred to him that a passenger train, designated as No. 5, would be due at that point in a short time, and remembering that as brakeman it was his duty to flag the approaching train so as to prevent it from running into the wreck, he proceeded, in the disabled and suffering condition in which he described himself, along the track in the direction from which the train was approaching, for the distance of about one-fourth of a mile, and flagged the train. He was permitted to state that in getting the flag he had fallen out of the caboose from weakness and loss of blood, and that he suffered great pain in going back to discharge the duty which he felt was incumbent upon him, and that after flagging the train, and entering one of the cars, he fell unconscious, in which condition he remained until the next day. It is objected that this testimony was improperly admitted, and that it could only have been introduced for the purpose of exciting the sympathy of the jury in the plaintiff's behalf, and to induce them to compensate him for what might be considered a praiseworthy act, instead of compensating him for the injuries resulting from the collision. The testimony was competent. It was admissible, not because the act of flagging the train, however meritorious that was, could be considered by the jury in fixing the amount of compensation, but because the plaintiff was entitled to recover not

only for the permanent injury sustained, but for the physical pain and mental suffering occasioned by the injury. He was entitled to communicate to the jury the character and extent of his injury, and the nature and intensity of the suffering resulting therefrom. If the plaintiff had voluntarily walked a quarter of a mile, or any other distance, immediately after receiving the injury, and, after enduring great suffering, had been taken up by a passing train, and had thereupon become unconscious from pain, exhaustion, and loss of blood, resulting from the injury, it cannot be doubted that the facts might have been stated. The facts following immediately in connection with the injury are none the less admissible, because the plaintiff was impelled to exert himself by a high sense of duty to those on the approaching train. As brakeman upon the wrecked train, it was the plaintiff's duty, as it appeared to him under the circumstances, to flag the oncoming passenger train, and prevent the destruction of human life, which might have followed had no warning been given. This was the highest conception of the duty of a brakeman. That the plaintiff had the courage and manliness to perform it, regardless of his own suffering, is to be spoken of in commendation and praise. Some other rulings of the court relating to the admission of evidence upon matters of minor importance are the subjects of criticism. We have examined the questions, and, without delaying to state them in detail, we have been unable to discover any error in that connection. So, in respect to certain alleged extra-professional statements, made by counsel in addressing the jury, of which the appellant complains, it is only necessary to say, if the legitimate privileges of debate were violated, the matter was set right by the court in such manner as that no harm could have resulted. The objections to the instructions given by the court upon the request of the plaintiff below are not of sufficient importance, nor are they presented in such a manner as to require that they be separately stated and commented upon. A careful examination fails to disclose any valid objection to those complained of. The appellant complains on account of the refusal of the court to give the following instructions: "It is the part of wisdom for railroad corporations to take men employed by them from inferior positions, and place them in higher ones, as they thus hold out the highest inducement to those in their employ to become skillful and faithful in the performance of their duties. The company has the means of ascertaining accurately the habits and character of its men, and to fill all vacancies with those who are known to be skillful and deserving." As a statement of the general policy proper to be observed by railroad corporations in respect to the advancement of their employes, the instruction asked was certainly, so far as we are advised, unobjectionable; but the instances are rare in which it is proper for a court to declare, as matter of law, whether or not a certain policy, as applied to the management of a particular business, is wise or unwise. These are questions of fact for the jury rather than questions of law for the court. *Unruh v. State*, 105 Ind. 117, 4 N. E. Rep. 453. Instructions should state legal principles applicable to the facts of the case, and not mere general rules of policy which may or may not be wise and proper in the conduct of a particular business. *Insurance Co. v. Buchanan*, 100 Ind. 63. The following instruction was also asked and refused: "Any evidence of the plaintiff tending to show a specific act of incompetence on the part of Stice, conductor, if there is any such evidence, is only admissible for the purpose of showing that the company had not exercised due care, prudence, and caution in the employment of or retaining in service of a careful, prudent, and skillful conductor, and to bring notice to the defendant of incompetence." While a specific act or mistake will not necessarily establish incompetence, as has already been remarked, a single act may be of such a character, and may involve such consequences as with the surrounding circumstances to indicate want of qualification on the part of the actor. Such acts are usually resorted to by witnesses as a basis for an

opinion as to the qualification of the person whose competency for a particular service is in question. In such cases the acts, with the accompanying evidence, are proper to be considered by the jury. *Railway Co. v. Ruby, supra*. The court also refused to charge that "specific acts of negligence are not competent to show that the conductor, Stice, was guilty of negligence in producing the collision, as charged in the complaint, if it were on a different occasion." While the foregoing is undoubtedly a correct statement of the law, when considered in connection with evidence to which it is applicable, the refusal of the court in the present case is not available to the appellant. The appellant's theory, and that of his witnesses, was that the collision was attributable not to the incompetence of Stice, but to his neglect. The appellant admitted the negligence of Stice, but insisted that he was not incompetent. There was no evidence to which the instruction was applicable.

We have discovered no error justifying a reversal. The judgment is affirmed, with costs.

(114 Ind. 458)

SPURGEON v. SMITHA *et al.*

(*Supreme Court of Indiana. May 10, 1888.*)

1. PRINCIPAL AND SURETY—RELEASE OF SURETY—CHANGE OF CONTRACT.

Where money is actually produced, and an unconditional offer made by the principal debtor to pay at once his note then due, and the creditor refuses to accept it, and asks the debtor to retain it, the sureties are discharged.¹

2. SAME.

When a creditor accepts part payment of a note, and reloaned the remainder to the principal debtor, the sureties are discharged.¹

3. PLEADING—FACTS AND CONCLUSIONS.

An averment that money was reloaned is the averment of a fact, and not of a mere conclusion, and evidence to establish this act of lending money a second time, or oftener, must not be pleaded.

Appeal from circuit court, Jefferson county; W. T. FRIEDLEY, Judge.

This was an action by appellant, George Spurgeon, against Granville T. Smitha and his sureties on a note executed to plaintiff.

C. E. Walker and John McGregor, for appellant. *Vanosdol & Francisco and Leland & Leland*, for appellees.

ELLIOTT, J. The appellant's complaint is founded on a promissory note executed by the appellees. The second paragraph of the answer of the appellees avers that they executed the note as the sureties of William R. Smitha; that the appellant knew the capacity in which they executed the note; that their principal paid him \$240; that the appellant thereupon reloaned the remainder of the sum due him to William R. Smitha, without the knowledge or consent of the appellees. The second paragraph of the answer avers the fact of suretyship and the appellant's knowledge, and also avers that after the note matured the principal tendered to the appellant the amount of the note; that he accepted \$240 in part payment of the note, and agreed with William R. Smitha that he should retain the remainder, paying interest thereon for one year. The third paragraph of the answer is substantially the same as the second. The fourth paragraph is a plea of payment. The contract made by the creditor and the principal, wherein the former, after accepting part payment of the debt, reloaned the latter the remainder of the money due, released the sureties. Sureties, as is well known, have a right to stand upon the letter of their contract, and if a creditor assumes to change the contract, he releases them from liability. According to the averments of the first paragraph of the answer the creditor, knowing that the appellees

¹ Sureties have a right to stand on the strict terms of their obligations. *Flow Co. v. Walmsley*, (Ind.) 11 N. E. Rep. 232, and note; *Bowers v. Cobb*, 81 Fed. Rep. 678; *Graeter v. De Wolf*, (Ind.) 18 N. E. Rep. 111; *Bank v. Gerke*, (Md.) 13 Atl. Rep. 358.

were sureties, made a radical change in the contract by reloading part of the money due him to the principal, and he has lost all claim upon the sureties. The averment that the money was reloaned to the principal debtor for one year is the averment of a fact and not of a mere conclusion. *Taylor v. Lohman*, 74 Ind. 418-422. The word "reloan" describes a fact,—the act of lending money a second time, or oftener. The evidence required to establish the fact is a very different thing from the fact itself, and not only need not be pleaded, but cannot be pleaded without a violation of the rules of pleading. The act of the creditor in refusing the money tendered him by the principal debtor released the sureties. The sureties had a right to rely upon the performance of the contract by the principal, and upon the acceptance of performance by the creditor. This much was implied in their contract, and as the creditor declined to accept performance when tendered him he departed from the contract, and released the sureties. *Post v. Losey*, 111 Ind. 75, 12 N. E. Rep. 121. A creditor impliedly undertakes that the debt may be paid at maturity, and if he refuses to accept the money due when tendered him, he breaks this implied undertaking, and loses his claim upon the sureties, for the act is injurious to them. A creditor who does any act inconsistent with the terms of the contract, or prejudicial to the interest of sureties, releases them from liability. 1 Story, Eq. Jur. §§ 324, 325. The refusal to accept the money tendered was, it is very clear, inconsistent with the terms of the contract, for the terms of the contract made it the duty of the creditor to accept payment when tendered him. It was also an act prejudicial to the interests of the sureties, for if the creditor had accepted payment, they would have been effectually discharged. The authorities fully sustain our conclusion, although the reasoning upon which some of the courts proceed is somewhat different from that pursued by us; their reasoning having for its basis the theory that the refusal of the creditor to receive the money when tendered is a fraud upon the sureties. *Sears v. Van Dusen*, 25 Mich. 351; *Donley v. Camp*, 22 Ala. 659; *White v. Association*, 63 Ala. 419; *M'Questen v. Noyes*, 6 N. H. 19; *Sailly v. Elmore*, 2 Paige, 497; *Joslyn v. Eastman*, 46 Vt. 258; *Johnson v. Ivey*, 4 Cold. 608; *Hayes v. Josephi*, 26 Cal. 535; *Curiac v. Packard*, 29 Cal. 194; *Brandt*, Sur. § 295; *Baylies*, Sur. 273; *Fell*, Guar. 520. The case of *Clark v. Sickler*, 64 N. Y. 231, is not supported by authority, and, as Mr. Brandt shows, is not sound in principle. In an early case in our own reports a doctrine very different from that asserted in *Clark v. Sickler* was declared. In the case decided by this court, (that of *Musgrave v. Glasgow*, 3 Ind. 31,) the court said: "If Musgrave had actually placed the money in the hands of Glasgow for the payment of the notes, and afterwards received it back from him as a new loan, under the circumstances detailed, it cannot be doubted that it would have been a payment, and Bond would have been discharged. And if the parties intended to waive the formality of passing the money from one to the other, and back again, but really to consider the transaction as a payment and new loan, we do not see any good reason why it might not be so regarded by the jury." It seems clear to us that where the creditor declines to receive the money offered him he elects to change the contract, for it is as much part of the contract that he should accept the money when tendered as that the debtor should pay it. Having elected to depart from the contract, he really made a new one, binding only the party consenting to it, and that was the principal debtor. In the case of *Wilson v. McVey*, 83 Ind. 108, cited by the appellant, this court referred to Mr. Brandt's work and approved the rule as stated by him, but held that the case was not within the rule. The court gave the jury this instruction: "It is a well-settled rule of law that sureties are not to be held beyond the precise terms of their contract. They have a right to stand upon the very terms of their contract, and if they do not assent to any variation of it, and a variation is made, it is fatal." There was no error in giving this instruction, for

it states the law correctly, and was applicable to the evidence. The evidence fairly supports the verdict, for it supplies ample grounds for the inference that the money was offered to the appellant by the principal debtor, and that the offer was declined except as to part of the debt, and the debtor requested to keep the remainder. One of the witnesses says that the appellant admitted that the principal debtor "had a big roll of money in his sleeve, and pulled it out and offered to pay the balance." Another witness testified that the appellant said to him that "William R. Smitha had paid him \$200, and interest, and told him that he had the rest of the money, and he [the appellant] said, 'I would rather he would keep the money and pay interest.' He [Spurgeon] said it was not a good tender, when he took out the money and offered it to him." It was said by another witness "that Spurgeon told William R. Smitha that he did not want all the money. He wanted to keep it at interest; that he [William] offered him the money, but he said he did not want it; that he would rather have the interest." It is true that the evidence does not show a strict tender, but it does show a waiver of a formal tender. The money was present, and was offered the appellant, and it was by his own affirmative act that a formal tender was prevented. If there had been no production of the money, and nothing more than a bare offer to pay the debt, it may be that the offer would not discharge the sureties. But here the offer was accompanied by the production of the money, and there was both the willingness and the ability to make immediate payment. We do not hold that a mere offer to pay will discharge the sureties, but we do hold that where the money is actually produced, and an unconditional offer is made to pay it at once to the creditor, and he refuses to accept it, and asks the debtor to retain it, the sureties are discharged. Where the money is actually produced, and the creditor does not object to the tender, but requests the debtor to retain the money, he cannot subsequently insist that the tender was insufficient. The act of the creditor makes the offer of the money produced by the debtor a sufficient tender, for he so characterizes it by his act. Judgment affirmed.

(114 Ind. 476)

REIBEL v. CINCINNATI, I., ST. L. & C. RY. CO.

(Supreme Court of Indiana. May 11, 1888.)

1. CARRIERS OF PASSENGERS—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.

A passenger injured by jumping from a moving train to prevent being carried past his place of destination, is guilty of contributory negligence.¹

2. SAME—PLEADING—PROXIMATE CAUSE.

A paragraph of a complaint admitting that plaintiff's intestate jumped from defendant's train, and alighted on the platform, but was run against by a fellow passenger and fell under the train, and was killed, is insufficient in failing to state affirmatively that defendant's failure to stop the train was the proximate cause of decedent's death.

Appeal from circuit court, Jennings county; JEPHTHA D. NEW, Judge.

Action by appellant, Frances Reibel, administratrix, against the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company for causing the death of her intestate.

J. S. Scobey, for appellant. *A. G. Smith, J. B. Brown, and R. Hill*, for appellee.

NIBLACK, J. Action by Frances Reibel, administratrix of the estate, as well as the mother of Frank Reibel, deceased, against the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company for causing the death of the decedent. The complaint was in two paragraphs. The first charged that on the 4th day of July, 1885, the said Frank Reibel, with five other persons, took

¹ On the subject of contributory negligence in jumping from moving trains, see *H. m. mingway v. Railway Co.*, (Wis.) 37 N. W. Rep. 804, and note.

passage on one of the defendant's trains at the city of Greensburg, in Decatur county, to the town of Sunman, in Ripley county, paying his fare to the conductor on the train, who informed him that the train would stop at Sunman; that as the train approached the town of Sunman the signal indicating that it would stop at that place was sounded; that thereupon the said Frank Reibel, and the other five persons with whom he was so traveling, went out upon the platform of the car in which they had been riding, preparatory to alighting from the train when it should stop; that the speed of the train was then so checked as to reduce it to the rate of six miles an hour, but that the train did not stop at Sunman, and, its speed being about to be increased, the said Frank Reibel and said five other persons jumped from the train onto the platform at Sunman station, they believing, and having good reason to believe, that they could safely so alight from the train without injury to themselves or to any one of them; that said other five persons did safely so alight, but that the said Frank Reibel, notwithstanding due care on his part, was caught in his clothing and dragged against and under the train, and was thereby instantly killed, being at the time about 21 years old; that they, the said Frank Reibel and said five other persons, without any want of care or negligence on their part, were compelled to get off the train as they did while it was in motion, and running, as stated, at a speed of six miles an hour; that the defendant wrongfully, unlawfully, willfully, and purposely failed, neglected, and refused to stop its train of cars at Sunman station as it had agreed to do, but, on the contrary, increased the speed of its train when it reached that place. The second averred substantially the same preliminary facts, and charged that as the train approached Sunman station its speed was reduced to about five miles an hour, and that at that rate it ran past that station without stopping; that, as the speed of the train was about to be increased, the said Frank Reibel, and five other persons referred to, stepped from the platform of the car on which they were standing onto the platform at said Sunman station, alighting thereon safely, but that, being then run against by one of the other persons who got off the train with him, he, the said Frank Reibel, was thrown down upon the last-named platform, and thence under the train which ran over him, whereby he was instantly killed; that the said Frank Reibel so alighted from the train under the advice, knowledge, and command of the defendant, exercising due care, and believing, as he had good cause to believe, that he could do so without injury to himself or to any one else. Demurrers were sustained to both paragraphs of the complaint, and the defendant had final judgment upon demurrer. We have, consequently, only to inquire whether either one of the paragraphs was sufficient upon demurrer.

The general rule is that passengers who are injured while attempting to get upon or off a railroad train while it is in motion cannot recover for their injuries. 2 Wood, Ry. Law, 1126; *Railroad Co. v. Hendricks*, 26 Ind. 228, 41 Ind. 48. To this general rule some exceptions have been recognized, one of which is where the passenger is either ordered or invited by the conductor or its agents to get on or off, notwithstanding the motion of the train. *Railroad Co. v. Carper*, 112 Ind. 26, 13 N. E. Rep. 122, 14 N. E. Rep. 352; *Railway Co. v. Pinchin*, 112 Ind. 592, 13 N. E. Rep. 677; *Railroad Co. v. Duncan*, 28 Ind. 441. But a passenger must not attempt either to get on or off a train while it is in motion, if it be obviously dangerous to make the attempt, although he may have been advised or even ordered to do so by the servants of the company. 2 Wood, Ry. Law, 1127. Such an attempt is at the peril of the passenger when he is a person of ordinary intelligence, and not acting under constraint. While it is the plain duty of a railroad company to stop its train at the place of a passenger's destination, long enough to permit him to get off with safety, the fact that a train is about to pass such place of destination without stopping does not justify the passenger in incurring any serious risk by jumping from the train. In such a contingency the passenger's remedy is against the company

for carrying him past his place of destination. It was not expressly charged in the first paragraph of the complaint that Reibel, the decedent, was required by the railroad company to get off the train at Sunman station, as he did. We construe the averment that he was so compelled to quit the train at that place to mean that he had to jump from it to prevent being carried past his place of destination. In the light of this construction, he was guilty of contributory negligence in jumping from the train under the circumstances, as they are described in the said first paragraph of the complaint, which was, in consequence, rightly held to be insufficient upon demurrer. The second paragraph of the complaint admitted that the decedent alighted safely upon the platform of the station at Sunman, but charged that one of his fellow-passengers there-afterwards ran against him and threw him down upon the platform, and thence under the train, where he was killed. How this fellow-passenger happened to run against the decedent was not, as has been said, stated. This may have been the voluntary act of the fellow-passenger. Nothing, at all events, was averred to the contrary. When the decedent reached the platform of the station at Sunman safely, the defendant presumed owed him no further duty as a passenger. If the defendant was at fault in any matter that thereafter occurred, it should have been affirmatively alleged. In other words, it was not affirmatively shown that the defendant's failure to stop its train at Sunman was the proximate cause of the decedent's death. From the facts stated, the inference rather is that his death resulted from some fault or accident on the part of a fellow-passenger after he became disconnected with the train. We need not, therefore, inquire whether, as an abstract question, the decedent was, upon the facts charged in the second paragraph of the complaint, guilty of contributory negligence in jumping from the train at Sunman. 2 Wood, Ry. Law, 1133, 1139, 1144, 1150, 1154; Whart. Neg. § 369 *et seq.* The judgment is affirmed, with costs.

(114 Ind. 447)

EVANSVILLE & T. H. R. Co. v. MOSIER.¹

(*Supreme Court of Indiana.* May 11, 1888.)

1. RAILROAD COMPANIES—STOCK-KILLING—FENCES—GATES AT PRIVATE CROSSINGS.

A railroad company, which has erected gates in its line fence, for the convenience of pasture-land owners in using a private crossing maintained for their benefit, is not bound to keep the gates in repair, and is not liable to the owners for loss of cattle in consequence of the want of repairs.²

2. SAME.

The fact that a railroad company long since erected gates in its line fence, and constructed a private crossing, which were used exclusively by the owners of the contiguous land, does not imply a contract on the part of the company to keep such gates in repair, or constantly closed, for the benefit of the land-owners.

Appeal from circuit court, Knox county; N. F. MALOTT, Judge.

Iglehart & Taylor, for appellant. *Cobb & Cobb*, for appellee.

MITCHELL, C. J. Mosier recovered judgment against the appellant railroad company for the value of two colts killed by the company's cars, on its track, upon which the animals entered on the morning of the 22d day of August, 1883. The evidence shows without dispute that the animals escaped from the inclosure in which they were pasturing through a gate at a private crossing which led from a public highway over the company's right of way and track to some inclosed pasture lands. The inclosure embraced a tract of land comprising 135 acres, which, although owned in separate parcels by the plaintiff and four others, was surrounded by a common fence, and was used as a common pasture by the several owners. There were two private cross-

¹Second appeal. For opinion in first appeal, see 1 N. E. Rep. 197.

²See *Pennsylvania Co. v. Spaulding*, (Ind.) 13 N. E. Rep. 268, and note.

ings leading over the company's right of way to the pasture; one at the north, and the other at the south end of the tract. The plaintiff habitually used the south gate, but on the occasion in question his animals passed out through the north gate onto the railway track. The company erected and maintained the gates at the crossings, and when the gates were closed, and properly fastened, the road was securely fenced. The fastening on the north gate had become so far defective, that unless adjusted with care by persons passing through, the gate was liable to be blown open, or it might be opened by animals coming in contact with it. This was known to at least one of the land-owners, but it does not appear to have been known to the company or its agents, the crossings having been used, so far as appears, exclusively by the owners of the pasture land. There was no evidence tending to show the agreement under which the gates had been erected, nor did it appear that the company had agreed with the land-owners to keep the gates shut, or maintain them in repair. The section foreman, whose duty it was to pass over and keep that portion of the track and the adjacent fences in repair, observed the condition of the gates the evening before the animals were injured. He saw that the north gate was slightly "sagged," as it had been for some time before, but it was then closed, and apparently in a safe condition.

Relevant to the evidence as thus summarized the court charged the jury substantially that if they found from the evidence that the gate through which the animals escaped was kept up as a part of the fence, for the convenience and benefit of the several land-owners, or some of them, in using a private crossing over the railroad from the pasture to the public highway, and if they should further find that, with reasonable care in securing the fastening of the gate when shutting it, the gate was sufficient to prevent the escape of stock, and was usually kept closed, then their verdict should be for the defendant. In this instruction the court presented to the jury the theory or conditions upon which they might exonerate the defendant from liability. They were instructed, in effect, that although the gate may have been erected for the convenience and benefit of the land-owners, yet, under the law, the exoneration of the railroad company depended upon whether or not it had provided the gate with such fastenings as could, with reasonable care, be adjusted so as to make it secure, or whether or not the company usually kept the gate closed. The charge was capable of no other construction, and must have been so understood by the jury. This statement of the law was inaccurate, and it must have misled the jury to the injury of the appellant. Upon the former appeal of this case, 101 Ind. 597, 1 N. E. Rep. 197, the rule governing cases of this class was stated explicitly to the effect that "the duty to fence is not owing to one who has undertaken to maintain the fence, nor to one for whose benefit the private crossing is maintained." Persons, for whose convenience railroad companies erect or maintain gates at private crossings, assume the risk of all increased danger to their property which may result from having gates instead of fences. *Railway Co. v. Williamson*, 104 Ind. 154, 3 N. E. Rep. 814; *Bond v. Railroad Co.*, 100 Ind. 301. The land-owner, for whose benefit a private crossing is maintained, and who is supposed to be fully cognizant of the condition of the gates, and of the uses to which it is put, must therefore, as between himself and the company, see to it that the gate is in proper condition, and that it is kept closed. He has no right to expect that the railroad company, unless it has expressly contracted to do so, will erect gates for his exclusive benefit, and also keep watch over them, and keep them closed. *Railway Co. v. Goodbar*, 102 Ind. 596, 2 N. E. Rep. 337, and 3 N. E. Rep. 162; *Railroad Co. v. Woodward*, 112 Ind. 117, 13 N. E. Rep. 260. In respect to the appellant's insistence that the evidence does not sustain the verdict, it is sufficient to say, it has not been pointed out to us, nor are we able to discover wherein the evidence is in any manner substantially different from what it was when the case was appealed before. We were constrained to re-

verse the judgment then for want of sufficient evidence. We should necessarily arrive at the same conclusion again, were we not compelled to reverse for the error in giving the instruction above mentioned. It is contended that because the railroad company erected the gates and constructed the crossing some 15 years ago, it impliedly came under a contract to maintain the gates in repair and closed as if they had not been erected for the appellee's convenience. We do not assent to this view. The evidence shows nothing more than that the crossings and gates were constructed by the railroad company, and that they were used exclusively by the owners of the land. It cannot be implied that the railroad company came under an obligation to keep the gates closed. The only answer filed by the railroad company in the court below was the general denial. The appellee now contends that the defense that the animals entered upon the railroad track through a gate at a private crossing, was a special defense, and that the evidence in relation to that matter was not admissible under the general denial. We are asked to determine whether, under the issues, the evidence was properly admitted. It is sufficient to say, in respect to this matter, that although the appellee objected to the evidence, it was admitted, and there being no cross-error assigned, no question in relation thereto is presented by the record.

The judgment is reversed, with costs, with directions to the court below to sustain the appellant's motion for a new trial.

(115 Ind. 112)

JOHNSON v. JOHNSON *et al.*

(*Supreme Court of Indiana.* May 11, 1888.)

JURY—TRIAL BY—EQUITABLE ISSUE.

Where, in an action on a note and mortgage, defendant's wife filed a counter-claim, alleging that she executed the note and mortgage as surety for her husband, and had acquired the lands by gift from her father, and praying a cancellation of the mortgage, the issue joined on such counter-claim is equitable, and a jury should be denied.

Appeal from circuit court, Grant county; W. H. CARROLL, Judge.

Action by James Johnson against Berry Johnson and others on a note and mortgage. A cross-complaint was filed by Charlotte Johnson, and on the issue therein involved the court refused plaintiff's request for a jury on the ground that the issue was equitable. Plaintiff appeals.

George W. Harvey, for appellant. *John T. Strange* and *Rufus W. Bailey*, for appellees.

ELLIOTT, J. The appellant instituted this suit upon a note and mortgage, and Charlotte Johnson filed a cross-complaint or counter-claim, wherein she alleged that she was the wife of Berry Johnson; that the note and mortgage were executed by her as surety for her husband, who had borrowed the money of the mortgagee, and that she acquired the land mortgaged by gift from her father. The counter-claim prayed a cancellation of the mortgage. After issue joined on the counter-claim the appellant dismissed his complaint. There is no bill of exceptions presenting the motion or affidavit for a change of venue, and consequently no question is before us upon the ruling denying a change of venue. The issue joined on the counter-claim was one of equitable cognizance, and the court did not err in denying the appellant's request for a trial by jury. Judgment affirmed.

(114 Ind. 506)

HOLSCLAW v. STATE.*(Supreme Court of Indiana. May 11, 1888.)***CRIMINAL LAW—APPEAL AFTER PLEA OF GUILTY.**

Rev. St. Ind. 1881, § 1643, providing that "any prisoner against whom any punishment is adjudged may appeal * * * within ten days after trial" does not authorize an appeal from a justice's judgment entered, without trial, upon defendant's plea of guilty of the offense charged, (selling liquor to minors,) after he has procured replevin-bail for the payment of the judgment.

Appeal from circuit court, Greene county; **GEORGE W. BUFF**, Judge.

Prosecution, before a justice of the peace, of **Barney Holsclaw** for selling liquor to minors. Defendant pleaded guilty, and appeals from an order dismissing his appeal to the circuit court.

Moffett & Davis, for appellant. *W. C. Hultz, W. L. Slinkard*, and *The Attorney General*, for appellee.

Howk, J. On the 16th day of October, 1886, this prosecution was commenced before a justice of the peace of Greene county against the appellant upon an affidavit, wherein it was charged that on or about the 15th day of October, 1886, at said county, said appellant "did then and there unlawfully sell to Jacob R. Blaker and Thomas Terrell, each of whom was then and there a person under the age of twenty-one years, one-half pint of whisky, at and for the price of twenty-five cents, contrary to the form of the statute," etc. Afterwards, on the same day, appellant appeared in person and by counsel before such justice of the peace, and, having been arraigned on said affidavit, for plea thereto said that he was guilty as charged therein, and thereupon it was adjudged by such justice that appellant make his fine to the state in the sum of \$20, and pay the costs of prosecution taxed, etc., and that he stand committed, etc. And afterwards, on the same day, he procured replevin bail for the payment of such fine and costs. On the 23d day of October, 1886, appellant prayed an appeal from the justice's judgment to the court below, which was granted. In that court, at its November term, 1887, the motion of the state by its prosecuting attorney to dismiss the appeal herein was sustained by the court, and such appeal was accordingly dismissed. From such dismissal of his appeal from the justice by the court this appeal is now here prosecuted by defendant below, and the only error whereof he complains is the sustaining the motion of the state to dismiss his appeal from the judgment of the justice to the court below.

It is manifest that the question for our decision, presented by this appeal, may be thus stated: Is there any law of this state which authorized his attempted appeal from the judgment of the justice, entered upon his plea that he was guilty of the offense charged, and after he had procured replevin-bail for the payment of such judgment? We are of opinion that this question must be answered in the negative. It is certain that defendant had no right of appeal from such judgment of the justice to the circuit court of the county, unless such right of appeal was expressly given by some statutory provision. The only statute of this state providing for an appeal from the judgment of a justice in criminal cases is section 1643, Rev. St. 1881, in force since September 19, 1881, which reads as follows: "Any prisoner, against whom any punishment is adjudged may appeal to the criminal court, and if there be none, then to the circuit court of the county, within ten days after trial, on entering into recognizance for his appearance at the next term of such court, as in other cases, and such appeal shall stay all proceedings." Did this section of the statute authorize defendant's appeal from the justice's judgment against him to the circuit court of the county? The statute does not in terms provide for an appeal from the judgment of a justice entered, without trial upon the defendant's plea of guilty. If it had been the legislative will and intent to pro-

vide that appeals would lie from all justices' judgments, in criminal cases, to the proper criminal or circuit courts, we may well suppose that the statute would have provided that such appeals might be taken within 10 days after judgment, instead of "after trial," as the statute reads. The statute does not contemplate, and makes no provision for an appeal by the defendant from a judgment, entered upon his plea of guilty, without trial, by a justice of the peace in a criminal cause. There is nothing in the record of this cause to indicate that defendant's plea of guilty before the justice was procured by fraud, imposition, or evil practice. On the contrary, it may reasonably be presumed from the record that his plea of guilty was entered advisedly by defendant, as it is shown that he was accompanied by his attorney when he was arraigned before the justice and entered his plea of guilty. Our conclusion is that there is no law of this state which authorized the defendant's attempted appeal from the justice's judgment entered upon defendant's plea that he was guilty of the offense charged herein, after he had procured replevin bail for the payment of such judgment.

The court below did not err, therefore, in sustaining the state's motion to dismiss such attempted appeal. The judgment is affirmed, with costs.

(114 Ind. 508)

HETH TOWNSHIP OF HARRISON COUNTY *et al.* v. LEWIS *et al.*

(*Supreme Court of Indiana. May 12, 1888.*)

OFFICE AND OFFICER—COMPENSATION—DEFAULT.

When a township trustee has unlawfully appropriated funds of the township, largely in excess of his services to it, neither such trustee while in default, nor his assignees, can enforce a claim for his services against the township.

Appeal from circuit court, Harrison county; SAMUEL RAMSEY, Judge.

Action by Jacob S. Lewis and others, assignees of Lewis W. Bowling, assignee of B. S. Thornsburg, against Heth Township of Harrison County and others, for services rendered such township by said Thornsburg. Judgment for plaintiffs. Defendants appeal.

Douglass & Stockslager, for appellants. *W. N. & R. J. Tracewell*, for appellees.

ELLIOTT, J. This action was instituted by the appellees upon an allowance made by the board of commissioners of Harrison county in favor of Benjamin S. Thornsburg, trustee of Heth township, for services for the year ending October 16, 1876. A certified copy of the order was issued by the auditor to Thornsburg, and he assigned it to Lewis W. Bowling, as trustee for the sureties on his official bond. Bowling subsequently assigned the certified order to the appellees. The order making the allowance contains this clause: "It is therefore ordered by the board that B. S. Thornsburg be allowed said sum of one hundred and seventy-two and 50-100 dollars out of the proper funds of said township." The answer of the appellant alleges that the order was assigned to Bowling as trustee for the sureties on Thornsburg's official bond to indemnify them against any loss they might sustain because of his default in failing to pay over money due the township; that an action was brought on the bond, and was defeated by the sureties who filed a plea of *non est factum*; and that it was on the issue tendered by that plea that they were successful; that judgment was recovered against Thornsburg for \$1,800; that he then was and still is insolvent; that the judgment is in force, and unsatisfied. The appellees replied to this answer that, prior to the assignment of the order to Bowling, as trustee, they had signed the bond of Thornsburg; that an action had been instituted thereon which resulted as stated in the answer; that they expended in the defense of the action the sum of \$200, and devoted 10 days' time to the work of preparing for trial.

The answer is good and the reply is bad. The township was not liable for

v.17N.E.no.1—8

services to its trustee, who had wrongfully appropriated its funds, for the allowance by the board of commissioners does not vest in the defaulting officer a right to compel the township to pay him for services while he was the debtor of the township in a sum largely in excess of the value of those services. The order of allowance is not a commercial instrument, and is not protected as commercial paper in the hands of a *bona fide* holder so that it is subject to the same defenses in the hands of the appellees as it would have been in the hands of the defaulting trustee. It is perfectly clear that a trustee, who had unlawfully appropriated \$1,800 of the money of the township, cannot enforce a claim for services, and the rights of his assignees cannot be any better than his. The question seems to us too plain for discussion, for we can conceive no principle of law or justice which will justify a defaulting officer or his assignees in pressing a claim for services while a judgment for the money unlawfully appropriated by the officer remains in force. We have not deemed it necessary to discuss the minor questions presented by the appellant's counsel, for the merits of the case are so decisively with their client that there is no necessity for passing upon questions not affecting the merits of the controversy. Judgment reversed, with instructions to sustain the demurrer to the reply, and to proceed in accordance with this opinion.

(115 Ind. 113)

SILVER v. PARR.

(Supreme Court of Indiana. May 12, 1888.)

1. APPEAL—REVIEW—PRESUMPTION.

Where the evidence is not in the record, the appellate court will presume that instructions asked for and refused in the court below were properly refused as not warranted by the evidence.

2. SAME—RECORDS—INSTRUCTIONS NOT SIGNED BY JUDGE.

Rev. St. Ind. § 533, cl. 6, providing that all instructions given by the court must be signed by the judge, and filed as part of the record, is mandatory, and where instructions are not signed in accordance with the provisions of such statute they are no part of the record, and will not be considered by the appellate court.

Appeal from circuit court, Hamilton county; E. B. GOODYKOONTZ, Judge. Action by Harley Silver against John N. Parr for damages for malpractice. Judgment on verdict for defendant. Plaintiff appeals. *Stafford & Boyd*, for appellant. *Kane & Davis*, for appellee.

HOWK, J. This was a suit by appellant, Silver, against appellee, Parr, as defendant, in a complaint of three paragraphs. The object of the suit was to recover damages, which plaintiff claimed he had sustained by reason of the carelessness and negligent treatment he had received from defendant, who had undertaken, as a practicing surgeon, to set the broken bones of plaintiff's leg, and to attend to and cure and heal the same, for a fee and reward, etc. Defendant answered by a general denial of plaintiff's complaint. The issues joined were tried by a jury, and a verdict was returned for the defendant, and, over plaintiff's motion for a new trial, the court adjudged that the defendant recover of the plaintiff his costs herein, taxed at, etc. From this judgment plaintiff has appealed, and has here assigned as error the overruling of his motion for a new trial.

The evidence is not in the record. The only grounds upon which plaintiff's counsel rely for the reversal of the judgment below, are (1) that the court erred in giving the jury certain instructions of its own motion; and (2) error of the court in refusing to give the jury certain other instructions at the plaintiff's request. So far as the instructions asked for by plaintiff, and refused by the court, are concerned, it is settled by our decisions that where, as in this case, the evidence is not in the record, it will be presumed here, in support of the ruling of the court below, that such instructions were properly refused, because they were not applicable to the case made by the evidence.

Freeze v. De Puy, 57 Ind. 188; *Powers v. State*, 87 Ind. 144; *Railway Co. v. Harrigan*, 94 Ind. 245; *Railroad Co. v. Rowan*, 104 Ind. 88, 3 N. E. Rep. 627. The point is made by defendant's counsel, and seems to be well made, that none of the instructions, either those given by the court of its own motion or those requested by plaintiff and refused by the court, are properly in the record, because, counsel say none of such instructions were signed by the judge of the trial court. In the sixth clause of section 533, Rev. St. 1881, it is provided, among other things, as follows, to-wit: "All instructions given by the court must be signed by the judge, and filed, together with those asked for by the parties, as part of the record." This language of the statute is mandatory, and has been so construed by this court. *Childrees v. Callender*, 108 Ind. 394, 9 N. E. Rep. 292. It has been held also that when it appears, as in the case we are now considering, that the instructions are not signed by the judge of the trial court, they do not become a part of the record. *Railroad Co. v. Hedges*, 105 Ind. 398, 7 N. E. Rep. 801. We must hold, therefore, in the cause now before us, that the question relied upon by plaintiff's counsel for the reversal of the judgment below not properly presented by the record for our consideration and decision. We have found no error in the record which requires the reversal of the judgment. The judgment is affirmed, with costs.

(114 Ind. 501)

BERNHAMER v. MILLER.

(Supreme Court of Indiana. May 12, 1883.)

1. GUARDIAN AND WARD—REMOVAL OF GUARDIAN—DISCRETION OF COURT.

Rev. St. Ind. 1881, § 2524, providing that guardians may be removed for any cause which, in the opinion of the courts of probate jurisdiction, or the judges thereof, in vacation, renders it for the interest of the ward that the guardian shall be removed, gives a large discretion to such courts, and their actions in such case will not be disturbed unless this discretion is abused.

2. SAME—Costs.

A guardian, upon his removal, is personally liable for the costs of the proceeding for such removal.

Appeal from circuit court, Marion county; ALEXANDER C. AYRES, Judge.

This was a petition by Anna M. Miller for the removal of the appellant, William F. A. Bernhamer, guardian of his minor children, and for an accounting by him.

Bernhamer & Walls, for appellant. *Duncan, Smith & Wilson*, for appellee.

ZOLLARS, J. Upon a petition by appellee, and after a hearing of the cause, the court below removed appellant from the guardianship of the persons and property of Charles F., Elizabeth, Ida, and Edward A. Miller, minor children, ordered him to make a final report and accounting within 30 days, and to turn over to his successor, who might thereafter be appointed, the custody of the children and their money in his hands, and adjudged against him the costs of the proceeding. The evidence is not in the record. The only questions made here are that the petition is insufficient and the judgment erroneous. The sufficiency of the petition was called in question below by a demurrer, which, of course, admitted as true all that is therein properly stated. It would not be profitable, we think, nor beneficial to the parties concerned, to set the petition out in full, nor in substance. We have examined it carefully, and the argument of counsel in relation thereto. After such an examination we are satisfied that sufficient causes are stated in the petition to justify the court in removing the guardian. It may be that the charges in the petition were neither proven nor provable, but, as we have stated, the evidence is not in the record, and the demurrer admits as true all that is properly charged. After naming certain causes for which a guardian may be removed, the statute provides, "or any other cause which, in the opinion of such court, or the judge thereof in

vacation, renders it for the interest of the ward that such guardian shall be removed." Rev. St. 1881, § 2524. The courts of this state, having probate jurisdiction, have no more important duty to perform than to guard the property, and the education and training, of minor children who are left without the care of their natural guardians. A large discretion is left with such courts in the appointment, control of, and removal of guardians. This court will not disturb their actions in those regards unless there has been an abuse of the discretion. *Nettleton v. State*, 13 Ind. 159. The court below clearly did not err in adjudging against appellant the costs in the proceeding for his removal. They could not have been taxed against the petitioner, who was successful in the litigation, and as clearly they should not have been made a charge upon the estates of the wards. Some other features of the judgment are objected to in argument; but we need not extend this opinion to examine the objections thus urged, as no such objections were so made to the judgment below as brings it before this court for review in those particulars. Judgment affirmed, with costs.

(114 Ind. 534)

SECOND NAT. BANK OF RICHMOND v. TOWNSEND.

(*Supreme Court of Indiana*. May 15, 1888.)

JUDGMENT—EFFECT—MERGER OF DEBT—ASSIGNMENT FOR BENEFIT OF CREDITORS.

The holder of a note, who, after the maker's voluntary assignment, obtains judgment on it, is not debarred from filing a claim for the amount of the judgment against the estate, since the debt is not so merged in the judgment as to make a new debt lacking the old one's incidental right to share in the assets.

Appeal from circuit court, Wayne county; D. W. COMSTOCK, Judge.

Action by the Second National Bank of Richmond, Ind., against John G. Townsend, assignee of Joseph W. Moore. Judgment was rendered for defendant, and plaintiff appeals.

ELLIOTT, J. Joseph W. Moore assigned all of his property for the benefit of his creditors. The assignment was made under the statute regulating voluntary assignments, and the deed was duly recorded. At the time the deed was executed and recorded the appellant held two notes executed by Moore, and subsequently obtained judgment upon them. After judgment was recovered, the appellant filed a complaint against the assignee, asking an allowance of the claim evidenced by the judgment, and on the trial offered in evidence the transcript of the judgment; but it was excluded, as were the notes on which the judgment was founded. The appellee's counsel, in a very able and ingenious brief, defend the ruling of the trial court upon the ground that the judgment merged the debt, and created a new one not in existence when the deed of assignment was executed and recorded. In support of their theory counsel refer to the case of *Bowen v. Eichel*, 91 Ind. 22, and the cases there collected. That case decides that a defendant, against whom an action is pending, cannot avail himself of a discharge in bankruptcy unless he pleads it in the action prosecuted against him. The decision in the case is supported by the decisions of the supreme court of the United States, and is, as we believe, a correct declaration of the law. *Dimock v. Copper Co.*, 117 U. S. 559, 6 Sup. Ct. Rep. 855, and cases cited. While we adhere with confidence to the decision in *Bowen v. Eichel*, we cannot apply the doctrine it asserts to such a case as that now before us. In that case the question was whether a defendant, who had suffered a judgment to be rendered against him, could subsequently avail himself of a defense that he might successfully have made to a pending action; while here the question is, does the creditor, by taking judgment on his claim, lose the right to participate in the benefit of a fund created by the assignment of the debtor? It is obvious that there is a wide and plain difference between the two cases. Here the question is not between the creditor and the debtor, nor is it as to the right of the debtor to defend against

the judgment; for the only question here is as to the right of the creditor to share in the distribution of the trust funds in the hands of his debtor's assignee. We have no doubt that the judgment merged the notes as a cause of action. This is decided in *Gould v. Hayden*, 63 Ind. 443, and that case has been often approved. But the merger of a claim as a cause of action does not deprive the creditor of his right to resort to a fund held by a trustee, or to make available a security held for the debt. Thus, for example, a judgment will merge the mortgage as a cause of action, but will not destroy the lien. *Bank v. Brown*, 112 Ind. 474, 14 N. E. Rep. 358; *Curtis v. Gooding*, 99 Ind. 45; *Pence v. Armstrong*, 95 Ind. 191; *Manns v. Bank*, 73 Ind. 243; *Gas-Light Co. v. State*, Id. 219; *Teal v. Hinchman*, 69 Ind. 379. Property fraudulently conveyed may be subjected to the creditor's claim, and the grantee charged as a trustee, although the original debt is transformed into a judgment, and the judgment is rendered after the conveyance. *Stout v. Stout*, 77 Ind. 587; *Bump, Fraud. Conv.* 498. These familiar illustrations prove that while a judgment so merges the claim as a cause of action as that a second action cannot be maintained upon it, and so concludes the defendant that he cannot interpose a defense existing against the original claim, still the judgment does not so charge the debt as to deprive the creditor of the collateral rights conferred upon him by the original debt. But there are authorities more directly in point. In *Rawley v. Hooker*, 21 Ind. 144, it was held that a judgment did not so merge the contract as to prevent a reference to it for the purpose of determining the rights of the parties under it. In that case WORDEN, J., said: "To be sure, the notes were merged in the judgment, but it does not seem to follow, necessarily, that the parties could not go behind it in order to determine their rights in regard to the mode of collection as to appraisement." The question here presented was discussed in *Donald v. Kell*, 111 Ind. 1, 11 N. E. Rep. 782, and it was said: "It has long been the law that whenever justice requires it a judgment will be adjudged to be an old debt in a new form, and will not be regarded as creating a new debt." The same doctrine was declared in *Madison Tp. v. Dunkle*, 16 N. E. Rep. 593, (March 31, 1888,) and many cases were cited in its support. Equity always refuses to permit a merger where it will work injustice. In this instance this equitable principle should be applied. The act of the creditor in reducing his claim to judgment neither prejudiced the rights of any other creditor, nor interfered with the administration of the trust. The debt remains. The evidence is, it is true, changed into a new and higher form, but the appellant is still creditor. We cannot conceive any solid ground upon which it can be held that a creditor by putting his claim in judgment, loses his right to share in the trust funds created by the debtor's assignment. If the creditor should file his claim one day, and take judgment the next, he certainly would not lose his right to participate in the distribution of the trust funds, and we cannot perceive any just reason for holding that the fact that the claim is reduced to judgment before it is filed with the assignee deprives him of that right. Equity looks through form to substance, and the substance to which it will here look is that the appellant was a creditor when the assignment was made, and continued a creditor, although the form of the evidence of his debt was changed. Even if we should accept appellee's theory that there was a technical merger, it would be a sacrifice of substance to form to permit that merger to cut off the appellant's right to resort to the trust fund created for the benefit of creditors. But we do not accept that theory. On the contrary, we hold that, although the notes were merged as a cause of action, incidental right, such as the right to share in the trust funds in the hands of the assignee, was not ever technically merged in the judgment. Incidental rights and equities of that nature were not litigated, and were not concluded by the judgment, and there can therefore be no merger. Judgment reversed.

(114 Ind. 525)

CLEVELAND, C., C. & I. RY. CO. v. WYNANT.

(Supreme Court of Indiana. May 15, 1888.)

1. RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE—ACCIDENTS AT CROSSINGS.

In an action for damages for injuries caused by horses taking fright at a box car standing on a crossing, evidence that other horses had taken fright from the same cause is irrelevant.

2. SAME.

A railway company is not liable for damages for personal injuries caused by horses taking fright at a box car, which was not encroaching on the road, nor is it liable if the car was left by the company at a point off the highway, but was afterwards moved upon it by persons for whom the company was not responsible, unless it allow the car to remain on the highway an unreasonable time.

Appeal from circuit court, Madison county; D. Moss, Judge.

H. H. Poppleton and Robinson & Lovett, for appellants. *H. D. Thompson*, for appellee.

MITCHELL, C. J. Action by Harriet Wynant against the appellant railway company to recover damages for injuries alleged to have been suffered by the plaintiff from the overturning of her carriage, the horses having taken fright at a box car, which, it is charged, the company unlawfully and negligently permitted to be and remain partially in and upon a public highway over which the plaintiff was traveling. The case was considered once before by this court, and reversed because the evidence did not sustain the verdict of the jury. 100 Ind. 160. A second trial has been had, with the result that judgment has again been rendered for the plaintiff. The case is before us a second time upon the same pleadings, and, according to the insistence of appellant's counsel, upon substantially the same evidence. Waiving any observations concerning the sufficiency of the evidence, or whether it is in any essential respect variant from what it was before, it is enough to say the judgment must be reversed for errors hereinafter pointed out. To sustain her case, the plaintiff gave evidence tending to show that certain empty, and, for the time being, unused, freight cars, which had been stored on a short railway track which diverged from the company's main line to a gravel pit, had been permitted to encroach from five to eight feet on either side of a public highway, over which the above-mentioned track lay, leaving a space of from 15 to 25 feet in width of the traveled way between the projecting cars. There was evidence tending to show that the plaintiff and her husband were passing over the highway in a vehicle drawn by two gentle horses. When about to go upon the railway track, between the cars, without having previously shown any sign of fear, the horses suddenly took fright, and became unmanageable. Whether they were frightened at an empty car, or at noise which proceeded from it, is immaterial to the questions to be decided. There was some evidence tending to show that a box car had encroached upon the road for several days prior to the accident. The railway company introduced evidence tending to show that the car had been let down on the highway on the day of the accident by the unauthorized interference of some boys with the brakes. The car was an ordinary empty box car, such as is in common use on all railroads. At the trial the plaintiff produced witnesses who testified that they had passed over the highway in question several days prior to that on which the accident happened, and after describing the situation of the cars as they then observed them, and the manner in which they then projected into the highway, they were permitted to testify, over objection, that their horses took fright or "shied" at the cars. Nothing appeared concerning the disposition of the horses driven by the several witnesses in respect to whether or not they were ordinarily gentle and well disposed, or whether they were under careful guidance, and so the evidence might have been excluded on that account. But, if these objections had been obviated, we can discover

no sound principle which justified the admission of the evidence. The principal facts in dispute under the issues were, whether or not the railway company had unlawfully or negligently or unreasonably permitted its empty car to remain placed upon a public highway, thereby causing the horses attached to the carriage in which the plaintiff was seated to take fright and run away, resulting in an injury for which she was in no way blameable. The evidence admitted pertained to facts altogether aside from those in dispute, and in no way tended to raise a legal presumption as to the disputed facts. It could have had no other effect than to mislead the jury, and distract their attention from the real issues in the case. There is no fixed rule governing the frightening of horses. An object that may render one unmanageable from fear, another may pass without notice. It does not follow, because one or more may have taken fright at a given object in a highway, that the object was necessarily frightful to all gentle horses, nor does proof that a number of horses took fright at an object raise a legal presumption that another horse, on a different occasion, became frightened at the same object. *Piollit v. Simmers*, 106 Pa. St. 95; *Railway Co. v. Glasscott*, 4 Colo. 270; *Newsom v. Railroad*, 62 Ga. 339; *Durbrow v. McDonald*, 5 Bosw. 130; *Wentworth v. Smith*, 44 N. H. 419. The railway company was not bound to anticipate and make preparation to meet testimony of the character of that in question, nor would it have been heard to prove in rebuttal that other gentle horses had passed between the cars without taking fright, or that the horses which took fright were vicious and unsafe under ordinary circumstances. *Bauer v. City of Indianapolis*, 99 Ind. 56; *Kidder v. Dunstable*, 11 Gray, 342; *Temperance Hall v. Giles*, 33 N. J. Law, 260. Thus, in the case first above cited, it was held, in a suit against a city for an injury received in consequence of an obstruction upon a sidewalk, that it was not proper to admit evidence to show that others had passed over the same obstruction without injury. Where it becomes necessary to affect those charged with the duty of keeping highways, bridges, or other structures in a safe condition, or of keeping only competent persons in their service, with notice of defects or unfitness, or where the question is as to the safety or availability of a machine or contrivance designed for a particular purpose, or for practical use, evidence is admissible to show how the thing served when put to the use for which it was designed, in the one case, or that occurrences of a character to make the defect or incompetency notorious had taken place, in the other. *Railway Co. v. Ruby*, 38 Ind. 294; *Railroad Co. v. Newell*, 104 Ind. 264, 3 N. E. Rep. 836; *City of Delphi v. Lowery*, 74 Ind. 520; *City of Fort Wayne v. Coombs*, 107 Ind. 75, 7 N. E. Rep. 743; *Railway Co. v. Wright*, 16 N. E. Rep. 145, (present term.)

The present case does not come within the rule above stated. None of the occurrences described were of such a character as to convey notice to the railway company, or to be known to any others than the witnesses themselves. Evidence of other similar occurrences on other occasions is not admissible for the purpose of raising a presumption that the particular accident in question happened, or that the place was defective and dangerous, or that the situation was of such a character that the occurrence resulting in the injury complained of might well have taken place. The facts are the only legitimate evidence of the injury, and of the manner and cause of the occurrence. *Ramsey v. Road Co.*, 81 Ind. 394; *Collins v. Inhabitants of Dorchester*, 6 Cush. 396; *Hubbard v. City of Concord*, 35 N. H. 52; *Maguire v. Railroad Co.*, 115 Mass. 239; *Hawks v. Inhabitants of Charlemont*, 110 Mass. 110; *Blair v. Pelham*, 118 Mass. 420. The case is parallel in principle with *Hudson v. Railway Co.*, 59 Iowa, 581, 13 N. W. Rep. 735. In that case the plaintiff claimed damages for injuries occasioned to his horse resulting from defective planking at a railway crossing. The judgment of the lower court was reversed because a witness was permitted to testify that some time prior to the injury complained of a horse driven by him had got his foot between the plank

and rail, at the same place where the plaintiff's horse was injured. We are aware of the fact that some contrariety exists in the decisions upon the point in question. In our opinion the rule above indicated is the one justified by the decisions of this court, and altogether the safer one upon principle. *Patt. Ry. Acc. Law*, 420. There is, in the present case, no open, visible connection between the evidentiary facts or independent occurrences out of which it is assumed certain presumptions arise, and the facts sought to be established by deduction from the evidentiary facts proved. This the law requires. The jury must not be left to decide the principal facts by making remote inferences from facts having no visible connection with those in dispute. *U. S. v. Ross*, 92 U. S. 281. The only presumptions of fact which the law recognizes are those which arise or may be inferred immediately from the facts proved. *Manning v. Insurance Co.*, 100 U. S. 693; *Douglass v. Mitchell*, 35 Pa. St. 440. It must have been assumed, because some other horse frightened at the car, that it was necessarily an object calculated to frighten gentle horses, and therefore that those drawing the plaintiff's carriage became frightened at it. The conclusion was not a natural deduction from, nor had it any visible or probable connection with, the facts. *McAleer v. McMurray*, 58 Pa. St. 126. It might be proved that horses of ordinary gentleness took fright at a newspaper or other object casually left in a public highway, but it would hardly be contended that proof might be heard to show that a newspaper was an object naturally calculated to frighten horses of ordinary gentleness. It is well settled that one who negligently or without right places an object naturally calculated to frighten horses of ordinary gentleness within the limits of a public highway, or who wrongfully suffers such an object, although placed there without fault, to remain an unreasonable length of time, may become liable for an injury occasioned by the fright of horses thereat. *Town of Rushville v. Adams*, 107 Ind. 475, 8 N. E. Rep. 292; *Turner v. Buchanan*, 82 Ind. 147; *Piolli v. Simmers*, *supra*. Such an object, wrongfully placed or unreasonably kept or maintained in a public highway, may become a nuisance for which the author may incur liability to a person suffering special injury therefrom. As to what objects may lawfully be placed within the limits of a public highway, and as to what may constitute a reasonable time during which such objects may be kept there, must depend upon the circumstances of each particular case. Horses may take fright at wheelbarrows, road-engines, covered wagons, box cars, reaping-machines, building materials, and an indefinite number of other things which are not nuisances *per se*, when found within the limits of a public highway; and yet all these may become nuisances by being negligently permitted to obstruct a highway, depending upon the circumstances of each case. Horses of ordinary gentleness become accustomed to such objects when the objects are found in their customary places. They are more liable to become alarmed when they encounter such an object in an unusual place, or under extraordinary circumstances. This is part of the common knowledge possessed by all intelligent persons of mature years. All horses are disposed to scare or shy at objects of an unusual character in a highway. Roads are prepared with reference to this generally known disposition, and persons who place or leave objects in a highway are likewise charged with notice of this habit. These are things which every adult person of ordinary experience must be presumed to know. It is not, therefore, a subject to be pleaded and proved, whether a box car or any other particular object is naturally calculated to frighten horses. This is to be determined by the experience, observation, and intelligence of the court and jury, as applied to all the facts of the particular case before them. *Gilbert v. Railway Co.*, 51 Mich. 488, 16 N. W. Rep. 868; *Railway Co. v. Farver*, 111 Ind. 195, 12 N. E. Rep. 296. The mere fact that an object is in the highway, in violation of a statute, does not necessarily make the owner liable for damages resulting from fright which the object may have occasioned to horses.

There must have been some natural, causative connection between the violation of the statute and the frightening of the horses. The object in the situation in which it was left must have had a necessary or natural tendency to that end, according to common experience. A cow or a sheep may be upon a public highway in violation of a statute, and a horse of ordinary gentleness may take fright at such an animal. The frightening of horses was not, however, the mischief which the statute requiring certain animals to be restrained from running at large was intended to prevent. The injury must in each case be proximately such as was within the purpose and protection of the statute. *Railway Co. v. Locke*, 112 Ind. 404, 14 N. E. Rep. 391. It was error to admit the evidence.

At the proper time the defendant company asked the court to instruct the jury to the effect that the railway company had the right to have its cars standing on its branch road, at any point except in or upon the highway, and that if the car, at which the plaintiff's horses took fright, was placed by it at a point so as not to obstruct the highway, and was afterwards moved into the highway by persons for whom the company was not responsible, that the company would not be liable to the plaintiff for the injury suffered by her unless it negligently permitted the car to remain upon the highway an unreasonable length of time. This was undoubtedly a correct statement of the law, and it was applicable to the defense which the defendant sought to maintain by its evidence. It is the right of a party applying for it to have his theory of the case clearly and distinctly presented to the jury when he has adduced evidence fairly tending to support it. *Tenbrooke v. Jakke*, 77 Pa. St. 392; *Railway Co. v. Krichbaum*, 24 Ohio St. 119; *Comstock v. Norton*, 36 Mich. 279; *Thornt. Jur.* § 165. The instructions given by the court, although correct in the abstract, were general. The defendant had a right to an instruction adapted to the special features of the defense which it undertook to support by its evidence. *Parkhill v. Town of Brighton*, 61 Iowa, 103, 15 N. W. Rep. 853; *Parmlee v. Adolph*, 28 Ohio St. 10; *Railroad Co. v. Picksley*, 24 Ohio St. 654.

For the foregoing reasons the judgment is reversed, with costs, with instructions to the court to sustain the appellant's motion for a new trial.

(114 Ind. 537)

MEADOWS et al. v. STATE ex rel. ALDERS

(Supreme Court of Indiana. May 15, 1888.)

GUARDIAN AND WARD—GUARDIAN'S BOND—LIABILITY OF SURETY.

Under Rev. St. Ind. § 1221, which provides that the principal and surety in an official bond shall be bound to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond; and sections 2459 and 2527, providing that the measure of damages in an action on a guardian's bond is the injury to the ward, with exemplary damages, at discretion, and 10 per cent.,—the surety's liability on such a bond does not exceed the sum therein specified.

Appeal from circuit court, Monroe county; E. D. PEARSON, Judge.

Wm. H. East, Edwin Carr, and M. M. Dunlap, for appellants. *Buskirk & Duncan*, for appellee.

NIBLACK, J. This was an action by the state, upon the relation of Eliza A. Alderson, on a guardian's bond, in which James McBride was principal and Pleasant W. Meadows was surety, and in which the penalty was fixed at \$100. The circuit court made a finding in favor of the state, and assessed the relatrix's damages at the sum of \$204.55. Meadows moved for a new trial upon the ground that the damages as against him were excessive, but his motion was overruled, and judgment was rendered against him as well as McBride for the amount of the damages so assessed in favor of the relatrix.

The only question made in this court is upon the alleged excess of the damages as against Meadows, the contention being that, as he was a surety only in the

bond in suit, his liability was limited to the amount of the penalty named in that instrument. In support of the proceedings below it is claimed that under section 1221, Rev. St. 1881, a guardian's bond ought to be construed as intending to embrace, and as actually embracing, all the damages which may accrue by reason of the default or misconduct of the guardian, and that, under section 2459, as supplemented by section 2527 of the same revision of the statutes, the measure of damages in an action on the bond of a guardian is the injury which the ward may have sustained, with such exemplary damages as the court or jury trying the cause may be willing to give, and 10 per cent. on the whole amount which may be assessed. As applicable to the principal in a guardian's bond, the construction contended for is doubtless the true construction, but as against the surety this rule as to the measure of damages is subordinate to the further general rule that a surety in a statutory bond cannot be held liable for a sum greater than the penalty fixed in the bond. A surety in such a case is entitled to stand upon the letter of the bond as to the extent of his liability. This is the doctrine of the text-writers on the subject of suretyship, and of the recent and well-considered case of *Graeter v. De Wolf*, 112 Ind. 1, 18 N. E. Rep. 111. See, also, *Brandt*, Sur. § 93; *Baylies*, Sur. 171; 2 Sedg. Dam. 208, and note. There have been cases in which, owing to some default of the surety, a sum in addition to the amount of the penalty of the bond, not exceeding the legal rate of interest, was assessed against him; but such cases constitute rare exceptions to the general rule to which we have referred, and have no practical application to the case before us. *Brandt*, *supra*, and authorities cited. The circuit court, therefore, erred in assessing damages against Meadows in excess of the sum of \$100, and in consequence his motion for a new trial ought to have been sustained. If the relatrix shall, within 60 days herefrom, enter a *remittitur* of all the judgment below as against Meadows in excess of the sum of \$100, such *remittitur* to take effect as of the date of the judgment, then the judgment will stand affirmed; otherwise the judgment will be treated as reversed. In either event, the costs of this appeal will be taxed against the relatrix.

(114 Ind. 550)

MILLER v. HUDSON.

(Supreme Court of Indiana. May 16, 1888.)

REPLEVIN—WHEN LIES—FOR GOODS SEIZED ON EXECUTION.

Plaintiff being replevin bail on a judgment against another, execution issued jointly against them, was levied by defendant, a constable, upon the property of plaintiff, who brought replevin therefor. *Held*, under Rev. St. Ind. §§ 697, 698, which authorizes a joint execution in such case, that while it was the duty of the defendant to exhaust the effects of the principal debtor before seizing those of the surety, yet, if the property of the surety so seized be subject to execution, replevin was not plaintiff's proper remedy.

Appeal from circuit court, Greene county; GEORGE W. BUFF, Judge.

Action of replevin by David W. Miller against Starling Hudson, a constable, for property seized under execution. Judgment for defendant. Plaintiff appealed.

John D. Alexander and *H. W. Letsinger*, for appellant. *A. G. Carvins, L. H. C. Carvins*, and *Will L. Carvins*, for appellee.

ELLIOTT, J. This is an action of replevin prosecuted by the appellant against a constable, who had seized his property upon an execution duly issued on a judgment on which he was replevin bail. The action cannot be maintained. It is the doctrine of the common law that a party against whom an execution is issued cannot maintain replevin against the officer who levies upon his property. This rule is declared by our statute, but is so modified as to permit the action to be maintained against the officer when the property

seized is exempt from execution. Rev. St. §§ 1266, 1267, 1547. It has often been decided that an execution defendant cannot maintain replevin except where he shows that the property is not subject to seizure on execution. *Hartlep v. Cole*, 101 Ind. 458; *McCoy v. Reck*, 50 Ind. 283; *Dowell v. Richardson*, 10 Ind. 573. The statute expressly provides that the complaint shall show that the property was not seized upon an execution. If it fails to show this, it must show that the property was exempt. In the face of this positive statute it is difficult to conceive any plausible theory, much less a sound one, upon which a party against whom an execution is issued can maintain a replevin without showing that the property was not subject to execution. The execution was properly issued against the replevin bail. The statute provides that "every recognizance of bail shall have the effect of a judgment confessed, and that at the expiration of the stay a joint execution shall issue." Rev. St. §§ 697, 698. These provisions fully authorized the issue of the execution, and justified the officer in levying it upon the property of the execution defendants, and in that position the replevin bail stands. As the law authorizes the execution, the property cannot be taken from the possession of the officer by a writ of replevin, although he may not have done his duty in levying it. It is undoubtedly the duty of the officer to first exhaust the property of the principal debtor subject to execution, and this he can be compelled to do, but replevin is not the appropriate remedy. *Elson v. O'Dowd*, 40 Ind. 300; *Johnson v. Harris*, 69 Ind. 305. In the cases cited it was held that the replevin bail was entitled to an injunction, and this, of course, implies that he cannot maintain replevin; for it is a settled principle that, where replevin will lie, a suit for injunction cannot be maintained. A replevin bail occupies the position of surety, but he is nevertheless an execution defendant upon the judgment he confesses when he enters of record his undertaking as bail. When the execution issues, he becomes an execution defendant as much as his principal, although he is entitled to the rights of a surety. He is a party to the execution, for it issues against his property as well as against that of his principal, and he cannot maintain replevin, although he may have his rights protected and preserved by other remedies. Judgment affirmed.

(114 Ind. 540)

WINEMILLER *et al.* v. WINEMILLER.

(*Supreme Court of Indiana*. May 16, 1886.)

DIVORCE—ALIMONY—INSTALLMENTS—INTEREST.

Under Rev. St. Ind. 1881, § 1047, providing that the decree for alimony shall be for a sum in gross, and not annual payments, but that the court may, in its discretion, give a reasonable time for payment in installments, such installments do not bear interest before due unless the decree expressly so provides, in spite of Rev. St. § 5199, providing that, in the absence of contract, money judgments shall bear 6 per cent. interest from the return of the verdict or finding.

Appeal from circuit court, Knox county; GEORGE A. BICKNELL, Judge.

Suit to restrain collection of execution, brought by Thomas Winemiller against Rachael Winemiller *et al.* Judgment for plaintiff. Defendant appeals.

Wm. A. Cullop, George W. Shaw, and J. C. Adams, for appellant. *George G. Reilly*, for appellee.

MITCHELL, C. J. On the 9th day of March, 1886, Rachael Winemiller obtained a decree of the Knox circuit court, by which the marriage relation theretofore existing between herself and Thomas Winemiller was annulled. By the terms of the decree she was awarded the gross sum of \$2,250 as alimony. The court ordered that upon the defendant, within 30 days, giving a bond in the penal sum of \$3,000, payable to the plaintiff, with sufficient surety conditioned for the payment of the installments, and interest thereon, as

they severally became due, the amount awarded for alimony should become due and payable as follows: Two hundred and fifty dollars at the expiration of ninety days, and the residue in four equal installments of five hundred dollars each, payable, respectively, in one, two, three, and four years from the 10th day of June, 1886. The defendant filed a bond in compliance with the order of the court. He paid the first two installments when they fell due, but refused to pay interest. An execution was issued upon the assumption that the full amount due had not been paid. This suit was brought to restrain the officer from proceeding to enforce payment of the amount claimed. Judgment for the complainant.

The sole question involved is whether or not the deferred payments draw interest from the date of the order or decree of the court. Section 1047, Rev. St. 1881, requires that the decree for alimony to the wife shall be for a sum in gross, and not for annual payments, but that the court, in its discretion, may give a reasonable time for payment by installments, on sufficient surety being given. In pursuance of the statute, \$2,250 was fixed in the decree under consideration as a sum in gross for alimony to the wife. In the exercise of its discretion the court gave time for the payment of the amount fixed, upon condition that sufficient security by bond should be given. The effect of the decree, therefore, was to make the sum of \$2,250 fall due in installments of the several amounts and at the respective dates mentioned. At each given date a specified sum was to be paid. The court, undoubtedly, within its discretion, could have provided by its decree that the several installments should be payable with interest. But it made no such decree. The provision that certain specific sums should be paid on certain given dates rather excludes the idea that interest was to be paid in addition to the sums mentioned. In the absence of a requirement that the several installments should be paid with interest, we must assume the court found that \$2,250, payable at the time and in the manner fixed in the decree, was such a sum as the circumstances of the case rendered just and proper to be paid as alimony. A decree directing that a sum in gross be paid in specified amounts, and upon given dates, will be satisfied by paying the several amounts upon the dates fixed, without paying interest, unless the payment of interest is required by the decree. In such a case the several amounts specified must be regarded as falling due according to the terms of the decree, and, like any other obligation which does not provide for interest, it may be discharged by paying the amount therein stipulated, provided payment be made before default. Section 5199, Rev. St. 1881, which declares, in effect, that interest on judgments for money shall be at the rate of 6 per cent. from the return of the verdict or finding of the court, if there be no contract, is not controlling when applied to a case like the present, in which specific sums of money are ordered to be paid upon the date or dates fixed by the court. That the court ordered the bond to be conditioned for the payment of the several installments, and interest thereon, does not make the installments draw interest before they become due. The obligation of the bond would only become operative in the event of a failure to pay any installment at maturity. After that each installment part due would, of course, draw interest, under section 5199, from the date it fell due. There was no error. The judgment is affirmed.

(115 Ind. 123)

BUCHART v. BURGER.

(Supreme Court of Indiana. May 17, 1888.)

EXCEPTIONS, BILL OF—SETTLEMENT AND SIGNING—DATE OF PRESENTATION.

Under Rev. St. Ind. 1881, § 629, which provides that the date of the presentation of a bill of exceptions to the judge for signature shall be stated in the bill, the written statement on the back of the bill of the fact and date of presentation is not sufficient.

Appeal from circuit court, Dubois county; O. M. WELBORN, Judge.
Ely, Wilson & Dillon, for appellant. *O. A. Trippet*, for appellee.

ELLIOTT, J. The appellee insists that there is no bill of exceptions in the record. On the back of the bill is written: "Tendered to me for approval and signature, March 15, 1886." This is not sufficient. The statute, in express terms, requires that "the date of the presentation shall be stated in the bill of exceptions." Rev. St. § 629. It has been expressly decided that a statement on the margin or on the back of the bill is not sufficient. *Orton v. Tilden*, 110 Ind. 131-139, 10 N. E. Rep. 936. Judgment affirmed.

(114 Ind. 553)

ANDERSON *et al.* v. SCHOLEY.

(Supreme Court of Indiana. May 17, 1888.)

1. CARRIERS—OF PASSENGERS—LIABILITY FOR INJURY—COMPLAINT.

A complaint charging that defendants undertook to carry plaintiff as a passenger in their coach from one given point to another, and that by reason of the negligence of defendants in failing to provide lights (the night being dark) so as to enable the driver to see and keep the road, and failing to provide reliable horses and a careful and efficient driver, the vehicle was upset, whereby the plaintiff was severely injured, is good, since, when the relation of carrier and passenger exists, and the passenger sustains injury from the overturning of the carriage, this is sufficient to make out a *prima facie* case of negligence against the carrier, and to throw upon him the burden of showing that the injury was not the result of want of skill or prudence on the part of the driver, or of practicable care or foresight on the part of the carrier.¹

2. SAME—CONTRIBUTORY NEGLIGENCE OF PASSENGER.

In an action by a passenger against a carrier for injuries received by the overturning of a coach it is no defense that the driver went out of the road at the repeated suggestion of the plaintiff, who told him he was too far to one side, and thus caused the upsetting of the vehicle over the bank, it being the duty of defendants to supply a driver who knew the road, and would not be controlled by suggestions from a passenger.

3. SAME.

In an action by a passenger for injuries received from the overturning of a coach, through the negligence of the defendants in failing to supply the coach with lights, whereby the driver missed the road in the darkness, it is no defense that the defendants habitually used coaches to which no lights were attached, and that the plaintiff knew this fact when he became a passenger; since, it being the duty of the carrier to make reasonable provision for the safety of the passenger, he may rely on the care and foresight of the carrier, unless the instrumentalities provided are so glaringly defective as to make it apparent to every prudent person that they are insufficient and unsafe.

4. SAME—NEGLECT OF CARRIER.

If a common carrier of passengers omit any reasonably practicable precaution tending to insure the safety of the passengers, the omission is such negligence as will make him liable to a passenger who, without fault himself, is injured thereby.²

5. SAME—EVIDENCE.

In an action by a passenger against common carriers for injuries received by the overturning of the coach, testimony offered by the defendants that after the accident they instructed their drivers to carry the plaintiff free of charge, is irrelevant, the directions to the drivers being given in the absence of the plaintiff.

¹See, also, *Lawrence v. Green*, (Cal.) 11 Pac. Rep. 750.

²See note at end of case.

6. ACCORD AND SATISFACTION—PROOF.

In order to make out the defense of accord and satisfaction, it must be shown that the agreement to accept something of value in satisfaction of the liability incurred has been fully executed, and that the thing to be so taken has been accepted and received.¹

Appeal from circuit court, Dearborn county; WILLIAM H. BAINBRIDGE, Judge.

S. H. Stewart and N. S. Givan, for appellants. *John B. Coles and Roberts & Stepp*, for appellee.

MITCHELL, C. J. This was an action by William Scholey against Mason W. Anderson and Timothy McHenry to recover damages for an injury sustained by the overturning of a stage-coach in which the plaintiff was being carried as a passenger, and of which Anderson and McHenry, who were partners, were the proprietors. The complaint charges that the defendants undertook to carry the plaintiff from the city of Aurora to Rising Sun, on the evening of the 15th day of January, 1885, and that by reason of the negligence of the defendants in failing to provide lights, the night being dark, so as to enable the driver to see and keep in the road, and by providing unreliable horses, and a negligent and inefficient driver, the vehicle was upset, whereby the plaintiff was severely injured. The defendants answered the general issue, and specially, by way of accord and satisfaction, that before the bringing of the suit, by agreement between the plaintiff and defendants, the latter had paid the charges of the physicians for their services in waiting upon the plaintiff after he had received the injuries complained of, and had also permitted him to ride in their coaches from Rising Sun to Aurora, and return, free of charge, which payment of the physicians' bill and riding free of charge had been accepted by the plaintiff in full satisfaction of all liability of the defendants on account of the injuries complained of. Without demurring to the special answer, the plaintiff replied in denial, and upon trial to a jury the latter had a verdict in his favor. From the judgment which followed, this appeal is prosecuted.

On behalf of the appellants it is first contended that there is no connection shown between the particular acts of negligence charged and the injury complained of, and hence that the court erred in overruling the demurrer to the complaint. The point is not well made. The *gravamen* of the complaint is that while the relation of passenger and carrier existed between the plaintiff and the defendants, the former was injured by the negligent overturning of the vehicle in which he was being carried. The relation of carrier and passenger having been established, the fact that the passenger sustained an injury by the overturning of the carriage made a *prima facie* case of negligence against the carrier. The carrier then assumed the burden of showing that he used all reasonable and practicable precaution in providing a sufficient conveyance, together with safe horses and other suitable and proper appliances for the journey, and that the driver was qualified for the position, and that he acted with reasonable skill and caution. In short, it became the duty of the carrier to rebut the presumption of negligence which arose from the happening of the accident, by showing that the injury was not occasioned by any want of skill or prudence on the part of the driver, or by any neglect or want of practicable care or foresight on the part of the carrier. *Railroad Co. v. Newell*, 104 Ind. 264, 3 N. E. Rep. 836, and cases cited; *Woolery v. Railway Co.*, 107 Ind. 381, 8 N. E. Rep. 226; *Railroad Co. v. Pedigo*, 108 Ind. 481, 8 N. E. Rep. 627; *Stokes v. Saltonstall*, 13 Pet. 181. The omis-

¹As to what is a valid accord and satisfaction, see *Zimmer v. Becker*, (Wis.) 29 N. W. Rep. 228, and note; *Leslie v. Keepers*, (Wis.) 81 N. W. Rep. 486; *Bofinger v. Turyes*, 7 Sup. Ct. Rep. 529; *Simms v. Hampson*, (Ariz.) 12 Pac. Rep. 686; *Burgess v. Manufacturing Co.*, (Me.) 9 Atl. Rep. 726; *Railway Co. v. Gordon*, (Tex.) 7 S. W. Rep. 695.

sion to state just how the defendants' failure to supply the carriage with lights on a dark night, or to furnish safe and tractable horses, and a careful and efficient driver, resulted in the overturning of the carriage, did not make the complaint bad. They were causes adequate to have produced the injurious result. It was the duty of the defendants to explain the causes of the accident, so far at least as to show that it was not attributable to any omission on their part, or on the part of the driver, who was their agent. Concerning the contention that the evidence does not sustain the verdict, it is enough to say, if the jury believed the plaintiff's testimony in relation to the occurrence, there can be no doubt but that the verdict is abundantly sustained. It is true, the driver testified that he was in the road, pursuing the right track, and that he pulled to the left, thereby upsetting the conveyance over the bank, because the plaintiff told him repeatedly he was too far to the right. The plaintiff denies this. However the fact may be, it was the duty of defendants to supply the coach with a driver who knew the way for himself, and who would not be controlled by the suggestion of a passenger on the inside, while he occupied the seat, charged with the duties and responsibility of driver. So in respect to the alleged compromise. While the plaintiff admitted that the defendants paid the expenses of the doctor for setting his shoulder, and that he had been permitted to ride gratuitously from Rising Sun to Aurora on several occasions, he denied that this had been done under an agreement to compromise his claim against the defendants for damages. On the appellee's behalf it is insisted that the second paragraph of the answer did not state facts sufficient to constitute a defense, and that even if the facts therein pleaded had been proved, the refusal to grant a new trial would not have constituted reversible error. However that might be, the jury manifestly found, upon the strength of the plaintiff's evidence, that they were not proved. The plaintiff testified that the doctor's bill was paid by the driver, and that he, plaintiff, promised at the time to repay him. Some of the instructions given by the court to the jury are made the subjects of unfavorable comment. Without setting them out in detail, it is only necessary to say they relate for the most part to the degree of care the law exacts of a carrier of passengers. The jury were told in one of the instructions to which objection is made that a company or corporation, or one or more persons engaged in transporting passengers for hire from one point to another, constituted such company, corporation, or person a common carrier of passengers, and that the omission of any reasonably practicable precaution tending to insure the safety of passengers was such neglect as would make a common carrier liable to a passenger who was injured therefrom without fault. There was nothing objectionable in this instruction, nor was there in any of the others in which the court defined the duties of carriers of passengers. Relevant to the plea of accord and satisfaction, and the evidence pertaining thereto, the court instructed the jury to the effect that if the plaintiff had agreed to accept payment of his doctor's bill, and the right to ride in the defendants' coaches for a time fixed, free of charge, in full satisfaction of his claim for damages, then he would not be entitled to recover, provided the agreement had been executed. The doctrine is elementary that, in order to make out the defense of accord and satisfaction, it must be shown that the agreement to accept something of value in satisfaction of the liability incurred has been fully executed, and that the thing to be so taken has been accepted and received. *Jackson v. Olmstead*, 87 Ind. 92; *Deweese v. Cheek*, 35 Ind. 514.

We have examined the other instructions complained of, and find them correct within the principles heretofore expressed in this opinion. It is the duty of the court, in cases like the present, to instruct the jury whether or not a given state of facts, if established by a preponderance of the evidence, may or might constitute negligence. *Woolery v. Railway Co.*, *supra*. The instructions given by the court were consistent with this rule. The appellants

complain because the court, upon objection, refused to permit them to ask the plaintiff whether the defendants' coaches had been supplied with lights prior to the accident complained of. It is assumed that if the defendants habitually used coaches to which no lights were attached, and the plaintiff knew the fact when he became a passenger, he took the risk, and would have no right to complain. This position is not maintainable. It is the carrier's duty to make reasonable provision for the safety of the passenger, and the former is supposed to know better than the latter what precautions are necessary to enable him to execute his undertaking. While the carrier is not an insurer of the sufficiency of his appliances, he does, in effect, insure those whom he undertakes to carry, that he has not neglected any reasonable precaution necessary to make the journey safe. Unless, therefore, the instrumentalities provided by the carrier are so glaringly defective as to make it apparent to every prudent person that they are insufficient, and that the journey could not be taken with safety, the passenger may rely upon the care and foresight of the carrier. *Bradbury v. Goodwin*, 108 Ind. 286, 9 N. E. Rep. 302. The court excluded testimony offered by the appellants tending to show that they had instructed their drivers to carry the plaintiff free of charge after the accident. The instructions given by the defendants to the drivers of their coaches, in the absence of the plaintiff, did not tend in any proper manner to prove any fact in issue.

We find no error. The judgment is affirmed, with costs.

NOTE.

CARRIERS OF PASSENGERS—DEGREE OF SKILL AND CARE. It is the duty of carriers of passengers for hire to exercise extraordinary care and caution, *Raymond v. Railway Co.*, (Iowa,) 21 N. W. Rep. 495; the utmost human care and foresight, *Wilson v. Railroad Co.*, (Minn.) 8 N. W. Rep. 833; the highest degree of care and diligence which is reasonably within the power of persons engaged in such business, *Van de Venter v. Railway Co.*, 26 Fed. Rep. 32; the highest degree of care and skill, *Moore v. Railroad Co.*, (Iowa,) 30 N. W. Rep. 51; *Mackoy v. Railway Co.*, 18 Fed. Rep. 286; *Dunlap v. The Reliance*, 2 Fed. Rep. 249; *Coddington v. Railroad Co.*, (N. Y.) 5 N. E. Rep. 797; *Railway Co. v. Thompson*, (Ind.) 8 N. E. Rep. 18; the utmost skill and vigilance, *Dunlap v. The Reliance*, 2 Fed. Rep. 249; *Railway Co. v. Newell*, (Ind.) 3 N. E. Rep. 836; and they are liable for the smallest negligence of themselves or servants, *The Pilot Boy*, 28 Fed. Rep. 108; *Pershing v. Railroad Co.*, (Iowa,) 32 N. W. Rep. 488; and the *onus* of disproving the presumption of negligence, by showing that the injury arose from an accident which the utmost care, skill, and diligence could not prevent, is on the carrier, *Railroad Co. v. Pitter's Adm'r.*, (Ky.) 3 S. W. Rep. 591; *Pershing v. Railroad Co.*, *supra*; *Railway Co. v. Jones*, (Ind.) 9 N. E. Rep. 476, and note; *Broen v. Railroad Co.*, (N. Y.) 16 N. E. Rep. 60; but a carrier of passengers is held to the exercise of the highest care which human vigilance can give, only in respect to things appertaining to the actual transportation of the passengers, and in regard to the results naturally to be apprehended from a failure so to do, *Morris v. Railroad Co.*, (N. Y.) 13 N. E. Rep. 455; *Hayman v. Railroad Co.*, (Pa.) 11 Atl. Rep. 815.

(109 N. Y. 383)

MANHATTAN CO. v. PHILLIPS *et al.*

(Court of Appeals of New York. June 5, 1888.)

1. LIMITED PARTNERSHIP—GOOD FAITH—QUESTION FOR JURY.

Where plaintiff, seeking to hold defendant as a general instead of a special partner, contends that defendant's actual payment of money into the firm, which is requisite to constitute him a special partner, was not made in good faith, and certain facts, if unexplained, support his contention, and plaintiff calls defendant as a witness, the fact that the latter in his testimony offers a possible explanation of the matters concerning the payment does not preclude plaintiff from going to the jury on the issue of the good faith in the payment.

2. SAME—PUBLICATION OF NOTICE—TIME.

When the certificate of a limited partnership is recorded October 1st, and publication is not made until October 10th, there is still compliance with Rev. St. N. Y. pt. 2, c. 4, tit. 1, § 9, requiring partners to publish the terms of the partnership, when requested, for at least six weeks "immediately" after the recording of the certificate.

3. SAME—VARIANCE.

There is no material variance between the certificate of formation of a limited partnership expressing the nature of the business to be "a general commission business, buying and selling grain, flour, and produce on commission," and the published notice stating the business to be "for the purpose of conducting a general commission business."

Appeal from general term, superior court, city of New York.

Action on a promissory note by the president and directors of the Manhattan Company against William I. Phillips and Richard H. Laimbeer. This is an appeal from a judgment of the superior court of the city of New York overruling exceptions taken by plaintiff at the trial, and after verdict, for the defendant Laimbeer, ordered to be heard in the first instance at the general term. The defendants, William I. Phillips and Laimbeer, were sued as co-partners under the name of "William I. Phillips," and a recovery sought upon a promissory note dated January 8, 1884, alleged to have been made by them in that name. Laimbeer alone answered, setting up that the partnership was formed under the statutes of this state relating to limited partnerships, (title 1, c. 4, pt. 2, Rev. St.); that he was a special partner merely, and subject only to such liabilities as by statute attached to one in that character. Upon the trial of the issues the plaintiff proved the formation of a partnership between Laimbeer and William I. Phillips "for the purpose," as expressed in the written articles, "of carrying on a general produce and commission business" under the name of "William I. Phillips," in the city of New York, from October 1, 1883, to May 1, 1885; that Phillips was to be the general partner, and contribute \$5,000, and Laimbeer the special partner, and contribute \$20,000, to the capital of the concern; and a certificate which recited "that the nature of the business to be transacted is that of a general commission business, buying and selling grain, flour, and produce on commission." The articles of partnership and the certificate bore date October 1, 1883, as did also the order for publication, which designated the Daily Register and the Real-Estate Chronicle as the newspapers in which the terms of the partnership so formed should be published. The certificate was recorded on the same day. The first publication in the Register was October 6th, and in the Real-Estate Chronicle, October 10th. Each stated that the firm was formed "for the purpose of conducting a general commission business." At the close of the evidence, the plaintiff's counsel moved the court to direct a verdict for the plaintiff, upon the grounds, as stated by him, "(1) that the publication in the Real-Estate Chronicle did not commence, according to the affidavit of publication, until the 10th day of October, 1883, and therefore there was not an immediate publication, and therefore there was no compliance with the statute; (2) that there is a material variance between the statement of the nature of the business to be transacted as embodied in the certificate that was filed and recorded on the 1st of October, 1883, and the statement of the nature of the

business as embodied in the advertisements introduced in evidence." This motion was denied. The plaintiff had also given evidence as to the circumstances attending the payment by the special partner of his contribution to the capital of the concern, and its counsel asked to go to the jury upon the question of the *bona fides* of that payment. This, also, was denied; and then a more explicit request was made for permission "to go to the jury on the question whether or not the \$20,000 that was paid in on the 1st of October, 1883, by Mr. Laimbeer, was not paid in upon the understanding that it should find its way back to him, either through the preceding firm of Phillips & Co., or in some other way." This was denied, upon the ground, as stated by the trial judge, "that there is no evidence that would justify such a finding by the jury." Exception to each of the above rulings was duly taken, and the court then directed a verdict in favor of the defendant Laimbeer. To this the plaintiff also excepted, and after verdict the court, on motion of plaintiff's counsel, ordered the exceptions to be heard in the first instance at the general term, where, after argument, they were overruled, and judgment ordered for the defendant Laimbeer, dismissing the complaint as to him, with costs.

Rev. St. N. Y. pt. 2, c. 4, tit. 1, § 9, provides: "The partners shall publish the terms of the partnership, when requested, for at least six weeks immediately after such registry, in two newspapers to be designated by the clerk of the county in which such registry shall be made, and to be published in the senate district or city or town in which their business shall be carried on; and, if such publication be not made, the partnership shall be deemed general."

Stern & Myers, for appellant. *B. F. Tracy*, for respondent.

DANFORTH, J., (*after stating the facts as above*.) We agree with the court below that the publication of the certificate was in substantial compliance with the statute, and that there was no material variance between the statement as to the nature of the business to be conducted, as the same was embodied in the certificate and the description given in the advertisements. We are, however, of opinion that the jury should have been permitted to inquire whether the money of the special partner was paid in good faith, as a real contribution to the capital of the concern, or whether it was formal only. Both parties went into evidence. The principal witness called for the plaintiff was the defendant Laimbeer. From his evidence, and the documents put in during his examination, it appeared that the firm of Phillips & Co. was formed on the 1st day of June, 1882; that it continued in existence until October 1, 1883, when, by mutual consent of the copartners, it was dissolved; that on the same day a copartnership was formed under the name of "William I. Phillips." The defendant Laimbeer was a special partner in the firm of William I. Phillips & Co., putting in \$20,000. He was also a special partner in the firm of William I. Phillips, and was to pay in as capital for that firm the sum of \$20,000. William I. Phillips was one of two general partners in the first-named firm, and was the sole general partner in the last. On the 1st of October, Laimbeer made a check on the New York Produce Exchange Bank for \$20,000, payable to the order of ———, presented it to the paying teller, and for it received 20 bank-bills, each of \$1,000. These bills were on the same day, "about noon," handed by him to "William I. Phillips," and the transaction constitutes the alleged payment in of the capital of the firm of William I. Phillips. On the same day, William I. Phillips, in the name of "William I. Phillips & Co.," drew its check on the Manhattan Bank for \$20,000, to the order of R. H. Laimbeer, and delivered it to him, and the teller says: "I received it about noon, I think." He deposited the check, the same day, in the Produce Exchange Bank, and it was passed to his credit. Without it, his account would have been good for less than \$14,000, and the payment of the check given by him to Phillips would have overdrawn that account. It appears that there were two deposits to the credit of Phillips & Co. in the Man-

battan Bank on the 1st of October: one of \$20,000; the other of \$1,572.54. On the next day, October 2d, a check of Phillips & Co. for \$20,000 came in through the clearing-house. Evidence was offered to show that on the 1st of October, 1883, the firm of Phillips & Co. was insolvent, and that on the same day a check signed, "WILLIAM I. PHILLIPS," for \$20,000, to the order of Phillips & Co., was deposited to its credit. In the absence of some explanation, it might be inferred from these facts that the transactions of October 1st were simultaneous; that the intention was to use the capital contributed by Lainbeer to the firm of William I. Phillips to make him good for the capital contributed to the firm of William I. Phillips & Co. If so, the payment could not be upheld as one made in good faith; for the new firm would have had only the right of money, but no continued possession, nor any benefit from it. The appropriation would have been made before its formation. *Bank v. Sirret*, 97 N. Y. 320. It is true, an explanation was given,—one which the appellant concedes might, in some view, authorize a jury to find in favor of the defendant, and so uphold the transaction. But because that explanation came from a witness called by the plaintiff, notwithstanding the witness was the defendant, the court held it must be taken as true, made the concession of the plaintiff final, and so disposed of the issue without the intervention of the jury. A similar ruling was presented in *Becker v. Koch*, 104 N. Y. 394, 10 N. E. Rep. 701, under circumstances, in their effect, not unlike those now before us, upon the evidence of a party interested, and called by his adversary; and it was held that it was a proper question for the jury as to what degree of faith should be given, under the facts of the case, to the explanatory testimony. The principle of that case governs, and requires that the appeal should succeed. The judgment is therefore reversed, and a new trial granted, with costs to abide the event.

All concur.

(109 N. Y. 583)

LATHERS v. KEOGH.¹

(Court of Appeals of New York. June 5, 1888.)

1. VENDOR AND VENDEE—CONSTRUCTION OF CONTRACT—PAYMENT OF TAXES.

A contract of sale of improved city real estate, dated August 4th, provided that the deed, which was to be executed August 23d, should contain full covenants, and should convey the property "free and clear from all incumbrances," except certain mortgages, and that "the calculations and adjustments of the exact amounts to be paid as to rents, interest, &c., shall be made the same as if this contract were actually carried out on September 1st, at 12 m.," and that the rents, issues, and profits of the premises earned before September 1st should go to the vendor, and those earned after to the vendee. An annual tax was assessed at the time of the execution of the contract, but was not confirmed until August 29th. On the day of the execution of the deed an adjustment of rents, interest, gas charges, and insurance premiums was made, without any taxes being taken into consideration. *Held*, that the symbol "&c.," after the words "rent" and "interest," referred only to the current and accrued earnings and liabilities of the premises, and could only add to the expressed items of rent and interest something of an analogous nature, and that it would not make the vendor liable for said tax.

2. COVENANTS—AGAINST INCUMBRANCES—TAXES ASSESSED, BUT NOT LEVIED.

A covenant in a deed that the premises were "free, clear, discharged, and unincumbered of and from all charges, taxes, assessments, and incumbrances, of what kind and nature soever," does not make the grantor liable for an annual tax on the premises assessed before, but not confirmed until after, the execution of the deed.

Appeal from general term, supreme court, First department.

Action by Richard Lathers against Christopher B. Keogh, to recover the amount of the tax paid on certain real estate sold by defendant to plaintiff. The special term overruled a demurrer to the complaint, which was reversed in general term, and the demurrer sustained. Plaintiff appeals.

¹Affirming 89 Hun, 576.

Richard O'Gorman, Jr., and Wm. C. Trull, for appellant. A. H. Stoiber for respondent.

GRAY, J. The contract in this case, by which the defendant undertook to sell, and the plaintiff undertook to purchase, the property described therein, was dated August 4, 1883, and called for the execution and delivery on the 23d day of that month, by the seller, of "a warranty deed with full covenants, conveying * * * the lands and premises, with the six houses thereupon erected, free and clear of all incumbrances," except certain described mortgages. The contract further contained this provision: that "the calculations and adjustments of the exact amounts to be paid as to rents, interest, &c., shall be made the same as if this contract were actually carried out and performed on September 1, 1883, at twelve m. It is hereby understood and agreed by and between the respective parties hereto that all rents, issues, and profits of the respective lands and premises hereby agreed to be conveyed, or of any part or portion thereof, shall be apportioned as of September 1, 1883, so that the seller shall take all such portion of such rents, issues, and profits as is for a period prior to or is earned up to September 1, 1883; and the remaining portion shall go to the purchaser, irrespective of the time when such rents, issues, and profits may be due." The reason for the insertion of such a clause as the one just quoted from the contract is found in the fact that there were buildings standing upon the premises. The question of the apportionment of the rental moneys earned by them, and the adjustment of the liabilities incurred for insurance, gas, and other such like current and usual charges against a building, as well as of the amount of interest accrued upon the existing mortgages, very naturally presented itself to the parties, and became the subject of an agreement as to their disposition. When the day came for the delivery of the deed of the property, viz., August 23d, the parties effected between themselves a settlement and adjustment of the various items of rents accrued, and of liabilities thus far incurred for the mortgage interest and the insurance and gas charges. The defendant, in this adjustment, was allowed for the rents of the property for the whole month, to September 1st, and was debited with the interest, insurance, and gas charges up to that date. Thereupon, and in pursuance of the contract, the defendant delivered to the plaintiff a deed of the premises, which had been executed and acknowledged as of August 23d, and which contained a covenant that the premises were "free, clear, discharged, and unincumbered of and from all * * * charges, * * * taxes, assessments, and incumbrances, of what nature or kind soever," except the mortgages described in the contract. Subsequently to this delivery of the deed, and on August 29th, a tax for the year 1883 upon the conveyed premises was confirmed, which, upon defendant's refusal, plaintiff was obliged to pay, and he now insists that this tax was a charge upon the property prior to the delivery of the deed, which defendant is legally bound to discharge under the covenant in his deed, and also under the provision in their contract that "calculations and adjustments of the exact amounts to be paid as to rents, interest, &c.," were to be made as though the contract was performed on September 1st.

In this contention we think he is in error. Considering, in the first place, this contract, we are unable to perceive that it is either defective in its terms, or made ambiguous by the addition of the symbol "&c.," after the words "rents" and "interest." Used in the way it was by the parties, this sign or symbol must be deemed to have reference only to such matters as bore some relation to the current and accrued earnings and liabilities of the premises, and which, obviously, had to be in some way adjusted between seller and purchaser. Such matters would naturally be within the contemplation of the parties, and furnish the subject for an agreement controlling the amount of moneys which should pass upon the closing of the transaction of sale. In the

interpretation of contracts, effect must be given to the intent of the parties, and to that end we may consider the circumstances of their situation, and the subject-matter of their meeting. So viewed here, no real difficulty arises, and no misapprehension should exist as to the intent of these parties when they made their agreement. They, in fact, have given a practical interpretation to it by their acts on August 23d, when the title passed. Where a written contract has been fully performed within its apparent intent and reasonable requirements, and to the evident satisfaction of the parties at the time, and it is not made to appear that there was any mutual error arising from a mistake of fact, or any practicing of fraud, courts should not interfere. In the particular provision of this contract we have been considering, we see no ground for holding that its language imported other matters of adjustment than those similar in their nature to what were named; and we see no reason for holding that a tax, which is made by the law a lien upon property, is analogous to items of rents or interest moneys. The whole clause, read together, indicates plainly the design of the seller, and excludes the idea of any legally created lien being within its provisions.

Considering, then, the covenant in the grantor's deed, that the property was free, clear, discharged, and unincumbered of all charges, taxes, assessments, and incumbrances, we do not find that he was placed under any liability for the annual tax. If, at the time the covenant was made, the property was incumbered by any tax, the vendor was liable. That the property was the subject of taxation does not control the question. Until the amount of the tax is ascertained and determined, no lien or incumbrance exists by reason thereof, and we think that the proper construction of this covenant merely calls for the freedom of the property, at the time of conveyance, from what can be considered an incumbrance upon the property; not freedom from some undetermined matter which may ripen into a charge imposed as a lien by law, but freedom from a visible and ascertained incumbrance. The tax upon taxable property is imposed, under the system of taxation in the city of New York, by the board of aldermen, who act, in determining thereupon, upon the assessment rolls prepared for them by the commissioners of taxes and assessments, and upon a statement which is furnished them by the comptroller, for the purpose of imposing the annual taxes, and which sets forth the amounts by law authorized to be raised by tax in that year on account of the city's needs and purposes, and the probable amount of receipts from all sources of revenue. They are then to estimate and compute the taxes for the year. Having done so, and having examined the assessment rolls, and made any necessary alterations permitted by the law, the board must set down against each item of property the sum, in dollars and cents, which is to be paid as a tax thereon. When these and other duties, not necessary to be particularized here, have been performed, the assessment rolls are only then completed and prepared for confirmation, and ready to be transmitted to the receiver of taxes. Until these requirements of the law have been fulfilled, the tax is not due or payable, and no lien attaches to the property, nor can any legal charge for any tax be said to rest upon it. Jurisdiction appertains to the board of aldermen to annex a tax to the name of a person and the property described as his, and all steps leading to that exercise of power by that body are initial only in the proceedings which result in taxation, and in no sense impose a charge or create an incumbrance upon the land described in the assessment roll. We do not think, therefore, that an assessment or a tax exists as an incumbrance, or as a charge upon lands in the roll, within the meaning of a covenant in a deed against charges, taxes, assessments, and incumbrances, until it has been confirmed, and the amount thereof has been determined in the methods prescribed. In the case at bar, the complainant alleged that subsequent to August 4th the calculation of the tax to be imposed was made, and a tax of \$893 was imposed upon said premises, and on August 29th that tax was duly confirmed. This

fact is admitted by the demurrer to the complaint. The views we have expressed are supported by the cases of *Dowdney v. Mayor, etc.*, 54 N. Y. 186; *Barlow v. Bank*, 63 N. Y. 399; *Fisher v. Mayor*, 67 N. Y. 73; and *Association v. Mayor, etc.*, 104 N. Y. 581, 12 N. E. Rep. 279.

Appellant's counsel cites *De Peyster v. Murphy*, 66 N. Y. 622, in support of his contention. In that case MILLER, J., held that, under such a covenant as the one here, an assessment for improvement was a charge against the person and the property, and was fairly embraced within the meaning of the covenant, without regard to the question whether it was a lien under the statute. The assessment was confirmed by the board of revision and correction of assessments on November 7th, the work having been completed in May; but the assessment was not entered in the title-book of assessments in the bureau of arrears until December 24th. The deed bore date December 5th, and it was claimed that the amount did not become a charge until it was entered in the title-book. The statute provided that no assessment for any city improvement shall be deemed to be fully confirmed, so as to be due and to be a lien upon the property, until entered as mentioned. But the case was peculiar. The learned judge said: "At the time when the contract was entered into, the improvement had been made. The plaintiff was in the full enjoyment of the benefits arising from the same, and it evidently constituted a portion of the value of the premises, and entered into the consideration upon the sale of the same." He held that, although an assessment which had been made and confirmed was not a lien for the purposes of the statute, it was nevertheless a charge "against the party, which incumbered the premises, and against which he was bound to provide." He said: "It may be conceded, as was recently held by this court in *Barlow v. Bank*, that a tax on real estate must be complete before it becomes a lien on the same, and yet a grantor be liable for an assessment or charge, where the intention of the parties is clear, and the covenant clearly covers such a liability as this." And, referring to *Dowdney v. Mayor, etc.*, Judge Miller further says: "The assessment was not confirmed, in that case, until after the conveyance was made, and the amount at that time had neither been ascertained nor determined." An obvious distinction is thus seen to exist between an assessment for a completed street improvement and the assessment of an annual tax. In the former case, although not a lien upon property by statute, yet, if confirmed, it has become a charge; whereas, in the latter case, until the annual tax is ascertained and extended, and the exercise of the duties in that respect completed, by the board to whom power in that respect belongs, no charge or incumbrance is created. The case of *Rundell v. Lakey*, 40 N. Y. 513, also cited by appellant, was decided by a divided court, and was the subject of consideration by ANDREWS, J., in *Barlow v. Bank, supra*. While some of the expressions of GROVER, J., who delivered the opinion in *Rundell v. Lakey*, may seem to conflict with our views in this case, we are inclined to adopt the principles laid down in *Barlow v. Bank*. In that case the question discussed was whether there was a breach of the covenant against incumbrances. ANDREWS, J., who rendered the opinion, refers, in the first place, to the case of *Rundell v. Lakey*, and says, (page 400:) "In *Rundell v. Lakey*, 40 N. Y. 513, the plaintiff, to whom the defendants, intermediate the completion of the assessment roll and the levying of the tax by the board of supervisors, had conveyed certain premises, with covenant for quiet enjoyment, was called upon by the collector of the town, after the tax had been levied and the warrant for its collection had been issued, to pay it; and at the request of the defendants, and upon their agreement to refund the amount to him 'in case they were legally liable to pay it,' paid the tax, and afterwards brought his action against them to recover the amount paid. * * * Five judges concurred in the result. GROVER, J., who delivered the only opinion in the case, places his judgment upon the effect of the agreement, considered in connection with the fact that, under the tax laws, the

owner of real estate residing in the town or ward where it is situated, and to whom it is assessed, is primarily liable for the payment of the tax subsequently imposed under the assessment, although he may have parted with his title after the completion of the assessment roll by the assessors, and before the levying of the tax by the board of supervisors. HUNT, C. J., and MASON and JAMES, JJ., were of opinion that the plaintiff was entitled to recover, independently of the agreement, upon the covenant in the deed. DANIELS, J., was for affirmance, upon the ground that the tax could have been collected by the collector from the defendants, and that they were liable to pay it within the meaning of the agreement. LOTT, J., dissented, and WOODRUFF, J., did not vote." Judge ANDREWS, in his opinion, held that "no lien or incumbrance on the lands assessed is created by the act of the assessors. The assessment is the basis upon which the board of supervisors act in apportioning the tax, but it is in no sense the imposition of a charge upon the land described in the roll. This is one of the preliminary steps which result in taxation. So is the election of assessors; and taxation of the lands within the town is as certain to take place before the assessors commence making the roll as after it is completed. The arrangements of the statute necessarily lead to the imposition of taxes at each annual meeting of the supervisors. The roll, when completed, fixes the valuation of the property to be taxed, but it does not determine the amount of the tax, and the most which can be claimed is that it renders more certain and definite the liability to taxation, which, nevertheless, existed before the assessment was made. The language of the covenant in the defendant's deed is that the premises 'are free and clear from all incumbrances whatsoever.' The covenant against incumbrances is a covenant *in presenti*, and, like the covenant of seizin, if broken at all, is broken as soon as the deed is executed. 4 Kent, Comm. 471; Rawle, Cov. § 89; *Horton v. Davis*, 26 N. Y. 495. The right of action accrues at once, and unless an action will lie immediately there is no breach of the covenant. The covenantee, suing upon such a covenant, may be restricted to nominal damages, where he has not been subjected to actual loss, (*Delavergne v. Norris*, 7 Johns. 358; *Hall v. Dean*, 13 Johns. 105;) but the right of action, when it exists at all, is complete the moment the covenant is made. If the plaintiff had brought his action the day after he took his deed, could he have maintained it? I think not. The answer would have been perfect, that the entry of the land in the assessment roll constituted no incumbrance." In a very recent case, of *Association v. Mayor, etc.*, 104 N. Y. 581, 12 N. E. Rep. 279, PECKHAM, J., said, as to the lien of a tax, where plaintiffs took title by deed dated July 31, 1877, and the tax was not confirmed until October, 1877, (page 588:) "In questions arising under covenants in deeds as to incumbrances, it has been decided that no lien or incumbrance by reason of a tax existed until the amount thereof was ascertained or determined." And, again: "It may be conceded that technically there was then no lien."

We are of the opinion that the judgment and order appealed from should be affirmed.

All concur, except EARL, J., not voting.

(110 N. Y. 23)

PEOPLE v. CIGNARALE.

(Court of Appeals of New York. June 5, 1898.)

1. HOMICIDE—MURDER—APPEAL.

Under Laws N. Y. 1887, c. 498, allowing an appeal from a conviction, in a capital case, directly from the trial court to the court of appeals, and providing that a new trial may be granted in such case where the court is satisfied that the verdict is against the weight of evidence, or that justice requires a new trial, no power is conferred on the court of appeals to grant new trials for any other or less reasons than

those governing the supreme court in similar cases, but said court is simply invested with the same jurisdiction in that respect as was formerly possessed by the supreme court.

2. **SAME—EVIDENCE.**

Upon a trial for murder, there was evidence of previous threats, and strong motives to commit the crime, and a number of disinterested witnesses testified that defendant followed deceased, her husband, on the street, and shot him from behind, as he was walking along apparently unconscious of her presence; while the uncorroborated testimony of defendant was that she had just been assaulted by deceased with a razor, and shot him in self-defense, which was wholly inconsistent with the facts as stated by the other witnesses and with other circumstances. *Held*, that the verdict of guilty of murder in the first degree should not be set aside as against the weight of evidence.

3. **SAME—FORMER ACQUITTAL.**

After the prosecution had rested in a murder trial, by mutual consent of defendant, the district attorney, and the court, the jury was discharged, and the defendant withdrew her plea of not guilty, and, by leave of the court, pleaded guilty of murder in the second degree, but no sentence was pronounced. Later in the term, defendant, by consent of the court and district attorney, withdrew her plea of guilty, and again pleaded not guilty. *Held*, that the acceptance of the plea of guilty of murder in the second degree was not an acquittal of the charge of murder in the first degree, and no bar to a conviction therefor.¹

Appeal from court of general sessions, city and county of New York.

This is an appeal by the defendant Chiara Cignarale from a conviction at the court of general sessions of the city and county of New York, on the 27th day of May, 1887, of the crime of murder in the first degree, under an indictment found against her and one Antonio D'Andrea, jointly charging them with the murder of one Antonio Cignarale on the 20th day of October, 1886. The appeal is brought directly to this court from the judgment of the court of general sessions, under chapter 493 of the act of 1887. Antonio Cignarale was the defendant's husband. They were both natives of Italy. There they had been married in their very early youth, and had lived as man and wife for about 13 years, when, in March, 1886, they came to America, and settled in the city of New York. The defendant at that time was about 24 years of age. They brought with them a daughter about 8 years of age, the only child of the marriage. They were both extremely poor; and, besides being strangers to the language, customs, and habits of the people they had come to live among, they had but little acquaintance among those who form the Italian colony in New York. Among the number of those whom they had, however, known at their native home was the defendant Antonio D'Andrea, a young man who, it seems, was second cousin to the appellant. Through him the husband procured work at his trade as a mason on the first day of his arrival in New York. He soon abandoned this employment, claiming the work was too hard, and went to blacking boots, and, as the defendant testified, insisted upon her aiding him in that business; and, when she declined to do this, he then insisted that she should pick up rags in the streets, which she also refused to do, but told him she would wash, or do other work suitable for a woman. The evidence justifies the conclusion that the husband was a lazy, shiftless person, unwilling to follow his trade for the support of his family. On reaching New York, they took up their abode and lived in a very humble way on the top floor of No. 342 East One Hundred and Tenth street, in that city, and they continued to live together there for two or three months, until about the 1st of July, 1886. The husband, according to the evidence, treated his wife in a very brutal manner, beating and kicking her, spitting in her face, and generally treating her with great indignity. The husband was jealous of D'Andrea, and accused his wife with having improper relations with him. About the 1st of July, 1886, the defendant left her hus-

¹That the defense of former acquittal must be pleaded, and that, in the absence of a plea setting it up, the question cannot be raised, see *Jordan v. State*, (Ala.) 1 South. Rep. 577; *Mann v. State*, (Fla.) 8 South. Rep. 207.

band, and took rooms in Forsyth street, leaving her daughter with the deceased. The defendant testified that she was driven away by her husband, and that, when she left him, she intended to return to her friends in Italy. She had \$100 when she left Italy, of which \$30 remained. With this she says she intended to pay her passage home, and there obtain money from her friends to send for her child. When she left her husband, she took with her a pistol and a box of cartridges, which she testifies her husband had bought with her money. On leaving her husband, she sought D'Andrea to assist her to obtain a passage ticket to Italy. But she abandoned her purpose, finding that she was very ill and weak, and at D'Andrea's suggestion took rooms in Forsyth street. D'Andrea came to board with her then, as did also two or more other Italians. The defendant remained in Forsyth street until a few days before the homicide, when she removed to One Hundred and Twenty-Fifth street; D'Andrea and the other boarders going with her. The people sought on the trial to establish that improper relations existed between the defendant and D'Andrea. There was direct evidence to support this view given by one De Mora Marro and one Filomena Nardiele, a married woman, who had left her husband to live with De Mora Marro, and who, as they testified, occupied rooms in Forsyth street during a part of the time the defendant resided there. They also testified that, while residing in Forsyth street, they heard the defendant threaten the life of her husband, and also heard D'Andrea promise the defendant to marry her if her husband was out of the way, and also heard him giving her instructions in the use of a pistol, using for that purpose a pistol of his own. The defendant denied that she lived in adultery with D'Andrea, and testified that she had for several years been afflicted with a disease of the womb which rendered sexual intercourse on her part with any one impossible. In support of this statement the declarations of the husband were permitted to be given in evidence. The defendant also denied the statements of De Mora Marro and the woman Nardiele as to the alleged threats and the promise of D'Andrea to marry her, and as to the instructions in the use of a pistol. It was claimed by the defendant that their evidence was instigated by malice because she refused to permit them to stay in her house or to harbor therein. It may fairly be said that their evidence is in some respects open to suspicion from its intrinsic impossibility. But, taking the evidence of all the witnesses together, the jury would have been justified in finding that adulterous relations existed between the defendant and D'Andrea. After the defendant left the house of her husband on One Hundred and Tenth street, he removed to One Hundred and Seventh street, and there continued to live to the time of his death. The daughter was taken to a convent. The defendant testified that the husband frequently came to her rooms in Forsyth street, and tried to get in, but she locked the door, and kept him out, and he would go away threatening her life. The narration thus far relates to facts preceding the day of the homicide, which occurred at about 12 o'clock on the morning of October 20, 1886. The theory of the prosecution was that the killing was a deliberate and premeditated assassination. On the other hand, it was claimed by the defendant that the killing was in self-defense, and therefore justifiable, or, if not justifiable so as to completely exonerate the defendant from liability, that there was an absence of the elements of deliberation and premeditation essential to the crime of murder in the first degree.

It is conceded that the deceased was killed by a pistol shot fired by the defendant on First avenue between One Hundred and Tenth and One Hundred and Eleventh streets, in the city of New York. The only eye-witnesses of the occurrence other than the defendant were Dominico Stabile, a carpenter, Vincenzo Allistalo, a midwife, and one Pasquale Rosa, a grocer. These persons were strangers to Cignarale and his wife, and, so far as appears, were wholly disinterested witnesses. The witness Stabile testified, in substance, that, at about 11:45 o'clock on the morning in question, he was on the east side of

First avenue, going from One Hundred and Tenth to One Hundred and Thirteenth street, and found the deceased on the same side of the avenue, who was walking leisurely in the same direction, with his hands in his pocket, and whistling. In passing, he observed a woman following the deceased at a distance of about 10 feet behind him. The woman was the defendant. Suddenly, when only a few feet in advance of the deceased, the witness was startled by the report of a pistol, and, turning, saw the woman with a smoking revolver in her hand, and cocking it for another shot. He at once called out to the deceased, saying to him, "Run away, or you will be shot." The deceased thereupon turned partly around, and the woman at the same moment fired again. The deceased, wounded and frightened, exclaimed, "Holy Virgin! Holy Virgin!" and commenced to run away from the woman, until, at the corner of the avenue and One Hundred and Twelfth street, he fell, and in a few moments died. The woman, after firing the second shot, cocked the revolver again, and proceeded to the place where her husband was lying, and, as the witness states, "was going around the crowd with the revolver, and looking between the legs of the crowd with the revolver." The defendant then passed up One Hundred and Twelfth street to Second avenue, and was arrested between One Hundred and Thirteenth and One Hundred and Fourteenth streets by an officer, having the cocked revolver in her pocket. The officer testified that, when he first saw the defendant on Second avenue, she had the revolver in her hand, and when she saw him she put it in her pocket, and that, after arresting her, he took her to the corner of One Hundred and Twelfth street, where the deceased was lying, and on seeing him she made a motion as if to snatch the revolver from the officer, who then had it in his hand. The witness Allistalo, who at the time was walking up the west side of the avenue, and witnessed the occurrence, corroborated the statement of the witness Stabile in all material respects. She testified that the deceased was about 10 feet in advance of the defendant, walking "indifferently." She said: "I heard the first shot, and I turned. I saw that the first shot went in a piece of paper, and the piece of paper was burning. Then I saw a woman with a revolver in her hand, and she fired the second shot, and I saw the second shot went into his back, and I saw exactly the smoke. Then he said, 'Holy Virgin!' and the man ran away." The witness Rosa testified that he was standing outside of his store, and heard the report of a pistol. "I turned around. I saw then the second shot going towards Cignarale. The man ran away; the woman running after." The pistol was a five-barreled revolver, and, when examined, it was found that two of the barrels had been discharged, and three of the barrels were still loaded. The autopsy disclosed that the ball entered the left side of the deceased, at about the ninth rib, and passed diagonally through the heart, and lodged in the right lung. The defendant testified that, in shooting her husband, she acted in self-defense; and, in corroboration of this theory, gave evidence, before referred to, tending to show that her husband frequently maltreated and abused her, sometimes kicking and striking her with great violence; that she had been driven from her home; that he had thereafter dogged and pursued her with intent to kill and harm her, going frequently to her several places of abode on Forsyth street and One Hundred and Twenty-Fifth street, and demanding admittance, and that on the very morning of the day in question he had appeared at apartments on One Hundred and Twenty-Fifth street, and that being denied admittance, and frightened away by the threat on her part to summon the landlord, he had vowed, as he left, that that should be her last day on earth. An Italian, an acquaintance of the parties, testified that, on the same morning, the deceased tried to borrow a revolver of the witness, and, in reply to an inquiry what he wanted a revolver for, replied: "I decided that to-day I will be killed, or I will kill my prostitute wife." Another witness, a butcher with whom both parties traded, testified that, a few minutes before the shooting, the de-

ceased came to his shop, in One Hundred and Tenth street, and paid him 10 cents borrowed money; and, on leaving, said: "I must see the end of my wife, and I want to spit in her face."

The defendant's account of the transaction is as follows: "I did my housework. Then it was about between eleven and twelve o'clock. I went to buy things for the house. *Question.* Where did you go? *Answer.* I went to One Hundred and Tenth street, and for a block on One Hundred and Tenth street I went on, and was thinking. I was disturbed. Then I saw him with a handkerchief in his hand, wiping his nose. As soon as he saw me, he put his handkerchief into his pocket, and gave me two slaps. I got scared, and I did not say a word to him, and I looked around if I could see a policeman. I did not say a word to him. I could not see any policeman. I went on to do my business. I walked along. While I was walking, I felt that he seized me by the arm. He said, 'Chiara, Chiara,' and I turned around to look into his face. He turned me around. I say: 'You don't want to go about your business. Let me go, Antonio.' He said: 'No, I want to reason with you. I gave you two slaps because you did not want this morning to open the door.' He says: 'What for didn't you open the door? I am your husband.' I said: 'Yes; you are my husband. I do not deny it. You chased me out. To whom shall I go? Since I came from Italy here, where shall I go? If I would not have met good people, you would have left me in the street to do bad things.' Then he said: 'Well, I was sure that you can do that.' Then he said: 'By the by, come, let us go near the river. Let us take a walk together. I have to tell you something.' I said, 'I cannot go,' because he did not look to me very sincere, because he was always looking in front and behind,—always turning around. Then I said: 'If you have anything to tell me, tell me it right here.' Then he said: 'Well, I will tell you right here.' Then he said: 'De Mora Marro told me that you sleep with Antonio D'Andrea.' I said: 'De Mora Marro, because I refused to receive him into my house in Forsyth street, says that I live with Antonio D'Andrea. If I would have received him into the house, he would not say that I lived with Antonio D'Andrea.' I said: 'Well, God knows all about me.' And then I said to him: 'Don't you know that I cannot do those things? For you I was not good, but for the others I am good enough,'—saying it in a kind of reproach. 'Well, you know if I am not good for you, I am not good for another,'—that is the sense of it. He said: 'Tell me the truth. If it is not the truth, I will break De Mora Marro's head.' Then he said: 'I do not believe it. I was not willing to believe it, because I know that you are sick.' And saying that, then he looked that way around the other side, and he took out with his left hand the razor out of his pocket. He says: 'I want to kill you.' Seeing the razor, I say: 'Ah, you betrayer!' I retreated one pace back, and I took my revolver out. Then, when he saw the revolver, he says: 'Well, there will be a time for you.' Then he turned around, and went in an opposite direction. When I heard him say, 'That time will come for you,' I just fired to the ground. He was four or five paces away from me,—about five feet away from me then. Then, when I fired, he turned around, with the razor open. He says, 'My God, happen what may!' and he jumped at me with his arm raised, just in a way to cut off my head off. Then, having the revolver in my hand, I fired the revolver. I did not know where the revolver went,—where the shot went. *Q.* At the time you fired that shot at your husband, did you believe you were in danger of being grievously hurt? *A.* I thought that he will go to kill me. *Q.* And was that the reason that you fired? *A.* Yes, sir. *Q.* To prevent yourself being cut with the razor? *A.* Yes, sir." The defendant also testified that she took the pistol with her to protect herself against her husband. In her examination before the magistrate after her arrest, she stated: "I am guilty of the charge. I shot my husband in order to defend myself, because he insulted me."

On examining the clothing of the deceased after his death, a razor was found in his inside vest pocket, wrapped in an old piece of paper, worn off at the ends, and tied with a string. No other razor was found, nor does it appear that the deceased had any other. The defendant's counsel took some exceptions to the rulings of the court on the trial in respect to the admission and rejection of evidence, and also to the charge. They are not urged as ground of error on this appeal, and upon examination it is clear that none of them disclose any error committed on the trial to the prejudice of the defendant. The case was submitted to the jury by the learned recorder in a full, fair, and impartial charge, who found the defendant guilty of murder in the first degree. Two reasons only are urged for the reversal of the judgment: (1) That the verdict is against the weight of evidence, and justice requires a new trial; (2) that the defendant could not legally be convicted of any crime higher than murder in the second degree, by reason of a prior plea to the same indictment of guilty of murder in the second degree, accepted by the court. The facts upon which this question arises are stated in the opinion.

William F. Howe, for appellant. *McKenzie Semple*, Asst. Dist. Atty., for the People.

ANDREWS, J., (*after stating the facts as above.*) The jurisdiction vested in this court by chapter 493 of the Laws of 1887, to order a new trial on appeal from a judgment of conviction in a capital case, where it is satisfied that the verdict was against the weight of evidence, or that justice requires a new trial, is invoked upon this appeal. The power to grant a new trial upon these grounds formerly pertained exclusively to the supreme court; but as now, by the act of 1887, an appeal lies directly to this court from a judgment of death rendered by the trial court, without any intermediate review in the supreme court, the power to grant a new trial, under the same circumstances as it was formerly exercised by the supreme court, was with manifest propriety and justice conferred upon this court. It was not, however, the intention of the statute of 1887 to confer upon this court a new power not theretofore exercised by appellate courts to grant new trials in criminal cases, or to confer a power to supervise or set aside the judgments of courts of original jurisdiction upon other or different considerations than those which governed the supreme court in similar cases. The statute simply invested this court with the jurisdiction, formerly possessed by the supreme court, to grant new trials on the merits,—a change made necessary by the change of procedure. Therefore, in determining whether, in a case brought to this court under the statute of 1887, a new trial should be granted on the merits, this court is bound by the settled rules governing appellate courts possessing and exercising this jurisdiction. It is a cardinal principle in our jurisdiction that the jury is the ultimate tribunal for the investigation and determination of questions of fact. It is no more the province of an appellate court than of the court of original instance to determine controverted questions of fact arising upon conflicting evidence. Neither can lawfully usurp the appropriate function of the jury, and neither can substitute its own judgment for that of the jury, where the facts are reasonably capable of diverse or opposing inferences. But the power to grant new trials is an essential safeguard against the miscarriage of justice, and in nearly all judicial systems the courts in some form have been invested with this power as a protection against passion, prejudice, mistake, perversity, or corruption on the part of jurors; and these are the matters to be considered by the court when called upon to supervise the findings of a jury. In very many, if not most, criminal cases, there is a conflict of evidence upon material facts. It is primarily the province and duty of the jury to determine where the truth lies. The case may be nearly balanced. There must, according to settled principles of criminal law, be a preponderance of evidence against the defendant to authorize a conviction. It is the duty of

juries to be guided by this rule. But on which side is the preponderance of evidence cannot be determined by fixed rules. It must be left, after all, to the good sense of the jury, under proper instructions as to the law, to determine the question. The court may entertain some doubt whether the fact was properly found by the jury; and in case of serious doubt, especially in a criminal case, it may, if in its opinion justice requires it, order a new trial. But the mere fact that there is a conflict in the evidence is not alone a ground for a new trial. The court must be able, upon a review of the proceedings, to reach the conclusion that injustice has probably been done on the trial, before it is justified in setting aside the verdict of the jury. In the nature of the inquiry the matter is not capable of exact rules or definition, and the court must act in the exercise of a discretion having reference to the circumstances of the particular case. The court would not, we think, be justified in granting a new trial in this case, under the act of 1887. There is much to appeal to the sympathies in the unfortunate condition of the defendant. But the evidence justified the jury in finding that in shooting her husband she acted deliberately and with premeditation, with the intention of taking his life. The principal facts proved on the trial on either side are recapitulated in the preliminary statement, and need not be repeated. The defendant, before leaving her rooms on One Hundred and Twenty-Fifth street, shortly before the homicide, armed herself with the pistol. According to the testimony of disinterested witnesses of the transaction, she was first seen following her husband on the avenue, and deliberately shot him from behind while he was walking ahead of her, apparently unconscious of her presence in the vicinity. The story of the defendant of the occurrences immediately preceding the shooting, not only is without any corroboration, but is irreconcilably inconsistent with the facts as observed by the other witnesses. Her story, that the deceased attempted to attack her with a razor, is not only inconsistent with the testimony of the other eye-witnesses of the shooting, but seems conclusively disproved by the uncontroverted evidence that the razor of the deceased was found, after his death, in his inside vest pocket, wrapped in paper, and tied around with a string, and no other razor was found in the vicinity. Upon the whole facts, we cannot say that the verdict was against the weight and preponderance of evidence, or that justice requires a new trial. The defendant may have been driven almost to desperation by the wrongs and insults of her husband; but the circumstances of the shooting, as the jury had a right to find them, do not show that the homicide was either justifiable, or that the defendant acted in the heat of passion, or without an intent to kill.

The remaining question arises upon the claim made by the counsel for the defendant that, on a former trial under the indictment, the defendant had, by legal intendment, been acquitted of the principal offense of murder in the first degree, which was a bar to a subsequent trial and conviction for that degree of homicide. The facts upon which this question depends, are, briefly, these: On a former trial, the defendant, upon arraignment, pleaded not guilty, and a jury was impaneled and sworn to try the issue. The trial proceeded, and witnesses were sworn and examined in behalf of the prosecution. At the conclusion of the case on the part of the people, by mutual consent of the defendant, the district attorney, and the court, the jury were discharged, and the defendant withdrew her plea of not guilty, and pleaded guilty of murder in the second degree, which latter plea was accepted by the court, but no sentence was pronounced. On a subsequent day, the defendant, by her counsel, applied to the court to be permitted to withdraw her plea of guilty of murder in the second degree, and, the district attorney consenting thereto, the court allowed the motion, and the defendant thereupon withdrew her said plea, and again pleaded not guilty to the indictment. The grounds upon which the application to withdraw the former plea was made, or upon which it was granted, do not appear. The trial from which the present appeal is

taken, was thereafter had under the general plea of not guilty so interposed, which resulted in the present conviction. It is now claimed that the acceptance of the plea of guilty of murder in the second degree on the former trial was in law an acquittal of the defendant of the crime of murder in the first degree, which acquittal stood in full force, and unimpaired by the subsequent proceedings. It would be a complete answer to this claim in point of law that the defense of former acquittal must be pleaded, and that, in the absence of a plea setting it up, the question cannot be raised. This was the rule before the enactment of the Code of Criminal Procedure, and is recognized by that statute. *People v. Benjamin*, 2 Park. Crim. R. 201; Code, §§ 332, 339. See, also, *State v. Barnes*, 32 Me. 230; 2 Bish. Crim. Proc. §§ 806, 813. But in a capital case, if it was made to appear that there had been a former acquittal, we should deem it our duty, under the statute of 1887, to take notice of the fact, although not presented by a formal plea. The contention that the acceptance of the plea of guilty of murder in the second degree on the former trial was in law an acquittal of the higher offense, notwithstanding its withdrawal at the instance of the defendant, is placed on the supposed analogy with those cases in which it has been held that, where a defendant indicted for murder is put on his trial for that crime, a conviction of murder in the second degree, or of manslaughter, is an acquittal of any higher degree of the crime than that for which he was convicted; and that, although the defendant succeeds in procuring a reversal of the judgment convicting him of the lesser offense, he does not thereby waive the benefit of the former verdict as an acquittal for the higher offense, but may insist upon it, and he cannot thereafter be tried for any higher degree of the crime than that of which he was formerly convicted. The preponderating weight of authority sustains the general principle as above stated. *Slaughter v. State*, 6 Humph. 411; *State v. Ross*, 29 Mo. 32; *People v. Gilmore*, 4 Cal. 378; *State v. Hornsby*, 8 Rob. (La.) 588; *State v. Kittle*, 2 Tyler, 472. In Ohio a different rule prevails. *Jarvis v. State*, 19 Ohio St. 585. In this state the same doctrine is recognized in cases of inferior offenses. *Guenther v. People*, 24 N. Y. 100; *People v. Dowling*, 84 N. Y. 478. The question has not arisen in this state, so far as we know, on an indictment for murder; but, *a fortiori*, if the doctrine contended for is applicable in case of minor offenses, it is to those of the higher grade. In determining whether the principle of these decisions is applicable in the present case, the *ratio decidendi* is to be considered. The doctrine that a man once tried and convicted or acquitted of a crime, on a valid indictment, by a court of competent jurisdiction, cannot be tried again for the same offense, has its foundation in the principles of justice, and was a very ancient doctrine of the common law. It is embodied in that provision of the constitution of our state (article 1, § 6) which declares that "no person shall be subject to be twice put in jeopardy for the same offense." In declaring the application of this constitutional principle, it is well settled that an acquittal or conviction by verdict of a jury, although not followed by judgment or sentence, is an acquittal or conviction which protects an accused person against another trial, provided there was a competent court and a lawful indictment, or, in case of conviction, so long as the judgment remains unreversed. And, whether the conviction was on confession or by verdict, the rule was the same. *Shepherd v. People*, 25 N. Y. 406, and cases cited. But in this state, and generally elsewhere, a party convicted is permitted, in some form, to have a review for the purpose of correcting any errors of fact or law which may have been committed on the trial; and it became a settled qualification of the doctrine that a party could not be twice tried for the same offense, that, by seeking and obtaining a new trial for error, he thereby waived the constitutional protection, and could be again tried for the offense of which he formerly was convicted. *U. S. v. Keen*, 1 McLean, 435; *People v. Dowling*, *supra*. But this doctrine, in turn, was limited so as to protect a defend-

ant who secured a reversal and new trial from being again put on trial for a higher grade of the same offense, or for another offense included in the same indictment, of which higher grade, or of which other offense, the first conviction was by inference an acquittal. So it was held that a verdict of conviction of one of several offenses charged in an indictment, or of a lesser degree of a single offense, implied, although the verdict was silent on the subject, that the jury found the defendant not guilty of such other offenses, or of the higher degrees of the same offense. It was on the theory that the verdict was separate and divisible, being both a verdict of acquittal and conviction, and that there was no inconsistency between a claim that the defendant was not guilty even of that of which he was convicted, and the claim that the verdict still stood as an acquittal of the other matters charged in the indictment, that the defendant was permitted on a new trial to urge the former verdict as an acquittal of all the matters charged other than that on which the conviction was had. The reason of the rule has, we think, no application to the present case. The confession of guilty of murder in the second degree having been voluntarily withdrawn by the defendant on her application to the court, removed, as is justly claimed by the assistant district attorney in his very able argument, the only proofs which sustained alike the conviction, as also the constructive acquittal, of the defendant of the higher crime. It left the case without any plea whatever until the defendant again interposed her general plea of not guilty to the whole indictment; and in a criminal case an arraignment and plea are essential to a valid trial and judgment. *People v. Bradner*, 107 N. Y. 9, 13 N. E. Rep. 87, and cases cited. The waiver wrought by the withdrawal of the plea involved the waiver of all which depended on the plea, and this included a waiver of the benefit of the implication which existed, so long as the plea remained, of an acquittal of the higher crime. We think that neither upon reason nor principle can the defense of former jeopardy be maintained. As to waiver in criminal cases, see *Pierson v. People*, 79 N. Y. 479, and cases cited.

The case of *Kring v. Missouri*, 107 U. S. 221, 2 Sup. Ct. Rep. 443, does not, we think, decide the question now presented. In that case there was a confession of the crime of murder in the second degree, followed by sentence and judgment in the state court of Missouri. The sentence was set aside by the appellate court of the state, because in violation of an understanding between the prosecuting officer, the defendant, and the court as to the length of sentence in case the defendant should plead guilty, and the appellate court remanded the case to the lower court for further proceedings. When the cause was again moved, the defendant stood on his plea of guilty of murder in the second degree, and its acceptance by the court, and refused to withdraw it. The court thereupon directed a plea of not guilty to be put upon the record, against the defendant's protest, and he was thereupon tried and convicted of murder in the first degree. The judgment was reversed by the supreme court of the United States. In the present case there was neither sentence nor judgment on the plea, and the defendant voluntarily withdrew the plea, and pleaded over to the indictment. It is quite clear from the prevailing opinion in the *Kring Case* that the absence of these circumstances in that case had a controlling influence. We are of opinion, therefore, that the defense of former acquittal, if properly pleaded, could not have prevailed.

We deem it unnecessary to consider whether the legislature, by sections 464 and 544 of the Code of Criminal Procedure, have changed the rule that a conviction for a lesser grade of an offense, or of one of two offenses charged in an indictment, imports an acquittal of the higher grade of the offense or of the other distinct offense. It is assumed in the *Kring Case* that it would be competent for the legislature to make such a change, applicable to future cases. The judgment should be affirmed.

All concur, except GRAY J., not voting.

(110 N. Y. 621)

BAYLIS v. STIMSON.¹

(Court of Appeals of New York. June 5, 1883.)

VENDOR AND VENDEE—RESCISSION OF CONTRACT—TITLE.

W. assigned a lease to defendant upon, as the assignment stated, "a consideration of one dollar, and other good and valuable considerations." The assignment was recorded, and thereafter plaintiff agreed to purchase the lease from defendant, and paid part of the purchase price. Prior to the consummation of the purchase W. made an assignment for benefit of creditors, and judgments were docketed against him. Plaintiff thereupon refused to complete the purchase "without releases from W.'s general assignee and from his judgment creditors." Held, that the court having found that defendant's title was good, that the assignment was made for a valid consideration, and not to defraud creditors, and the consideration mentioned in the assignment not showing otherwise, plaintiff could not recover the amount paid on account of the purchase, although such releases were not obtained.

Appeal from general term, superior court, city of New York.

Adrian Van Sinderin, for appellant. *Wm. Pierrepont Williams*, for respondent.

DANFORTH, J. The case was submitted to a referee, whose findings have been affirmed by the general term. Upon examination we discover no finding unsupported by evidence, nor a refusal to find any material fact which stood on uncontroverted evidence. The facts, therefore, are not in dispute, and, so far as they relate to any question upon this appeal, are as follows: On the 8th of November, 1882, one Theodore Weston held a lease from the trustees of Columbia College, of certain premises in the city of New York, and on that day assigned it to the defendant upon, as the assignment stated, "a consideration of one dollar, and other good and valuable considerations." On the next day the assignment was recorded. On the 24th of the same month the defendant entered into an agreement in writing with the plaintiff to sell to him the leasehold, free from all incumbrance save a mortgage of \$23,000, and the plaintiff agreed to buy the same at the price of \$40,500, and at once paid \$3,000 on account of the purchase price. Both parties agreed that the sale should be completed and title taken on the 10th of December, 1882. On the 4th of December, the said Theodore made a general assignment for the benefit of creditors to one D., which was duly filed in the proper office, and within a day or two thereafter judgments were docketed against him for a large amount. Immediately thereafter the plaintiff's counsel notified the defendant that he would not advise his client to take the title "without releases from Weston's general assignee and from his judgment creditors," and the time for completing the purchase was adjourned from time to time until January 24, 1883. At or about that time the plaintiff, for reasons thus intimated by his counsel, elected to rescind the contract, and so notified the defendant. No other objection was made to the title, but upon the trial of this action it was made to appear that prior to the assignment of the lease to Stimson the defendant had assigned it by way of security to one Norris for money due or to be advanced, but the referee found that the defendant was prepared to discharge that obligation upon the completion of the contract, and that in fact "the transfer of the leasehold premises from the said Theodore Weston to the defendant was made for a good and valuable consideration, was not intended to hinder, delay, or defraud creditors of said Weston, nor to create a trust, nor to preserve an interest therein for said Weston, but was an absolute and *bona fide* sale and transfer thereof." He also found that the defendant's title was neither defective nor subject to any well-founded objection in law or fact, and dismissed the complaint.

In any view of the case, whether it relates to the marketable quality of the defendant's title, or to its intrinsic goodness, we are of opinion that the con-

¹Affirming 53 N. Y. Super. Ct. 225.

clusion of the referee, and the judgment of the supreme court, approving it, should be affirmed. The opinions pronounced by these learned tribunals are reported, (58 N. Y. Super. Ct. 225,) and we have only to speak of the objections urged by the appellant to their exposition of law by which his action was defeated. It is said by the learned counsel for the appellant that the "findings and conclusions, as well as the opinions, of the referee and of the general term, all proceed upon the idea that the action was brought to recover money on the basis of a rescinded contract," which assumption he declares to be erroneous. But the pleadings allow no other construction than that complained of. The complaint states several objections to the title, notice to the defendant thereof, his omission to remove them, and that thereupon the plaintiff did on the 24th of January, 1883, notify him of his election to rescind the same, and demand the repayment of the sum of "three thousand dollars paid by plaintiff to defendant on account thereof, with interest from the 24th day of November, 1882, the time of the said payment, together with the expenses and counsel fees paid and incurred by plaintiff in the examination of the title to the said premises;" and this sum and the money paid for these causes he seeks to recover. The referee found the rescission made and notice thereof given to the plaintiff. He could not do otherwise, for the complaint alleged it and the answer admitted it. It is true, the complaint also alleges that the plaintiff incurred other expenses for matters said by him to have been promoted for the benefit and with the consent of the defendant; but, as we gather from the pleadings, these were denied by the defendant, and certainly are found by the referee to be unproven. The evidence called for no other conclusion. I speak thus doubtingly of the answer, for it is so drawn as to be unintelligible except upon careful comparison with the complaint, in order to find out what is denied. In terms it denies nothing, but directs our attention to the "whole of the paragraph beginning with the words, 'and the plaintiff,' in folio 11, to the whole of the paragraph beginning in folio 23 with the same words, to the last five lines of a paragraph ending in folio 15, the last three of folio 19, the first six lines of folio 20," and avers that as to the truth of such allegations as are there found the defendant has neither knowledge nor information sufficient to form a belief. It is thus inartificial and troublesome, and not in accordance with any rule of pleading at common law or under the Code. It is, however careless, no doubt easy for the pleader, but the labor of dissection and discovery as to its meaning is thrown upon the opposite counsel and the court. It belong to neither. The answer should disclose the defense, whether it be by denial or new matter, without reference to any other pleading. It should be complete in itself, and require neither amplification nor patching from fragments of the complaint. The Code means nothing less when it enacts (section 500) that "the answer must contain" "a denial of each material allegation of the complaint controverted by the defendant," and what allegations are thus controverted should appear on the face of the answer. The plaintiff's attorney should not be required to look beyond that pleading for such information, nor should the court be required to count lines and measure paragraphs to discover the matters put in issue. We think, however, the answer has been properly construed and applied; at least, the finding of the referee is clear and decisive. He also found that the objections made to the title offered by the defendant were baseless. This conclusion is amply sustained by the opinions already referred to, and to the cases there cited may be added *Moser v. Cochrane*, 107 N. Y. 85, 13 N. E. Rep. 442. The plaintiff seems to have been led by extreme caution into suspicions which were in fact groundless, and in no manner sufficient to relieve him from a contract upon which he fairly entered. No fact appeared to him; none is disclosed by evidence showing either that any creditor of Weston intended to attack the assignment under which the defendant's title was made, or that any foundation existed for such attack. Indeed, all that is

v.17N.E.no.2—10

suggested by the plaintiff is that "in an attack by creditors a wide range of inquiry would be open," "and if the findings were adverse to the good faith of the transaction, the purchaser would be remediless." The only fact called to our attention is the statement of consideration in the assignment. However that statement is construed, even as showing, as it does not show, that the conveyance was not founded on a valuable consideration, it would, standing by itself, be of no importance. 1 Rev. St. p. 137, §§ 4, 5. The possibility suggested is purely imaginary, and insufficient to create even a doubt, much less "a rational doubt," or one in the solving of which a court could lawfully require the assistance of a jury. *Shriver v. Shriver*, 86 N. Y. 575. Less than this would not avail the unwilling vendee, even if compelled to answer in a court of equity. *Hellretgel v. Manning*, 97 N. Y. 56.

I have carefully examined the elaborate and well-considered brief of the appellant, and the authorities referred to by him. I find nothing in either which impairs the reasoning or conclusion of the courts below, or supports the appeal. The judgment should therefore be affirmed.

All concur.

(110 N. Y. 61)

PEOPLE v. LAKE.¹

(Court of Appeals of New York. June 5, 1888.)

1. INCEST—BETWEEN FATHER AND ILLEGITIMATE DAUGHTER.

Under Penal Code, § 302, providing that "persons, being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, * * * who shall commit adultery or fornication with each other, shall, upon conviction, be punished," etc., a father who has sexual intercourse with his illegitimate daughter is guilty of incest.

2. SAME—INDICTMENT—MISNOMER.

An indictment for incest described the female as "Georgiana Towne, commonly known as 'Georgiana Lake.'" It appeared that her real name was Georgiana Jeanette Lake, and that she was generally spoken of as "Nettie Lake." Held no variance, there being no question as to the identity of the female.

Appeal from general term, supreme court, second department.

G. Arnold Moses, for appellant. Geo. Gallagher, for respondent.

PINCH, J. The prisoner was convicted of incest. To linger over the facts, or repeat the details of the proof, would peril the calmness and cleanness which belong to a judicial record, and we should therefore touch the disgraceful history only at points where necessity compels. The evidence was claimed to be insufficient, but it fairly established the prisoner's guilt, and fully justified the verdict of the jury. If some of it was open to objection, at least no objection was made, and the inference of the defendant's guilt was an easy deduction from the proof. The principal ground of defense asserted is that the victim of his lust, although his own daughter, was illegitimate, and so, whatever his depravity, it was not the crime of incest. He seduced that daughter's mother; abandoned her and the child for some years; then, returning, took the daughter, just grown into womanhood, for his book-keeper, as he said; seduced her in turn; and now pleads her illegitimate birth, the disgrace which she inherited from her cradle, and inherited from him, as a defense to the charge of which he stands convicted. The law draws no such distinction. If it did, we should be ashamed of it, for the offense, although committed with a daughter born out of wedlock, is not by that fact mitigated or condoned. She stood related to him by consanguinity within the forbidden degrees. That she had no inheritable blood for the purposes of descent and distribution does not alter the actual and natural relation. Kent says, while speaking of the general legislation relative to bastards: "This relaxation in the laws of so many of the states of the severity of the common law rests

¹Affirming 36 Hun, 642, *mem.*

upon the principle that the relation of parent and child, which exists in this unhappy case in all its native and binding force, ought to produce the ordinary legal consequences of that consanguinity." 2 Kent, Comm. *213. It was early held to be unlawful for a bastard to marry within the Levitical degrees, (*Hains v. Jeffell*, 1 Ld. Raym. 68;) a doctrine which of necessity recognized relationship and consanguinity. But our statutes leave no room for any reasonable doubt. The Penal Code enacts (section 302) that "persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who shall intermarry with each other, or who shall commit adultery or fornication with each other, shall, upon conviction, be punished," etc. This enactment is taken from the Revised Statutes, (part 4, c. 1, tit. 5, art. 2, § 12,) and its reference is to the provision as to marriage, (part 2, c. 3, tit. 1, art. 1, § 3.) That declares marriages between parents and children incestuous and void, and specially includes illegitimate as well as legitimate children. Since, therefore, the consanguinity between father and daughter, although the latter be illegitimate, is by law declared to make their marriage incestuous and void, the provision of the Penal Code applies to the same relation and describes the crime of incest. Beyond its utter want of merit the defense has no foundation in the law. A technical variance between the indictment and proof was asserted to exist and pressed upon our attention. The indictment gave the name of the daughter as "Georgiana Towne, commonly known as 'Georgiana Lake.'" There was no question of her identity, for she was present during the trial, and was identified by the witnesses. The proof shows that she was named "Georgiana Jeanette," and by an abbreviation of the middle name was generally spoken of as "Nettie Lake." It was no misnomer to describe her as "Georgiana Lake." Her name was Georgiana, and she was commonly called "Lake." Her father acknowledged her as his daughter, and she commonly bore his name, so that her true name in full was Georgiana Jeanette Lake, and it was no variance to describe her as Georgiana Lake, and the question of identity was put at rest by her presence.

Other technical variances were urged and complaints of the character of some of the testimony. They are not founded upon any exceptions taken by the prisoner, and do not seem to us to justify a conclusion of error in the proceedings. The judgment should be affirmed.

All concur.

(125 Ill. 9)

PEOPLE *ex rel.* COMMISSIONERS OF HIGHWAYS v. BOARD OF SUPERVISORS.

(*Supreme Court of Illinois.* May 9, 1888.)

1. BRIDGES—CONSTRUCTION—COUNTY AID—EXPENDITURE OF REGULAR TAXES.

In a petition by town commissioners of highways to compel the county to contribute to the cost of constructing bridges, an averment that the major part of the road and bridge tax of 60 cents on each \$100 on the last assessment roll of the town is needed for the ordinary repairs of roads and bridges in the town during the year for which the tax was levied, is not traversable, since it relates to a matter within the discretion of the commissioners.

2. SAME—COST OF BRIDGES—PERCENTAGE OF ASSESSMENT ROLL.

An allegation that the cost of the proposed bridges will be more than 20 cents per \$100 on the latest assessment roll is only provable by record, and cannot be tried to a jury.

3. SAME—EVIDENCE DEHORS THE RECORD—HARMLESS ERROR.

On the trial of issues of fact on petition by highway commissioners to compel county aid in the construction of bridges, the admission of oral evidence of the actions of the commissioners, which were also shown by their record read in evidence, is harmless error.

4. BOUNDARIES—WATER-COURSES.

The boundary of a township described as "beginning at the N. E. corner of section No. 11, T. 4, R. 8 west, on the section line, to Gordon's branch; thence down the

meanderings of said branch to the margin of C. creek; thence down on the left bank of said creek to the line between secs. No. 3 and 4, in said township," etc.,—must be considered as drawn at the bank of the stream; the presumption that it is in the middle of the bed of the stream or at low-water mark being positively rebutted.

Original proceeding for *mandamus*.

Wise & Davis and Burroughs & Warnock, for relators. *Dale & Bradshaw* and *Geo. F. McNulty*, for respondents.

SCHOLFIELD, J. This is an original application to this court by the commissioners of highways of the township of Edwardsville, in Madison county, for a writ of *mandamus* against the board of supervisors of that county. It is alleged in the petition that the said commissioners of highways did, on the 31st day of March, A. D. 1886, present to the board of supervisors of said county, then in session, a petition, estimate, and affidavit as follows:

"The undersigned, commissioners of highways of the town of Edwardsville, in said county, would respectfully represent that a bridge needs to be built over the Cahokia creek, in said town, where the same is crossed by the highway leading from the city of Edwardsville, in said town, to the city of Alton, in said county; and also that a bridge needs to be built over said Cahokia creek, in said town, where the same is crossed, at the Lucy Wheeler farm, by the highway leading from said city of Edwardsville, in said town, by way of the old fair-ground, to Venice, in said county, in which said work the said town of Edwardsville is wholly responsible; that the cost of each of said bridges will be seventeen hundred and fifty dollars, and the total cost of building both of said bridges will be thirty-five hundred dollars, which sum of thirty-five hundred dollars will be more than twenty cents on the one hundred dollars on the latest assessment roll of said town, and that the levy of the road and bridge tax for the present year in said town is the full amount of sixty cents on each one hundred dollars allowed by law for the commissioners to raise, the major part of which is needed for the ordinary repair of roads and bridges; that said town has provided and appropriated, for the building of said bridges, the sum of \$1,750, being one-half of the total estimate cost thereof. Wherefore the said commissioners of highways of said town hereby petition you for aid, and for an appropriation from the county treasury of a sum sufficient to meet one-half the expense of said bridges.

"*Dated at Edwardsville, Ill., this 30th day of March, A. D. 1886.*

"WM. SMOLA,

C. M. SCHWARZ,

"JOHN F. KIENLEN,

Commissioners of Highways."

"*State of Illinois, Madison County, Town of Edwardsville—ss.*

"BOARD OF COMMISSIONERS OF HIGHWAYS.

"We, the undersigned, commissioners of highways of the town of Edwardsville, hereby state that we have made a careful estimate of the probable cost of the erection of two bridges across Cahokia creek, in said town; one where the same is crossed by the highway leading from the city of Edwardsville, in said town, to the city of Alton, in said county; and one where the same is crossed, at the Lucy Wheeler farm, by the highway leading from the said city of Edwardsville, in said town, by way of the old fair-ground, to Venice, in said county; and we do estimate that the probable cost of each of said bridges will be seventeen hundred and fifty dollars, and that the total cost of said bridges will be thirty-five hundred dollars.

"Witness our hands this 30th day of March, A. D. 1886.

"WM. SMOLA,

C. M. SCHWARZ,

"JOHN F. KIENLEN,

Commissioners of Highways."

"*State of Illinois, Madison County, Town of Edwardsville—ss.*: William Smola, John F. Kienlen, and C. M. Schwarz, commissioners of highways of the town of Edwardsville, being each duly sworn, on oath say that the construction of the bridges mentioned in the estimate to which this affidavit is attached,

across Cahokia creek, in said town, is necessary, and that the same will not be made more expensive than is needed for the purpose desired.

"WM. SMOLA,

C. M. SCHWARZ,

"JOHN F. KIENLEN,

Commissioners of Highways.

"(Subscribed and sworn to.)"

The petitioners further represent that all the matters and things in said petition, estimate, and affidavit set forth were and are true, as therein stated, and the same were, upon presentation of said petition, estimate, and affidavit to said board of supervisors aforesaid, made to appear to said board of supervisors, and that said petition, estimate, and affidavit were presented to said board, as aforesaid, in good faith, and for the objects and purposes therein set forth; and that upon presentation thereof, as aforesaid, the same were by said board referred to its committee on roads and bridges, and afterwards, on the 14th day of September, A. D. 1886, being one of the days when said board was in session at its regular annual meeting, said board denied the prayer of said petition, and refused, and still does refuse, to make said appropriation, although it was its plain duty to do so, under the provision of the statute of this state. Wherefore the petitioners pray this court to order a writ of *mandamus* to issue from this court, directed to the said board of supervisors of Madison county, Ill., commanding it forthwith to appropriate the said sum of \$1,750 out of the treasury of said county, to be expended in paying for one-half the cost of constructing two bridges in the town of Edwardsville, in said county, as prayed for in said petition of said commissioners of highways; and the said board of supervisors may be summoned, in accordance with the rules and practice of this court, to answer this petition, and, upon a hearing thereof, this court will make such order herein as under the law may be justified, etc. The petition is subscribed by the commissioners, and sworn to.

Respondents filed 10 pleas, but demurrers were sustained to the first, second, seventh, eighth, and ninth pleas. The third, fourth, fifth, sixth, and tenth pleas are as follows: "*Third Plea*. And, for a further plea in this behalf, these respondents say that the said petitioners ought not to have a writ of *mandamus* against these respondents in this behalf, because they say for said year in the said petition named the levy of the road and bridge tax in said town of Edwardsville was not for the full amount of sixty cents on each one hundred dollars on the latest assessment roll of said township, but was less than said amount; and of this they put themselves upon the country. *Fourth Plea*. And these respondents, for a further plea in this behalf, come and defend," etc., "and say the petitioners ought not to have a writ of *mandamus* against them, because they say, when said petition of said commissioners of highways was presented to said board of supervisors, the matters and allegations in said petition contained were investigated by the said board of supervisors, and it did not appear to said board, or these respondents, that at the time said petition was so presented, nor at any subsequent time, that a major part of the full amount of road and bridge tax of Edwardsville township of sixty cents on the \$100.00 of the latest assessment roll for the year in said petition mentioned and claimed to be levied, was needed for the ordinary repair of roads and bridges in said town of Edwardsville; but, on the contrary, these respondents say that the major part of said tax of said sixty cents on the said \$100 was not needed for the ordinary repair of roads and bridges in said township at the time said petition was presented to said board, nor at any time subsequent thereto; and of this these respondents put themselves upon the country. *Fifth Plea*. And these respondents, for a further plea in this behalf, come and defend," etc., "and say the petitioners ought not have a writ of *mandamus* against them, because these respondents say that the major part of full amount of road and bridge tax for said Edwardsville township, for the year in said petition mentioned, alleged to be levied by said highway commissioners, of sixty cents on each \$100 allowed by law to be raised by said highway

commissioners for said tax, was not needed for the ordinary repair of roads and bridges in said township when said petition for said aid was presented to said board of supervisors, nor at any other time; and this these respondents pray may be inquired into by the country. *Sixth Plea.* And these respondents, for a further plea in this behalf, come and defend," etc." and say the petitioners ought not to have a writ of *mandamus* against them, because they say the cost of the bridges mentioned in said petition, and to be built, which aid was asked, would together be less than twenty cents on the \$100 of the latest assessment roll in said township; and of this they put themselves upon the country. * * * *Tenth Plea.* And, for a further plea in this behalf, leave," etc., "according," etc., "the respondents say that the petitioners ought not to have their writ of *mandamus* against these respondents in this behalf, because they say that the east end and part, to-wit, the east piers, abutments, and all the approaches thereto of said proposed bridge, in the said petition of the petitioners mentioned as crossing said Cahokia creek on the public highway leading from the city of Edwardsville to the city of Alton, in said county, is within the corporate limits of the city of Edwardsville, in the county of Madison and state of Illinois, and that the cost of constructing the other proposed bridge near the Lucy Wheeler farm will be less than 20 cents on the \$100.00 on the latest assessment roll of said town of Edwardsville at the time said county board was so petitioned, and that the said town of Edwardsville, before and at the time of presenting said petition for aid to said county board, had raised a sum of money sufficient to pay for said last-named bridge, exclusive of the amount needed for the ordinary repair of roads and bridges, and this they are ready to verify. Wherefore these respondents pray if petitioners ought to have their aforesaid writ of *mandamus*," etc.

Relators file their replication to respondents' tenth plea, as follows: "And the relators, as to the plea of the respondents by them tenthly above pleaded, by leave of court, say that they, the relators, by reason of anything in that plea alleged, ought not to be barred from having their aforesaid writ of *mandamus*, because they say that the bridge mentioned in said plea, proposed to be built across Cahokia creek, on the public highway leading from the city of Edwardsville to the city of Alton, is intended to take the place of an old wooden bridge now across said creek on said highway; that said old bridge rests upon two stone abutments, and no more, one of which abutments is on the west bank of said creek, and the other of said abutments is on the east bank of said creek; that said proposed bridge is to be an iron bridge, and is intended to be placed upon said two abutments, and upon no other abutments or piers; and that the estimated cost of \$1,750, mentioned in the petition herein for building said proposed bridge, includes no expense or work on the said abutment on the east bank of said creek, or any approach thereto; and this the relators are ready to verify. Wherefore they pray judgment, and their writ of *mandamus*," etc.

Questions of fact were certified to the Macoupin circuit court to be tried by a jury. The questions, and the findings of the jury returned in answer thereto, were as follows: "We, the jury impaneled and sworn to try the issues in the above-entitled cause, make the following answers to the following questions, (being the 7 questions submitted by relators:) (1) Was the levy of the road and bridge tax in the town of Edwardsville, in the year 1885, for the full amount of sixty cents on each \$100 on the latest assessment roll of said town of Edwardsville? *Answer.* Yes. (2) Was the major part of said road and bridge tax of sixty cents on each \$100 on the latest assessment roll of said town of Edwardsville needed for the ordinary repair of roads and bridges in said town, during the year for which the tax was levied? *A.* Yes. (3) Will the cost of the two bridges mentioned in relators' petition for *mandamus* be together more than twenty cents on the \$100 of the assessment roll in the town of Edwardsville for the year 1885? *A.* No. (4) How much, if any,

of the east end of the bridge mentioned in relators' petition, herein proposed to be built across Cahokia creek, on the public highway leading from the city of Edwardsville to the city of Alton, is in the corporate limits of said city of Edwardsville? *A.* None. (5) How much, if any, of the east abutment of the present bridge across Cahokia creek, on the public highway leading from the city of Edwardsville to the city of Alton, is in the corporate limits of the city of Edwardsville? *A.* None. (6) Is the bridge mentioned in relators' petition, and proposed to be built across Cahokia creek on the public highway leading from the city of Edwardsville to the city of Alton, intended to take the place of an old wooden bridge now across said creek, on said highway, and does said old bridge rest upon two stone abutments and no more, and is one of said abutments on the west bank of said creek, and the other on the east bank of said creek, and is said proposed bridge to be an iron bridge, and is it intended to be placed upon said two abutments, and upon no other abutments or piers? *A.* Yes. (7) Does the estimated cost of \$1,750 for building said bridge proposed to be built across Cahokia creek, on the highway leading from the city of Edwardsville to the city of Alton, include any expense or work on the east abutment of the old wooden bridge now across said creek on said highway, or an approach to said abutment, or approach to the east end of said proposed bridge? *A.* None. Answers to two interrogatories submitted by respondent: (1) How much, if any, of the east end of the bridge mentioned in relators' petition proposed to be built across Cahokia creek, on the public highway leading from the city of Alton to the city of Edwardsville, is in the corporate limits of the said city of Edwardsville? *Answer.* None. (2) If the jury answer that part of said east end is within the corporate limits of the city of Edwardsville, will it be necessary to expend any money on that part of said bridge, or the east pier or abutment or approach to said bridge, which they find is within the corporate limits of the city of Edwardsville, for the proper building of the same? *A.* We find that no part of said bridge is within the limits of the city of Edwardsville." The court, at the instance of the relators, gave the following instruction to the jury: "The court instructs the jury that the east margin of Cahokia creek is the boundary line of the city of Edwardsville, where the bridge mentioned in relators' petition is proposed to be built across said creek on the highway leading from the city of Edwardsville to the city of Alton." Respondents asked the court to instruct the jury as follows, but the court refused to do so: "(1) The court instructs the jury, as a matter of law, that the corporate limits of the city of Edwardsville, as bounded by the Cahokia creek, extend to the middle of the stream of said creek. (2) The court instructs the jury, as a matter of law, that the corporate limits of the city of Edwardsville, as bounded by Cahokia creek, extend to low-water mark of said creek." After the jury had returned their answers to the interrogatories aforesaid, but before they were discharged by the court, relators requested the court to instruct them as follows: "If the jury find from the evidence that the cost of building the two bridges mentioned in relators' petition is undisputed in the evidence, and amounts to \$3,500, and that the total of the assessment roll of the town of Edwardsville, in the year 1885, is \$1,013,423.00, then 20 cents on the \$100 of said assessment roll is less than the cost of said two bridges, and the jury ought to answer the 3d question submitted to them in the affirmative." The court, holding that the instruction was asked too late, declined to give it.

The answer of the jury to the third interrogatory propounded on behalf of the relator is palpably erroneous; but the question there propounded is one not proper for the determination of a jury, and the error in their verdict may, for that reason, be disregarded.

The amount of the assessed valuation of the taxable property of the town of Edwardsville, for the year 1885, and the estimated cost of building the two bridges, are all matters of record, and therefore provable only by the record.

See the several sections of revenue act in relation to assessments, (Rev. St. 1874, c. 120.) and section 19 of "Act in regard to roads and bridges in counties under township organization," approved June 23, 1883. Hence the denial of the allegations of the petition that the cost of the two bridges would be more than 20 cents on the \$100 on the latest assessment roll, etc., was in the nature of a plea of *nul tiel record*, which the court must try by an inspection of the record. 2 Tidd, Pr. (3d Amer. Ed.) 741-743; *Carson v. Pearl*, 4 J. J. Marsh. 92; *Brady v. Com.*, 1 Bibb, 517; *Gray v. Pingry*, 17 Vt. 419. The mere ascertaining of an amount by the multiplication, addition, or subtraction of given numbers presents no question of fact for a jury. In such cases there can be but one result, and the court may either itself perform the labor of ascertaining it, or intrust that labor to any competent individual. In legal presumption, the court knows what is the result. It is upon this principle that where an action is brought for a sum certain, or which may be made certain by computation, the court can enter judgment for the plaintiff for the amount of his damages, without a writ of inquiry. 2 Wms. Saund. 107, and notes *b, c*; *Renner v. Marshall*, 1 Wheat. 215, 216; *Rust v. Frothingham*, Breese, 331. The evidence before us clearly shows that this issue must be decided in favor of the relators. No objection is perceived to the record evidence, and none is insisted upon in argument. The assessed valuation of the taxable property in the town of Edwardsville for the year 1885, which was the last assessment before presenting the petition to the board of supervisors, is \$1,013,423, 20 per cent. upon which can only be \$2,026.84, while the estimated cost of the bridges is \$3,500.

Question is made as to the sufficiency of the evidence to sustain the allegation that the major part of the road and bridge tax of 60 cents on each \$100 on the last assessment roll of the town was needed for the ordinary repair of roads and bridges in the town during the year for which the tax was levied. We think the evidence warranted the finding of the jury in that respect. But we held in *Board v. People*, 121 Ill. 616, 13 N. E. Rep. 220, that this question belonged solely to the commissioners of highways. We there said, among other things: "But whether the proposed work is necessary,—that is, whether public interest and convenience demand it,—or whether the major part of the 60-cents tax levied by the commissioners will be required for the ordinary repairs of roads and bridges, being matters within the discretion and judgment of the commissioners, are questions, the truth of which the board of supervisors have no right to inquire into or determine. With respect to these questions, all they have a right to do is to determine, from the petition presented to them, whether the commissioners have acted upon them, and decided them in the affirmative."

Complaint is made that the court permitted oral evidence to go to the jury of the action of the commissioners of highways as affecting the present controversy. But the same thing which this evidence tended to prove, was proved by the record of the commissioners of highways, which was read in evidence, and therefore no harm was done the respondents by the oral evidence.

The objections most seriously urged are against the answers to the fourth and fifth interrogatories propounded by the relators, and to the first and second interrogatories propounded by the respondents; and this involves—*First*, a question of law as to the proper construction of the language of the charter of the city of Edwardsville respecting a part of its boundary; and, *secondly*, a question of fact with respect to the location of the east end of the bridge. The city is incorporated under a special charter, which, in defining its limits, uses this language: "Beginning at the north-east corner of section No. 11, T. 4, R. 8 west of the third principal meridian, and running thence west on the section line to Gordon's branch; thence down the meanderings of said branch to the margin of Cahokia creek; thence down on the left bank of said

creek to the line between sections No. 3 and 4, in said township," etc. It is undoubtedly the established inference of the law that a conveyance of land bounded on a highway or river carries the fee to the center of the highway or river, provided the grantor at the time owned to the center, and there be no words or specific description to show a contrary intent; and we shall assume, for the present, at least, that this rule is equally as applicable to boundary lines of towns, etc., as to private grants. But it is competent for the riparian proprietor to sell his upland to the top or edge of the bank of a river, and to reserve the stream or flats below high-water mark, if he does it by clear and specific boundaries. 3 Kent, Comm. (8th Ed.) 434, 534, 535. And so we said in *Rockwell v. Baldwin*, 53 Ill. 22: "It is, however, but a presumption; for one man may own the bed of such a stream, and another may own the banks; and where, in a deed conveying land, the boundary is limited to the bank of the stream, instead of bounding it on or along the stream, the presumption must fail. The party must be controlled by the terms of his deed." There the language, "thence down the west line of the creek," was held, in connection with certain circumstances tending to show the interest of the grantor to be to that effect, to establish the boundary line on the bank of the creek. In *Child v. Starr*, 4 Hill, 369, to which we referred as supporting the views thus expressed, WALWORTH, Ch., said: "Running to a monument standing on the bank, and from thence running by the river, or along the river," etc., does not restrict the grant to the bank of the stream; for the monuments in such cases are only referred to as giving the directions of the lines to the river, and not as restricting the boundary on the river. If the grantor, however, after giving the line to the river, bounds his land by the bank of the river, or describes the line as running along the bank of the river, or bounds it upon the margin of the river, he shows that he does not consider the whole *alveus* of the stream a mere mathematical line, so as to carry his grant to the middle of the river." In *Howard v. Ingersoll*, 13 How. 381, one of the boundary lines between the state of Georgia and the state of Alabama is described as "running thence up the said River Chattahoochee, and along the western bank thereof, to the great bend thereof," etc. The court, in speaking of this language, say: "If the language of the article had been, 'beginning on the western bank of the Chattahoochee, and running thence up the river,' and no more had been said, the middle of the thread of the river ordinarily, and without any reference to the fact that Georgia was the proprietor of the river, would have been said to be the dividing line between the two states. But there is added, 'running up the said River Chattahoochee, and along the western bank thereof.' This last controls any uncertainty there may be; for, if the first call or object to locate the land is the bank of the river, it is plain that the western limit of Georgia, on and along the bank of the river, must be where the bank and the water meet in its bed within the natural channel or passage of the river." To like effect is the ruling in *Daniels v. Railroad Co.*, 20 N. H. 85; *Bradford v. Cressey*, 45 Me. 9. See, also, RICHARDSON, J., in *arguendo*, in *Rix v. Johnson*, 5 N. H. 520, and *Insurance Co. v. Stevens*, 87 N. Y. 287. None of the cases cited in argument by counsel for respondents go to the extent of holding that, where a line is described as running on a particular bank of the stream, it, in fact, runs in the middle of the stream. In *Piper v. Connelly*, 108 Ill. 646, we held the plat on the back of the deed to be a part of the description of the premises conveyed, and it showed the river, not the bank, to be the line. In *Helmer v. Castle*, 109 Ill. 664, there was a conveyance bounding the property conveyed by a road, and it was simply held that this carried title to the center of the road; and in *Trustees v. Schroll*, 120 Ill. 509, 12 N. E. Rep. 243, the boundary was upon a lake or pond, and we but there repeated the general doctrine before herein recognized. In *Ipswich Petitioners*, 13 Pick. 431, the line is described as running, "and by Ipswich river, to a wall; * * * then by

said wall," etc.,—and this, it was held, made the center of the river, and of the wall, the line. In *Iron-Works v. Inhabitants*, 9 Cush. 492, the language is, "bounding on said west branch of Farmington river as the same runs," etc.; and it was held the center of the stream was the line. And in *Luce v. Carley*, 24 Wend. 451, the only remaining case cited that it is deemed necessary to notice, the language is, after giving certain monuments, "from thence down the river as it winds and turns," etc.; and it was held that the grantee took to the middle of the river. The language here used in regard to Gordon's branch is within those cases, and the line there is undoubtedly the middle of the stream. But the language describing the line when Cahokia creek is reached, is radically different; and the fact that it is so different is conclusive that it was not intended that it should convey the same meaning. Thus the description of the line is: "To Gordon's branch; thence down the meanderings of said branch to the margin of Cahokia creek; thence down on the left bank of said creek," etc. If this does not clearly say that the line shall run "down on the left bank of Cahokia creek," then it would seem impossible to express that idea. There is no ambiguity in the language, and we are aware of nothing to prevent its having its usual effect, in this connection.

But it is further contended by counsel for respondents that, even if it shall be held that the line does not run in the middle of the stream, it must be held that it runs where the water and land meet at low water. But low-water mark is not the bank of a stream. It is the point to which the stream recedes at its lowest stage. The banks of the stream, on the other hand, are "the elevations of land which confine the waters in their natural channel, when they rise the highest, and do not overflow the banks." Gould, Waters, § 45. In *Howard v. Ingersoll*, *supra*, WAYNE, J., in speaking of the like question there under consideration, said: "The call is for the bank,—the fast land which confines the water of the river in its channel or bed in its whole width. That is to be the line. The bank or the slope from the bluff or perpendicular of the bank may not be reached by water for two-thirds of the year. Still the water-line impressed upon the bank above the slope is the line required by the commissioners; and the slope of the river, though left dry for any time, and but occasionally covered by water in any stage of it to the bank, was retained by Georgia as the river up to that line." The same line was again considered by the same court in *Alabama v. Georgia*, 23 How. 505; and the court repeated its former ruling, holding that the line ran on the west bank of the Chattahoochee river; that the bed of that river belonged to Georgia; and that it included that portion of the soil which is "alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it, at its average and mean stage, during the entire year, without reference to the extraordinary freshets or the winter or spring, or the extreme droughts of the summer or autumn." To like effect, see, also, Gould, Waters, § 200. The rulings of the circuit court in instructing the jury were substantially in harmony with this view of the law, and we therefore think the jury were properly instructed.

We have given careful consideration to the evidence, and we think the clear preponderance is with the finding of the jury, that the east end of the bridge is not within the incorporated town of Edwardsville. A mistake in the abstract makes Spillman say: "Allowing the end of the new bridge to rest a foot and a half over the east abutment, which is the usual way of placing them, the east end of the bridge would be about four feet on the up-stream side, and about three feet on the lower-stream side, *east* of the east line of the bank of the creek. The record shows that the word "*east*," here italicized, should be "*west*." The witness was asked: "Allowing a foot and a half to two feet of the new bridge to rest upon the east abutment here, I will ask you to state how far the east end of the bridge would be from the margin of the creek on the east side of the creek." And he answered: "On the up-

stream side, I think it would be about something near four feet; and on the lower-stream side, probably miss it as much as three feet or two and a half inside of this east line of the bank." The witness had, moreover, previously stated: "The margin of the east bank of Cahokia creek is east of the eastern pier or abutment of the bridge;" and also that "the east end of the bridge, if it rests on this old abutment pier, would be west of the eastern line of the bank of the creek." There is contradictory evidence on this question; but, this mistake in the abstract being corrected, in our opinion, the preponderance is, as before observed, with the finding of the jury.

We think, on the authority of *People v. Board*, 100 Ill. 640; *Town of New Boston v. Board*, 110 Ill. 197; *Supervisors v. People*, Id. 511; *Supervisors v. People*, 118 Ill. 459, 9 N. E. Rep. 192; and *Board v. People, supra*,—the relators are, on the findings of the jury, and the evidence before us, entitled to a peremptory writ of *mandamus*, as prayed in the petition; and it will issue accordingly. Peremptory *mandamus* awarded.

(115 Ind. 180)

DUESTERBERG v. SWARTZEL *et al.*

(*Supreme Court of Indiana. May 18, 1888.*)

1. APPEAL—REVIEW—MATTERS IMPERTINENT TO APPELLANT.

A defendant cannot complain that the court improperly sustained his co-defendant's demurrer to the complaint.

2. MORTGAGES—FORECLOSURE—REDEMPTION BY JUNIOR LIENOR.

The right of a junior lien creditor to redeem real estate sold under mortgage foreclosure within one year after such sale, is not affected by the fact that the purchaser at such foreclosure sale has since purchased the same land from the former owner, and received a deed of quitclaim therefor.

Appeal from circuit court, Knox county; GEORGE A. BICKNELL, Judge.

W. A. Cullop and Geo. W. Shaw, for appellant. Samuel W. Williams, for appellees.

HOWK, J. In this case, Gerrard H. Duesterberg, executor of the will of Louis Stolpp, deceased, sued Joseph A. and Mary A. Swartzel, Lizzie M. Dove, and Benjamin R. Pegram, as defendants in a complaint of two paragraphs. The separate demurrers of defendants Dove and Joseph A. Swartzel to each paragraph of plaintiff's complaint, for the alleged insufficiency of the facts therein stated to constitute a cause of action, were severally overruled by the court to the first paragraph, and sustained by the court to the second paragraph, of such complaint. Defendant Pegram filed his separate answer to the first paragraph of plaintiff's complaint, and also his cross-complaint against his co-defendants herein, who appeared to such cross-complaint, and were ordered to answer it. Defendants Swartzel, Swartzel, and Dove filed their answer to the first paragraph of plaintiff's complaint, and plaintiff was ruled to reply. The cause was tried by the court, and a finding was made for the defendants, and judgment was rendered accordingly. The only errors assigned here by plaintiff call in question the sustaining of the separate demurrers of appellees Joseph A. Swartzel and Lizzie M. Dove to the second paragraph of plaintiff's complaint. By a separate assignment, defendant Pegram also says that the court below erred in sustaining such demurrers to the second paragraph of plaintiff's complaint; but, as such second paragraph was not the complaint of Pegram, we cannot see how it concerns him whether the court did or did not err in sustaining demurrers to such paragraph of plaintiff's complaint, or, if the rulings were erroneous, upon what ground defendant Pegram could claim that he was injured by such errors. In the second paragraph of his complaint, plaintiff alleged that on the 15th day of November, 1886, in a certain cause in the court below in which he, as such executor as aforesaid, was plaintiff, and one Joseph A. Pollock was defendant, by the consideration of such court the plaintiff recovered a judgment

against said Pollock for the sum of \$1,021.40, with 6 per cent. interest thereon, and costs of suit, taxed at \$——; that, at the time of the rendition of such judgment, said Joseph A. Pollock was the owner in fee-simple of the real estate in Knox county, Ind., described as lots numbered 164, 165, 166, and 167, in Harrison's addition to the city of Vincennes, then and since of the value of \$12,000; that, prior to the rendition of said judgment, said Joseph A. Pollock, and his wife, Evaline A. Pollock, executed a mortgage on all of said real estate to Joseph L. Bayard, John H. Robb, and Louis L. Watson, for the sum of \$5,900; that at the February term, 1887, of such court, said Bayard, Robb, and Watson brought an action against said Pollock and wife to foreclose said mortgage, and made defendant thereto plaintiff herein, in his trust capacity, as executor of the will of Louis Stolpp, deceased, and said Benjamin R. Pegram, defendant herein, alleging the junior lien of this plaintiff by virtue of his said judgment, and a junior lien in favor of said Pegram by virtue of a judgment in such court recovered by said Pegram of said Joseph A. Pollock, and asking that this plaintiff and said Pegram be required to answer as to whatever claim to or interest in said real estate they respectively had or claimed to have; that this plaintiff and said Pegram appeared to said action in such court, and filed answers and cross-complaints therein against said Pollock and wife, plaintiff herein setting up his aforesaid judgment lien; that issues were joined between all the parties to said action, and such proceedings were had therein that the court below, at its —— term, 1887, found and adjudged that there was due said Bayard, Robb, and Watson, on account of their said mortgage lien, the sum of \$5,797; that there was due plaintiff herein, executor as aforesaid, on his said judgment lien, the sum of \$1,137.97; that there was due said Pegram, on account of his said judgment, the sum of \$115.96,—all of which sums were due from said Pollock, and were liens on the aforesaid real estate; that it was decreed in said action that said real estate should be sold to satisfy said judgments, and that the proceeds of such sale should be applied—*First*, to the payment of the lien of said Bayard, Robb, and Watson; *secondly*, to Evaline Pollock, wife of said Joseph A. Pollock, by reason of her marital rights, whatever portion of her one-third remained, if any, in excess of what was necessary to satisfy said mortgage lien; *thirdly*, the remainder, first, to the plaintiff herein on his said judgment lien, and next to said Pegram on his judgment lien; and, *fourthly*, the surplus, if any, to said Joseph A. Pollock. And plaintiff further said that, pursuant to said judgment and decree, an order of sale thereon was issued to the sheriff of Knox county, commanding him to sell said real estate as provided in said decree; that on 'he —— day of ——, 1887, pursuant to said decree, said sheriff offered and sold said real estate, for the sum of \$5,945, to defendant Joseph A. Swartzel, who, at the time of such sale, paid said purchase money, and received from such sheriff a certificate of sale pursuant thereto, entitling him to a deed for said real estate on the —— day of ——, 1888, if the same was not sooner redeemed from such sale. And plaintiff averred that immediately after such sheriff's sale, and before the expiration of the year for redemption, defendant Joseph A. Swartzel, to-wit, on the 20th day of April, 1887, purchased of said Pollock all of said real estate, and, pursuant to such sale, by their quitclaim deed of that date, Pollock and his wife conveyed to said Swartzel said real estate, whereof the fee was then in said Pollock; that, at the time of such sale, said real estate was of the value of \$12,000, and the equity of redemption was worth \$2,000; that said Swartzel paid said Pollock, for the fee of such real estate, the sum of \$500, and took said conveyance for the purpose of preventing redemption either by said Pollock or by his wife; that, in arriving at the amount said Swartzel should and did pay for such real estate, he and said Swartzel took into consideration plaintiff's judgment lien thereon, recognizing the same as a valid lien on such real estate, which was subject to execution to satisfy

plaintiff's judgment the same as if said Pollock had redeemed the real estate from the sheriff's sale thereof, instead of conveying the same in fee to said Swartzel; that, immediately after the sale and conveyance of such real estate by Pollock and his wife to said Swartzel, the latter took and had since retained possession of the property, the rental value of which was \$50 per month; that said Mary A. was the wife of said Joseph A. Swartzel, and said Lizzie M. Dove had, or claimed to have, some interest in such real estate, or some part thereof; and that plaintiff's judgment was unpaid, and, by virtue thereof, he had a lien on said real estate prior to any lien, claim, or interest thereon or therein of the defendants and each of them. Wherefore, etc.

We are of opinion that the court below committed no error in sustaining the separate demurrers of defendants Joseph A. Swartzel and Lizzie M. Dove to the second paragraph of plaintiff's complaint. The facts stated in such paragraph were wholly insufficient to show any cause or right of action in favor of the plaintiff against such defendants, or either of them, or against the real estate described in such paragraph. It is not claimed by plaintiff that the judgment and decree of the court for the sale of such real estate, to which he was a party, were invalid and void for any reason. Nor does plaintiff claim, in the second paragraph of his complaint, that the sheriff's sale of such real estate to defendant Joseph A. Swartzel, pursuant to such decree, was for any cause illegal, invalid, or inoperative, in any respect or particular. By his purchase of such real estate at sheriff's sale pursuant to such decree, defendant Joseph A. Swartzel acquired all the right, title, and estate of both Pollock and his wife in and to such property, subject, of course, to the rights of each of them to redeem the same from such sale thereof at any time within one year from the date of the sale, and subject, also, to the right of said Pollock, as owner of the real estate sold as aforesaid, under the provisions of section 767, R. v. St. 1881, to retain "the possession of the same for one year from the date of such sale." By the sheriff's sale of such real estate, said Joseph A. Swartzel, as purchaser thereof, took the same freed and discharged from the lien of the judgments of the plaintiff herein, and of the defendant Benjamin R. Pegram, and each of them, on such real estate, and subject only, so far as they are concerned, to the right of each of them to redeem the property from such sale thereof at any time within one year from the date of such sale.

After defendant Swartzel became the purchaser of such real estate at sheriff's sale, and had received from the sheriff a certificate of his purchase, he had an undoubted right, we think, to purchase from said Pollock and his wife any interest which they, or either of them, yet claimed in such real estate, possessory or otherwise, upon such terms as he and they could agree upon. The fact that Swartzel made such purchase from Pollock and his wife, after the date of such sheriff's sale, or the further fact alleged that said Pollock and his wife conveyed by quitclaim deed the fee of such real estate, and surrendered the possession thereof to said Swartzel, after such sheriff's sale, did not and could not deprive the plaintiff herein, or the defendant Pegram, of his legal right to redeem such real estate from the sheriff's sale thereof to said Swartzel at any time within one year from the date of such sale; and this right of redemption was all the right in or to such real estate which the plaintiff or Pegram had after the date of such sheriff's sale thereof. If such real estate was not redeemed from such sheriff's sale within the year allowed by law for such redemption, and if, at the expiration of such year, there was no such redemption, and a sheriff's deed was then executed pursuant to such decree and sale, conveying to said Swartzel the above-described real estate, the legal title of Pollock to such real estate, and the inchoate interest of his wife therein, under our law, became absolute and vested in said Swartzel as of the date of the sheriff's sale, and not as of the date of the sheriff's deed to him of his real estate. *Hollenback v. Blackmore*, 70 Ind. 234; *Ellitt v. Oale*, 80 Ind. 285, 113 Ind. —, 14 N. E. Rep. 708; *Wilhelm v. Humphries*, 97 Ind. 520.

In that view of the case, the claim of plaintiff that the title acquired by Swartzel, under the sheriff's sale and deed to him, had become merged in the title he acquired under his quitclaim deed from Pollock and wife, is wholly untenable, and cannot be sustained. The sheriff's sale and deed would give Swartzel a much better title to the real estate than he could possibly get under his deed from Pollock and wife; for, under the former deed, he would get the real estate free from the lien of the judgments of plaintiff or of Pegram thereon. In such case, if there were any merger of titles, Swartzel's title under his quitclaim deed from Pollock and wife would be merged in his older and better title under the sheriff's sale and deed of said real estate.

The demurrers to the second paragraph of complaint were correctly sustained. The judgment is affirmed, with costs.

(116 Ind. 8)

DONLEY *et al.* v. SCANLON.¹

(*Supreme Court of Indiana.* May 18, 1888.)

1. MASTER AND SERVANT—NEGLIGENCE OF MASTER—PLEADING.

In an action by an employe for personal injuries, a complaint stating that plaintiff, being only 15 years old, and inexperienced in such work, was employed by defendants to operate a planing-machine, known by them to be dangerous, but of which danger they did not warn plaintiff, and that there was great danger to the person operating the machine from splinters that broke off the lumber which plaintiff was directed to plane, and that such a splinter struck him in the eye, and destroyed it, is sufficiently specific.

2. PLEADING—AMENDMENT—CONTINUANCE.

Where, in an action for personal injuries received while operating a planing-machine, the first paragraph in the complaint alleged that plaintiff had been employed to work at a dangerous machine without being warned of its danger, the filing of an additional paragraph alleging that the machine was not in safe condition, and that plaintiff was injured by reason of its defective condition, will entitle defendants to a continuance when applied for on the ground of surprise.

Appeal from circuit court, Hendricks county; **ALEXANDER C. AYRES**, Judge.

Action by Thomas Scanlon, by his next friend, against Mary B. Donley *et al.*, for personal injuries received while in their service. There was judgment for plaintiff, and defendants appeal.

Lucus B. Swift and *Hogate & Blake*, for appellants. *Hill & Martz*, for appellee.

ELLIOTT, J. The appellee alleges in the first paragraph of his complaint that he was employed by the appellants to work in a planing-mill, as he might be directed by them; that he was 15 years of age, and inexperienced in such work; that he was put to work upon a planing and moulding machine of many and varied parts, and while at work a sliver flew off from the plank he was putting through the planer, and struck him in the eye, and destroyed it; "that there was great danger and liability of being injured to the person operating with and upon said planer and moulding-machine, in the condition it then was, from splinters and slivers that were liable to and did break off of the lumber which the plaintiff was directed to dress and plane;" that the plaintiff was ignorant of the danger, but the defendants knew of it, and did not inform him.

The appellants unsuccessfully moved the court to make the averment of the pleading concerning the planer more specific. We think that there was no error in overruling this motion. The theory of the pleading is that the defendants negligently set the plaintiff at work upon machinery known to them to be dangerous, but of which danger the plaintiff was ignorant. The complaint does not proceed on the theory that the machinery was negligently suffered to become dangerous, for the lack of repair or the like, but on the theory that it was an actionable wrong to put a young and inexperienced boy at work

¹ Rehearing denied.

upon a dangerous machine without giving him warning of the danger. It was not necessary, therefore, to do more than aver that there was danger in operating the machine, and that it was dangerous in the particular which caused the injury. This was done when it was averred that it was dangerous because of the liability of slivers and splinters to fly off and injure the person operating it. After the jury had been impaneled, the appellee filed a second paragraph of complaint. To the filing of this paragraph the defendants objected, and one of them filed an affidavit wherein it was stated: "The filing of the second paragraph of the complaint has prejudiced the defendants in the preparation of this cause for trial, in that they have not made any sufficient preparation to meet the testimony that may be adduced under said paragraph tending to show that there was any fault or imperfection in the original construction of the machine therein mentioned, or of any of the parts thereof, on account of its not being sufficiently guarded to prevent splinters from flying through the same, and that if time is allowed they can and will bring it into court for the inspection of the jury." On this affidavit a continuance was asked. The court erred in overruling this motion. We have seen that the first paragraph proceeds on the theory that the machine was intrinsically dangerous. The second paragraph avers that the machine "was not in good and safe condition, nor was the same properly guarded to prevent the escape of chips, slivers, and splinters," and that "by reason of said defective condition of said planer a sliver was thrown from it into the eye of the plaintiff." There is an essential difference between the two paragraphs, for the second relies upon the defective condition of the planer as the cause of action. The case had once been tried in the Marion superior court, upon the first paragraph of the complaint, and a verdict in the appellee's favor set aside. A change of venue was then taken to the Hendricks circuit court, and it was after the jury was impaneled on the second trial that the second paragraph of the complaint was filed. Under the circumstances a continuance should have been granted. Judgment reversed.

(114 Ind. 577)

MAYER et al. v. FEIG et al.

(Supreme Court of Indiana. May 19, 1888.)

1. FRAUDULENT CONVEYANCES—SECRET TRUSTS—CHATTEL MORTGAGES.

An agreement between the mortgagee and mortgagor in a chattel mortgage that the latter shall continue in possession of the mortgaged property, and sell and dispose of it in the usual course of business, the net proceeds to be applied in discharge of the mortgage debt, does not create either a secret or an open trust in the property in favor of the mortgagor. It is only when the mortgagor is authorized to dispose of the property substantially for his own benefit that in such case a trust is created for his use.

2. SAME—ACTIONS TO SET ASIDE—PLEADING AND PROOF.

A complaint the *gravamen* of which is a conveyance with intent "to hinder, delay, and defraud creditors," is not supported by evidence of a trust such as is contemplated by Rev. St. Ind. § 4921, which provides that "all deeds of gifts, conveyances," etc., "made in trust for the use of the person making the same, shall be void as against creditors, existing or subsequent, of such person."

Appeal from circuit court, Elkhart county; J. D. OSBORNE, Judge.
J. M. Vanfleet, for appellants. H. C. Dodge, for appellees.

NIBLACK, J. On the 9th day of October, 1884, Jacob Feig, of the city of Elkhart, in this state, executed to his father, Isaac Feig, of the city of New York, a chattel mortgage on a stock of clothing and other merchandise kept for sale in a particularly described building in said city of Elkhart, to secure the payment of the aggregate sum of \$3,926.20. The mortgage stipulated that the mortgagor should remain in possession of the mortgaged property until some one of several enumerated contingencies might happen. The mortgage further stipulated that the mortgagor should keep an accurate account

of all sales made by him of the mortgaged property, and that, after deducting the expenses of caring for and selling the same, he should weekly pay over to the mortgagee what remained of the proceeds until the mortgage debt should be fully paid. In April, 1885, Nathan Mayer, Burchard Engel, and Isaac Livingston, composing the firm of Mayer, Engel & Co., and Isaac S. Straus and Henry Myer, constituting the firm of Straus & Myer, judgment creditors of Jacob Feig, commenced this suit against him and his said father, Isaac Feig, to set aside and cancel the mortgage executed as above, upon the ground that the same was executed for the purpose of hindering, delaying, and defrauding the other creditors of Jacob Feig, and especially the plaintiffs, and that such mortgage was designed to be used as a "cloak and cover" for the benefit of him, the said Jacob Feig, in inducing his creditors to accept unfair terms of compromise in the adjustment of his indebtedness. The circuit court, after hearing the evidence, came to the conclusion that it did not support the material allegations of the complaint, and accordingly gave judgment for the defendants. It was made to appear by the evidence that the mortgaged property comprised all the property owned by Isaac Feig when the mortgage was given, and that it was probably not sufficient to pay the mortgage debt; that, after the mortgage was executed, it was agreed between Jacob Feig and his father that he, the said Jacob, should remain in possession and continue to sell and dispose of the mortgaged property as he had theretofore done, being required to pay over, from time to time, to him, the said Isaac Feig, as the mortgagee, the net proceeds of all sales made in pursuance of such agreement; that at the time of the trial the said Jacob had realized from sales made by him the gross sum of \$1,681.25, out of which he had paid \$400 on the mortgage; that he had retained and applied to his own use sums as follows: In November, 1884, \$23; in December, 1884, \$21; in January, 1885, \$40; in February, 1885, \$8; and in March, 1885, \$21; that he had used the remainder of such gross sum in the payment of expenses in taking care of and selling the property. There was also evidence tending to show that Isaac Feig knew that Jacob Feig had no means of living without using some part of the proceeds arising from the sale of the mortgaged property.

In the prosecution of this appeal, the only claim made is that, upon the evidence, the finding and judgment ought to have been in favor of the plaintiffs below. Sections 4920, 4921, Rev. St. 1881, are as follows: 4920: "All conveyances or assignments, in writing or otherwise, of any estate in lands, or of goods or things in action, every charge upon lands, goods, or things in action, and all bonds, contracts, evidences of debt, judgments, decrees, made or suffered with intent to hinder, delay, or defraud creditors or other persons of their lawful damages, forfeitures, debts, or demands, shall be void as to the persons sought to be defrauded." 4921: "All deeds of gift, conveyances, transfers, or assignments, verbal or written, of goods or things in action, made in trust for the use of the person making the same, shall be void as against creditors, existing or subsequent, of such person." Counsel for the plaintiffs impliedly admits that the evidence did not make a case against the defendants under section 4920, above set out, but contends that it did establish the fact that the mortgage was executed for the purpose of creating a secret trust in favor of Jacob Feig, and hence as a conveyance in trust for his use, which, under the provisions of section 4921, *supra*, was void as against the plaintiffs, without reference to the question of fraudulent intent, and however just the mortgage debt may have been. We are unable to concur in this latter view of the evidence. An agreement between the mortgagee and mortgagor in a chattel mortgage that the latter shall continue in possession of the mortgaged property, and sell and dispose of the same in the usual course of business, the net proceeds to be applied in discharge of the mortgage debt, does not create either a secret or an open trust in the property in favor of the mortgagor. When such an agreement has been entered into, and the mortgagor

fails, either in whole or in part, to apply the proceeds accordingly, the law will make the application, when necessary, for the protection of the interests of other creditors. It is only when the mortgagor is authorized to dispose of the property substantially for his own benefit that, in such a case, a trust is created for his use. *Bank v. Brown*, 112 Ind. 474, 14 N. E. Rep. 358; *New v. Sailors*, 16 N. E. Rep. 609, (No. 13,188, at the present term;) *Wilson v. Sullivan*, 58 N. H. 260; *Gibbs v. Parsons*, 6 Atl. Rep. 93. Then, too, the complaint upon which the plaintiffs relied at the trial made the *gravamen* of the suit depend upon the alleged fraudulent intent with which the mortgage was executed; thus making a case against the defendants under section 4920 of the statute. Conceding, therefore, that the evidence tended to prove that by some subsequent agreement or understanding between the parties, independent of and inconsistent with the stipulations of the mortgage, the transaction had been changed into a mere conveyance of the property in trust for the use of Jacob Feig, such proof did not support the *gravamen* of the complaint. Evidence of such a subsequent agreement or understanding tended only to make out a case under the provisions of section 4921, to which we have referred, which, as has been seen, was a case essentially different from the one presented by the complaint. Rev. St. 1881, § 393; *City of Huntington v. Mendenhall*, 73 Ind. 460. The judgment is affirmed, with costs.

(115 Ind. 312)

KEISTER *et al.* v. MYERS.¹

(Supreme Court of Indiana. May 18, 1883.)

1. PLEADING—AMENDMENT—FORM.

An amendment effected by filing a separate statement to the effect that certain words in the complaint are to be stricken out, and certain others inserted, having been allowed by the court, and treated as valid by defendant, will not be ground for reversal on appeal.

2. EQUITY—PARTIES.

A mortgagee who has assigned all his interest in the note and mortgage by indorsement on the note is not a necessary party to a suit to reform and foreclose the mortgage.

3. SAME—REFORMATION OF INSTRUMENTS—MUTUAL MISTAKE.

A complaint to reform a mortgage sufficiently shows mutual mistake by averring that the mortgagors agreed to convey the whole of a tract of land, and that both parties intended, at the time the transaction was consummated, that the entire tract should be included in the mortgage, but by mistake of the scrivener the description was so written as to cover only the undivided one-third.¹

4. SAME—EQUITABLE ESTOPPEL.

One who admits that an instrument which a court of equity is asked to reform does not set forth the agreement as it was actually made, and as the other party believed it did, will not be heard to say that he intentionally brought about or silently acquiesced in the discrepancy between the instrument and the agreement as made.

5. SAME—LACHES.

It cannot be said, as a matter of law, that one who accepts a mortgage with a wrong description of the land is guilty of such negligence as to forfeit all right to relief in chancery. Following *Baker v. Pyatt*, 106 Ind. 61, 9 N. E. Rep. 112.

Appeal from circuit court, Fulton county; ISAIAH CONNER, Judge.

Action to reform and foreclose a mortgage. Judgment for plaintiff. Defendants appealed.

Milo B. Smith and *Enoch Myers*, for appellants. *Rowley & Baker*, for appellees.

MITCHELL, C. J. It is charged in the complaint by Elizabeth Myers against Keister and wife that the defendants agreed to execute a mortgage convey-

¹As to the mistakes against which equity will relieve, and the proof necessary to obtain a reformation of a written instrument, see *Fehlberg v. Cosine*, (R. I.) 18 Atl. Rep. 110, and note; *Frederick v. Henderson*, (Mo.) 7 S. W. Rep. 186; *Rousseau v. Lambert*, (Ky.) 1d. 923; *Clark v. Root*, (Ark.) 6 S. W. Rep. 728; *Kornegay v. Everett*, (N. C.) 5 S. E. Rep. 418.

¹ Rehearing denied.

ing the whole of a certain tract of land in Fulton county, containing 48 and a fraction acres, as security for a debt of \$500, evidenced by a promissory note payable by Keister to Margaret Paffenberger, with interest. It is alleged that, notwithstanding the agreement to convey the entire tract as a security, and that both parties intended, at the time the mortgage was signed and delivered, that it should include the whole, yet, by a mistake of the scrivener, the description of the land mortgaged was so written that only an undivided one-third of the tract was covered by the mortgage, and that the mistake was not discovered until after the note had been assigned by the payee, by written indorsement thereon, to the plaintiff. Prayer for judgment on the note, and that the mortgage be reformed and foreclosed. The court sustained a demurrer to the complaint, after which the plaintiff, with leave and without objection, filed what purports to be an amendment to the complaint. The amendment consisted of a separate written statement, to the effect that certain designated words were to be stricken out of the complaint to which the demurrer had been sustained, and certain other words inserted in their stead. The defendants first demurred to the amendment, and afterwards to the complaint as amended. Both demurrers were in turn overruled, after which the defendants answered by a general denial, and upon the issue thus made the court found for the plaintiff. Without seeming to sanction the anomalous method of amending a pleading adopted by the plaintiff, since the demurrer amendment was allowed by the court, and treated as valid by the defendant, the case will not be reversed because of the novel manner in which the amendment was brought about.

The appellants contend, however, that the complaint is insufficient to warrant the reformation of the mortgage, because it does not show the mutuality of the mistake complained of, within the rulings in *Allen v. Anderson*, 44 Ind. 395; *Baldwin v. Kerlin*, 46 Ind. 426; and cases of that class. As has been seen, it was averred in the complaint that the mortgagors agreed to convey the whole tract as a security for the debt, and both parties intended, at the time the transaction was consummated, that the entire tract should be included in the mortgage; but by mistake of the scrivener, who presumably acted for both, the description was so written as to cover only the undivided one-third. This sufficiently disclosed a mutual mistake within the rulings in *Baker v. Pyatt*, 108 Ind. 61, 9 N. E. Rep. 112; *McCasland v. Insurance Co.*, 108 Ind. 130, 9 N. E. Rep. 119,—in which what we regard as the better rule governing the subject under consideration is enunciated. It was not necessary, in order to warrant a reformation of the mortgage, that the mortgagee should have been made a party. After she had assigned the note by indorsement thereon, she was neither a necessary nor a proper party to the suit, since, so far as appears, all her interest in the note and mortgage had passed by the indorsement of the note to her assignee. Courts of chancery lend their aid for the correction of mistakes in written instruments to the original parties thereto, and to all those claiming under them in privity. *East v. Peden*, 108 Ind. 92, 8 N. E. Rep. 722, and cases cited. As a matter of course, an instrument cannot be corrected without affording parties whose rights are to be affected, or whose obligations are to be enlarged, by the reformation, an opportunity to be heard. *Durham v. Bischof*, 47 Ind. 211.

The remaining question is whether or not the finding of the court that the mortgage ought to be reformed, is sustained by the evidence. There is no dispute but that the mortgagee loaned the money, the repayment of which was secured by the mortgage in suit, upon the express agreement that she was to have a mortgage upon the 40-acre tract, as it was called, upon which the mortgagors resided. Keister held the title to the land by two deeds: one from Sophia Lucas and her husband, which conveyed the undivided one-third; the other from Sophia Lucas, administratrix of the estate of Isaiah M. Carter, conveying the undivided two-thirds. When the parties went to the scrivener

to have the mortgage prepared, Keister took with him the deed from Mrs. Lucas and her husband, which conveyed the undivided one-third only, and the scrivener followed the description as it was written in that deed. The latter testified that he read the mortgage over in the hearing of the parties, and that no objection was made to the description. The mortgagee accepted the mortgage, and delivered the money without having observed or understood that the mortgage covered only the undivided one-third. She supposed that it was made in accordance with the agreement. The mortgagors did not testify one way or the other. The point of the argument on appellants' behalf is that the evidence entirely fails to show that the mortgagors were mistaken. On the contrary, it is said that the evidence shows that they were not mistaken; but that, in delivering the mortgage upon the undivided one-third of the land, they did precisely what they intended. This argument proves too much, and therefore it proves nothing. Without denying that they agreed to give a mortgage covering the entire tract, and that they received the mortgagee's money with knowledge that she intended to take and supposed she was receiving a mortgage corresponding with the agreement, the appellants say they intentionally delivered her a mortgage which only covered the undivided one-third of the land. A party who admits that an instrument which a court of equity is asked to reform does not set forth the agreement as it was actually made, and as the other party believed it did, will not be heard to say that he intentionally brought about or silently acquiesced in the discrepancy between the instrument and the agreement as made. *Roszell v. Roszell*, 109 Ind. 354, 10 N. E. Rep. 114. This will be regarded as an attempt merely to shift his position from that of one laboring under an innocent mistake to that of a person deliberately intending to perpetrate a fraud. No advantage can be gained in a court of conscience by attempting such a change. A court of equity will not permit one party to take advantage and enjoy the benefit of the ignorance or mistake, either of law or fact, of the other, which he knew of and did not correct. *Hollingsworth v. Stone*, 91 Ind. 244; 2 Pom. Eq. Jur. § 847. It cannot be said, as a matter of law, that a party who accepts a mortgage with a wrong description, such as that contained in the instrument under consideration, is guilty of such negligence as to forfeit all right to relief in a court of chancery. *Morrison v. Collier*, 79 Ind. 417; *Baker v. Pyatt*, *supra*. There was no error. The judgment is affirmed, with costs.

(114 Ind. 588)

DAVIS v. RUPE *et al.*

(Supreme Court of Indiana. May 19, 1888.)

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—MODIFICATION OF REMEDIES.

Acts Ind. 1879, p. 176, which provided that the owner of land sold by the sheriff should have possession for one year after the sale, and that the owner or occupant should be liable to the purchaser for the reasonable rents and profits in case there was no redemption, was repealed by act April 11, 1881, to the same effect, but omitting the clause as to rents and profits. *Held*, that the latter act did not impair the obligation of contracts as to land sold to satisfy judgments obtained on debts incurred before its passage.

Appeal from circuit court, Wayne county; D. W. COMSTOCK, Judge.

H. C. Fox and John F. Robbins, for appellant. Burchmal & Rupe, T. J. Study, and Kibbey & Kibbey, for appellees.

MITCHELL, C. J. The question for decision in the present case arises upon the following facts: Between the 1st day of January and the 1st day of June, 1880, Elwood Hadley became indebted to divers persons for goods and merchandise sold and delivered. The debts were simple-contract debts, not secured by mortgage or other lien upon real estate. In the years 1880 and 1881, judgments were recovered in the Wayne circuit court against Hadley upon

the above-mentioned debts. Subsequently, in pursuance of an order and decree of the Wayne circuit court, the decree having been given in an action, in which the above-mentioned creditors united, to set aside an alleged fraudulent conveyance theretofore made of certain real estate owned by the judgment debtor, the sheriff of Wayne county, in the month of June, 1884, sold the real estate, described in the decree as the property of Elwood Hadley, to John Rupe, as trustee of the creditors at whose suit the decree had been given. No redemption having taken place from the sale so made, the sheriff executed a deed accordingly to the purchaser, as trustee, in June, 1885. Pending the year for redemption, Robert F. Davis occupied the real estate as tenant of Elwood Hadley; he having leased the same prior to the sale at a stipulated sum by the month, the amount agreed upon as rent being the fair rental value of the premises.

The facts having been found substantially as above stated in an action brought by the trustee against Davis to recover the rent accrued during the year for redemption, the court stated conclusions of law thereon, to the effect that the trustee was entitled to recover from the tenant of Hadley two-thirds of the rent so accrued; the wife of Hadley being entitled to the other one-third, she having become owner of an undivided one-third of the premises under the act of March 12, 1875. The propriety of the conclusions thus stated depend entirely upon the validity of the act relating to the redemption of lands from sales on execution and decretal orders in force from and after April 11, 1881. This act, like the one it superseded, (Acts 1879, p. 176,) provided that the owner of real estate sold by the sheriff on execution or decretal order should be entitled to the possession of the land sold for one year after the date of the sale. Section 767, Rev. St. 1881. Unlike the earlier act, the latter does not provide that the owner or occupant of the land, during the time it is subject to redemption, shall be liable to the purchaser for the reasonable rents and profits thereof, in case it is not redeemed. It is silent upon that subject. As has been seen, the debts which formed the basis of the several judgments, for the satisfaction of which the real estate was subsequently ordered to be sold, were contracted by Elwood Hadley in 1880, while the redemption law of 1879 was still in force. The sale was made in 1884, the act of 1881 being then in force. That act declares, in effect, that its provisions shall not apply to any sale made prior to the taking effect thereof, but that all sales made after the passage of the act, and all redemptions therefrom, shall be governed by its provisions. The learned circuit court proceeded upon the assumption that the provisions of the act of 1879, which in express terms rendered the owner or occupant of land sold liable to the purchaser for the reasonable rents and profits in case the property was not redeemed within the time prescribed, remained operative and in effect in respect to contracts made while it was in force, notwithstanding the provisions of the act of 1881 in relation to sales after the taking effect of that act. The later act, it is said, in so far as it indicates a contrary purpose by omitting to provide for the recovery of rent by the purchaser at an execution sale, is in conflict with those provisions of the federal and state constitutions, respectively, which prohibit the passing of laws impairing the obligation of contracts. What constitutes the obligation of a contract, in the constitutional sense, has been a fruitful subject upon which much learned discussion may be found in the reported decisions. Generally, the obligation of a contract may be said to be the legally enforceable duty which the obligor is under to perform it. Notwithstanding all that has been said upon the subject, the boundary line distinguishing enactments which affect the remedy merely from those which, by limiting or changing the remedy, impair the obligation of pre-existing contracts, has not been, and for obvious reasons cannot be, drawn so broadly as to furnish a satisfactory rule for the determination of all cases. "Every case must be determined upon its own circumstances." *Von Hoffman v. City of Quincy*, 4

Wall. 535. Certain general principles have been universally accepted, and whether or not an enactment falls within the constitutional inhibition is to be determined by the application of those principles to the statute and the contract in question in each case. Thus it is settled that an existing remedy, available for and appropriate to the enforcement of a contract when and where it was made, is within its obligatory scope. *Buser v. Shepard*, 107 Ind. 417, 8 N. E. Rep. 280; *Bryson v. McCreary*, 102 Ind. 1,¹ and cases cited; *Gunn v. Barry*, 15 Wall. 610; *Edwards v. Kearzey*, 96 U. S. 595. An available remedy for the enforcement of the contract having existed at the time it was made, the obligee may assume that the state will not deprive him of the means of making his contract effectual according to the course of justice in the courts. A contract having no other sanction than the moral sense of obligation or duty possessed by the persons benefited and equitably bound to perform, might in many instances be a delusion, and without force or value. Hence there is embraced in or adherent to the obligation of every contract the legal right to enforce performance according to a mode of procedure appropriate to the subject-matter of the contract. This right to make the contract effectual by legal compulsion is one of the most efficient and essential elements of its obligation, and is as much a subject of protection, within the constitution, as is any other feature of the contract. Although the remedy constitutes an essential part of the obligation of a contract, it does not follow that the existing or any other particular form of remedy becomes necessarily a contract right or a subject of the contract, and therefore part of its obligation, in such sense as to confer a vested right in the remedy, so as to place it beyond the domain of legislative modification or change. The power of the legislature to change the remedy where no substantial right under the contract is affected, is well settled. The prohibited change is such as affects or impairs a contract right, or which substantially deprives a party of adequate means of enforcing his contract. In the language of SHARKEY, C. J.: "It is only necessary that there should be an adequate subsisting remedy. * * * If the remedy given be as good as that which was taken away, the obligation of the contract is not impaired." *McMillan v. Sprague*, 4 How. (Miss.) 647; Wade, Retro. Laws, § 203; *Baldwin v. City of Newark*, 38 N. J. Law, 158. As is said by POLAND, C. J., in *Richardson v. Cook*, 37 Vt. 599: "The legislature may change and modify remedies, forms of proceedings, and the tribunal itself, as they choose, but they shall not directly or indirectly destroy or abolish all remedy whatever by which the performance of any class of valid, legal contracts may be enforced." "The rule seems to be that in modes of proceeding, and of forms to enforce the contract, the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right." *Tennessee v. Sneed*, 96 U. S. 69. As has often been declared, there can be no vested right in remedies, provided they are not so changed as to be rendered nugatory. Hence it is that whatever belongs to the remedy merely is within the control of the legislature, subject only to the limitation that an adequate and reasonable mode of enforcing the right must remain or be provided which leaves the value of the contract without substantial depreciation or impairment. *Lockett v. Urry*, 28 Ga. 345; *Read v. Bank*, 23 Me. 318; *White v. Hart*, 13 Wall. 646. Until the means which existed for the enforcement of a contract are by legislation directly affecting those means superseded by others materially less efficacious for the enforcement of the contract, there is no impairment of its obligation, even though a new remedy may have been provided which is less convenient or less prompt and speedy than the old. *Wolff v. New Orleans*, 103 U. S. 358; *Penrose v. Canal Co.*, 56 Pa. St. 46; *Simpson v. Bank*, 56 N. H. 466; Cooley, Const. Lim. 349, 350.

¹ 1 N. E. Rep. 55.

In respect to legislative enactments which effect a modification of exemption laws, or laws of an analogous character, in force at the time of the execution of a contract, the rule which obtains is that unless such enactments result in a substantial encroachment upon the rights of the creditor, by destroying or materially affecting a remedy which entered into and formed part of the contract itself, the statute is not obnoxious to the objection that it impairs the obligation of the contract. *Taylor v. Stockwell*, 66 Ind. 505; *Edwards v. Kearzey*, *supra*; *Bronson v. Kinzie*, 1 How. 311; *Bank v. Sharp*, 6 How. 301; *Morse v. Gould*, 11 N. Y. 281; *Stephenson v. Osborn*, 41 Miss. 119; *Lesley v. Phipps*, 49 Miss. 790. Thus it was held in *Taylor v. Stockwell*, *supra*, upon full consideration of the authorities, that the legislature might, in pursuance of an "enlightened public policy, and on principles of humanity, reserve to the debtor, as exempt from execution, the reasonable means of carrying on his business and occupation, and a reasonable amount of the necessities of life," and that the act of March 12, 1875, by which the hitherto inchoate interest of the wife in the husband's real estate became consummate, as against a purchaser at a judicial sale, was not a material impairment of a pre-existing creditor's remedy, and hence not an infringement upon the constitutional provision under examination. In that case, as in the present, the debt was represented by the simple contract of the creditor, unaccompanied by any specific or contract lien. Where the right to sell a particular or defined interest in the debtor's property for the satisfaction of a debt is not made a contract right,—that is, a part of the contract itself,—but exists only by virtue of general statutes authorizing the property to be levied upon and sold, such reasonable changes, looking to the amelioration and protection of the wife and family of the debtor, as do not withdraw from sale a substantial part of the debtor's property, are within the legitimate province of the legislature in determining the policy of the state. Accordingly, it has been held that statutes abolishing imprisonment for debt, and taking away the power of landlords to distrain for rent, and other similar enactments, do not, within the meaning of the constitution, impair the obligation of contracts entered into prior to their enactment. *Penniman's Case*, 103 U. S. 714; *Fisher v. Lacky*, 6 Blackf. 373; *Lockett v. Usry*, 28 Ga. 345; *Stocking v. Hunt*, 3 Denio, 274; *Institution v. Forman*, 33 N. J. Eq. 436. By the common law, real estate was not subject to be levied upon and sold on execution. The right to acquire a lien upon real estate by judgment, and the right to sell real estate upon execution, are derived from the statute. These are rights altogether outside of the creditor's contract. A creditor, even though he may have reduced his claim to judgment, has no contractual interest or estate in his debtor's land. *Gimbel v. Stolte*, 59 Ind. 446; *Iverson v. Shorter*, 9 Ala. 713; *Berthold v. Fox*, 13 Minn. 501, (Gil. 462;); *Thorne v. San Francisco*, 4 Cal. 127; *Watson v. Railroad Co.*, 47 N. Y. 157. In respect to such rights and remedies as are given by statute, and are not secured by contract, the creditor "stands wholly upon the law which gives him the remedy for the collection of his debt." Having contracted for no specific lien or particular remedy, the creditor has, in effect, agreed that he will take the remedy as he may find it, subject only to the condition that it shall be reasonably adequate to make his contract effectual by legal compulsion, and such as other creditors in like circumstances are entitled to by the laws of the land. Where, however, a creditor has acquired a specific lien upon or interest in property by contract, his rights in the specific property are then contractual, and it is not competent for the legislature to interpose in behalf of the debtor or his wife, and by enlarging the rights of either, or by modifying the rights of the creditor, to impair or depreciate the value of an antecedent debt or security. In the application of this principle, it has been held that the vendible value of the estate or interest of a mortgagee, or other holder of a specific lien upon real estate, cannot be materially affected or appreciably diminished by an act of the legisla-

ture which rendered consummate the prior inchoate right of a married woman in the real estate of her husband. *Helphenstine v. Meredith*, 84 Ind. 1; *Buser v. Shepard*, *supra*, and cases cited. In like manner, it has been held that a redemption law, the effect of which is to depreciate the value of an antecedent security, existing by way of mortgage, or which changes the character of the estate which passes by a sale under a power contained in a mortgage, cannot be maintained. *Coddington v. Blapham*, 36 N. J. Eq. 574; *Hillebert v. Porter*, 28 Minn. 496, 11 N. W. Rep. 84. So, in *Boice v. Boice*, 27 Minn. 371, 7 N. W. Rep. 687, it was held, where a clause had been inserted in a chattel mortgage giving authority to the mortgagee to take possession of the mortgaged property if he should at "any time deem himself insecure," that the right to take possession was a contract right, and beyond legislative interference.

The facts found in the present case show that simple-contract creditors, availing themselves of remedies confessedly ample as between themselves and their debtor, have sold real estate owned by the latter at an execution or decretal sale. For aught that appears, the several debts or judgments have been fully satisfied, either by the sale of real estate or otherwise. At all events, so far as the real estate in question is concerned, the relation of debtor and creditor has long since terminated, and that of purchaser and owner of an equity of redemption has followed. It is difficult to perceive how it can now be said that a statute which fixes the terms upon which the owner may redeem, can be said to impair the obligation of the creditor's contract, although the debt may have been coercively collected by a statutory sale of the debtor's property. Why should the purchaser of real estate who bids off property at an execution sale, with an existing redemption law in full view, have the right to appeal to the contract between the debtor and creditor? How is the purchaser concerned with the redemption law which was in force at the time the contract was made? A purchaser at an execution sale stands in no sort of legal privity of contract with the creditor upon whose claim the judgment was obtained. It does not alter the case that the purchaser and the creditor are the same person. In respect to the property purchased, they cannot be the same. The creditors ceased to be creditors when the sale occurred. Thenceforward their interest in the property was as purchasers at an execution sale, not as creditors. It cannot in reason be maintained that one rule should apply when the purchase is by a stranger, and another when the creditor or his agent becomes the purchaser. To require a purchaser of real estate sold on execution to conform to the terms of the redemption of the property purchased, as prescribed by the statute in force at the time of the purchase, does not, in any legal sense, impair the obligation of the contract which forms the basis of the judgment upon which the sale was made. Substantially this was said in *Insurance Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. Rep. 236. The facts in the case cited were that, at the time of the execution of the mortgage in question, the statute of the state of Illinois required the owner or other person entitled to redeem to pay 10 per cent. interest. A statute in force at the time of the sale authorized a redemption by paying 8 per cent. interest. It was insisted that the value of the mortgage contract was impaired by the subsequent law reducing the rate of interest, because, it was argued, the reduction of the interest would necessarily tend to lessen the number of bidders at the sale. It was held, however, that "the laws with reference to which the parties must be assumed to have contracted when the mortgage was executed, were those which, in their direct or legal operation, controlled or affected the obligation of that contract," and that the fact that bidders might be deterred by the reduction of interest was a contingency too remote to justify the conclusion, as matter of law, that the legislation affected the value of the mortgage contract. In the view we take, the case cited, involving, as it did, the rights of a purchaser under a mortgage sale, goes to an extent beyond what

is required to uphold the law under which the sale was made in the present case. The right of the execution debtor to occupy real estate sold during the year within which he is entitled to redeem, is a humane and reasonable regulation. As against debtors, the redemption law in force at the time of the sale has been uniformly held to govern. *Edwards v. Johnson*, 105 Ind. 594, 5 N. E. Rep. 716; *Moor v. Seaton*, 31 Ind. 11. We can see no reason why it should not govern as to creditors. Redemption from sales made in pursuance of decretal orders in foreclosure cases may stand upon a somewhat different basis. There is a sense in which a mortgagee acquires an estate or interest in the land mortgaged. Subsequent legislation tending to diminish that quantity or character of the estate by enlarging the right of the mortgagor might, in a given case, materially and injuriously affect the value of the mortgage debt. For that reason the ruling in *Insurance Co. v. Brouse*, 83 Ind. 62, is not controlling in a case like the present. For the same reason the conclusions at which we have arrived in the present case do not necessarily result in the modification of the case cited, except so far as that case may seem to have general application to all contracts. Concerning mortgages, the question remains for further examination. As has been observed, every case, though it may involve a purchase at a mortgage sale, must depend largely upon its own circumstances. Regard must be had to the effect of the law upon contracts as cases arise, in determining whether or not, within the given principles, the obligation of the contract has been impaired.

Upon the facts found in the present case our conclusion is that the learned circuit court erred. The judgment is reversed, with costs, with direction to the court below to restate its conclusions of law, and to render judgment in accordance with this opinion.

(115 Ind. 100)

WILLIS *et al.* v. CUSHMAN.

(Supreme Court of Indiana. May 29, 1888.)

EXEMPTIONS—DEBTS CONTRACTED BEFORE PASSAGE OF ACT—DISCHARGE IN BANKRUPTCY—NEW PROMISE.

Renewing a note after the maker's discharge in bankruptcy is in law contracting a new debt, so as to give him the benefit of act Ind. May 31, 1879, (Rev. St. Ind. 1881, § 703,) providing that a resident householder may hold \$600 instead of \$300 worth of property exempt from forced sale on execution or other process for a debt thereafter contracted.

Appeal from circuit court, Sullivan county; JOHN T. HAYS, Special Judge.

Action of replevin, by Thomas K. Cushman against Lemuel H. Willis *et al.*, to recover certain personal property. There was judgment for plaintiff, and defendants appeal.

John C. Briggs and *William C. Hultz*, for appellants. *Beasley & Williams* and *W. S. Maple*, for appellee.

HOWK, J. In this case, errors are assigned here by appellants (defendants below) which call in question (1) for the first time the sufficiency of the facts stated in the complaint to constitute a cause of action; and (2) the trial court's conclusions of law upon its special finding of facts herein. Plaintiff, Cushman, sued the defendants herein, in an action of replevin, to recover the possession of certain personal property, all in Sullivan county, Ind. The complaint was good, beyond all doubt, when questioned, as it was, after trial and findings thereon, with all their curative virtues, for the first time by an assignment of error in this court. Defendants answered by a general denial of the complaint herein. The issues joined were tried by the court, and, at defendants' request, the court made a special finding of facts herein, and thereon stated conclusions of law in favor of plaintiff, and rendered judgment accordingly. The facts found by the court were substantially as follows: (1) On the 2d

day of January, 1875, plaintiff became indebted to one James K. Medsker in the sum of \$250, and plaintiff then executed to Medsker his promissory note for such debt. (2) On the ——— day of ———, 1879, plaintiff, Cushman, was duly discharged in bankruptcy by the United States court having competent authority in that behalf, and received his discharge as provided by law, and the aforesaid debt was duly filed in said bankruptcy proceeding, and allowed by the court therein, but no part of the debt was paid at the time said Cushman so received his discharge in bankruptcy. (3) On February 1, 1880, plaintiff executed his promissory note to said Medsker in the sum of \$308.25, with interest at 6 per cent. per annum, and due three years after date, waiving valuation or appraisement laws, which last-mentioned note was given for said debt evidenced by the note so filed in bankruptcy as aforesaid, with the accrued interest, and for no other consideration. (4) On the ——— day of March, 1883, said last-mentioned note was assigned to defendant William A. Hawkins for a valuable and sufficient consideration. (5) Defendant William A. Hawkins duly recovered judgment on said last executed note in the Sullivan circuit court, at its June term, 1885, against said Thomas K. Cushman, for \$272.85, the balance of unpaid principal and interest thereof, which judgment is still in full force and unpaid, and has never been stayed, and said judgment was rendered on July 8, 1885. (6) On July 27, 1885, an execution was duly issued on said judgment, on the order of said Hawkins, by the clerk of such court, and delivered to defendant Willis, sheriff of Sullivan county, who, on January 12, 1886, levied said execution on certain described personal property, being the same now in suit. Plaintiff claimed such property as exempt from said execution, and claimed and demanded that \$600 worth of property should be set off to him, and exempted from said execution, and defendants only conceded to plaintiff the right to have \$300 worth of property set off and exempted from said execution. (7) Plaintiff thereupon prepared a proper schedule and appraisement, and presented the same to defendant Willis, then sheriff of such county, and claimed said property as exempt from sale on said execution, and demanded that the same should be set apart as exempt; all of which proceedings claiming said property as exempt were had and done in due form of law, and said property was and is of the value of \$500. The defendants requested plaintiff to select out of said property an amount equal in value to \$300, but plaintiff refused to select any part thereof, but claimed and demanded all of said property as exempt from sale on said execution, and defendants refused such demand. (8) The plaintiff is, and for 10 years last past has been, a resident householder of Sullivan county, Ind. (9) On June 23, 1886, plaintiff commenced this suit for the replevin of said property. (10) Proper steps have been taken to preserve the said levy by duly issuing a *venditioni exponas*. (11) Said execution was issued on a judgment as aforesaid, which said judgment was founded on a complaint, which said complaint was in these words, (setting out a copy of William H. Hawkins' complaint on the note last executed on the 1st day of February, 1880, and also a copy of such note, which we omit.) Upon the foregoing facts, the trial court stated its conclusions of law substantially as follows: (1) Plaintiff is entitled to have \$600 worth of property exempt from sale on said execution. (2) Plaintiff is the owner and entitled to the possession of the property described in finding No. 6.

[Signed]

“JOHN T. HAYS, Special Judge.”

We are of opinion that, upon the facts specially found, the trial court did not err in its conclusions of law, or either of them. The question for decision in this case may be thus stated: Upon the facts found by the trial court, what amount of property was the plaintiff, Cushman, entitled to claim and hold, under the law of this state, as exempt from seizure or sale for the payment of his debt to the defendant Hawkins? The defendants virtually conceded that plaintiff was entitled to claim \$300 worth of property as exempt

from seizure or sale on said Hawkins' execution; for the court found as a fact that they requested plaintiff to select out of his property an amount equal in value to \$300. But plaintiff claimed and demanded all of his property, which the court found to be of the value of \$500, as exempt from sale on said execution. In section 22 of the bill of rights of our state constitution of November 1, 1851, it is provided as follows: "The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted, and there shall be no imprisonment for debt, except in case of fraud." In accordance with the requirements of this section of the bill of rights, the general assembly of this state, at the first session thereof after the taking effect of the constitution of 1851, enacted a law entitled "An act to exempt property from sale in certain cases," approved February 17, 1852. In the first section of this act it was provided that an amount of property not exceeding in value \$300, owned by any resident householder, should not be liable to sale on execution, or any other final process from a court, for any debt growing out of or founded upon a contract, express or implied, "after the 4th of July, 1852." 2 Rev. St. 1876, p. 353. This section remained in force, just as it was enacted, until May 31, 1879, when it was superseded by an amended section, now known as section 703, Rev. St. 1881, and since in force, which reads as follows: "An amount of property not exceeding in value six hundred dollars, owned by any resident householder, shall not be liable to sale on execution, or any other final process from a court, for any debt growing out of or founded upon a contract, express or implied, after the taking effect of this act." Applying this statement of our exemption laws to the facts found by the trial court, it will be seen that when plaintiff first became indebted to James K. Medsker, on the 2d day of January, 1875, the law allowing an exemption of property not exceeding in value \$300 was in force; and that when plaintiff gave Medsker a new note for the debt, on February 1, 1880, the law allowing an exemption of property not exceeding in value \$600 was, as it still is, in full force. Hawkins recovered his judgment on the note last executed, but he claims that plaintiff is entitled to an exemption of only \$300 worth of property on the execution on his judgment, because he says that the note last executed was given for the same debt evidenced by plaintiff's first note to Medsker. There can be no doubt that plaintiff's discharge in bankruptcy, as found by the court, released him absolutely from all legal and personal liability upon his first promissory note to said James K. Medsker. Such discharge operated as an actual extinguishment of all pre-existing debts, claims, liabilities, and demands against the said bankrupt, Medsker, which were or might have been proved against his estate in bankruptcy. Section 5119, Rev. St. U. S.; *Rout v. Espy*, 93 Ind. 511; *Post v. Losey*, 111 Ind. 74, 12 N. E. Rep. 121. But, while this is so, plaintiff's discharge in bankruptcy did not pay his debt to Medsker, but left him morally bound to pay such debt, if able to do so, at some future time. This moral obligation resting on plaintiff constituted a sufficient consideration for the promissory note he executed to Medsker, after his discharge in bankruptcy, on the 1st day of February, 1880, as found by the trial court. It is true that the new promissory note revived the original debt of plaintiff to Medsker. *Carey v. Hess*, 112 Ind. 398, 14 N. E. Rep. 235, and cases cited. But it cannot be said, we think, that the laws in force at the time the original debt was contracted, and repealed or superseded before the execution of the new note, are also revived and made the measure of the rights and remedies of the parties in relation to said new note. On the contrary, it must be held that the rights and remedies of the parties to such new note must be measured and governed by the statutes affecting their rights and remedies in force at the time the remedy is sought. The original debt was revived when the new promissory note was given, not as of the date when

such original debt was contracted, but as of the date of such new note. See *Davis v. Rupe*, ante, 163, (decided at last term.) The judgment is affirmed, with costs.

(115 Ind. 22)

SHERLOCK v. LOUISVILLE, N. A. & C. RY. CO.

(*Supreme Court of Indiana*. May 23, 1888.)

1. EMINENT DOMAIN—RIGHTS AND REMEDIES OF OWNERS—LIMITATION.

In an action to recover damages for the occupation of land by a railway company, a count alleging that the company has been in possession for more than 20 years without consent of the owner, and praying for the ejectment of the company, is bad on demurrer, as the right of action is barred by the 20-years statute of limitations, and no damages can be recovered under such count.

2. SAME—PRESCRIPTION.

In an action against a railway company to recover damages for the occupation of land, a count alleging that the company erected its road on the land 31 years before the action was brought, and praying for perpetual injunction, is bad on demurrer, as the company has acquired title by prescription.

3. SAME—CLAIM FOR DAMAGES—RUNNING WITH THE LAND.

In an action against a railway company to recover damages for the taking of land, all injuries that naturally result from the construction and operation of the road may be recovered. Such damages accrue to and must be recovered by the owner of the land when the road was built. The claim does not pass with the land, and a grantee, to recover, must procure an assignment of the claim.

4. SAME—FENCING UP TRACK.

A strip of land 60 feet wide, taken by a railway company, is necessary to the operation of its road; and, where it has been in possession for more than 20 years, an owner of the adjoining land cannot build a fence on the strip, or ask damages for its removal by the company.

5. SAME—BRIDGES—OVERFLOW—ACCRUAL OF ACTION.

A railway company is liable for the overflow of adjoining land resulting from the negligent construction of a bridge over a natural water course; and, where the overflow occurs at a time of high water, the cause of action arises then, and not at the time the bridge was constructed.

Appeal from circuit court, Martin county; FRANCOIS WILSON, Judge.

Action, by John Sherlock against the Louisville, New Albany & Chicago Railway Company, to recover damages for trespass. There was judgment for defendant, and plaintiff appeals.

W. R. Gardner & Buskirk & Duncan, for appellant. *Geo. W. Easley* and *Geo. W. Friedley*, for appellee.

ZOLLARS, J. A demurrer was sustained to the second and sixth paragraphs of appellant's complaint. This ruling is assigned as one of the errors for which the judgment should be reversed. The substance of the second paragraph is that appellant has owned a prescribed tract of land for 30 years; that in 1883 the New Albany & Salem Railroad Company, duly incorporated under the laws of this state, without having had damages assessed or tendered to appellant, or his predecessor in the ownership of the land, and without his consent, or the consent of such predecessor, entered upon the land, and constructed its road thereon; that said company and its successor, the appellee herein, also a corporation under the laws of this state, have ever since unlawfully continued to use the road, so constructed, in the operation and moving of its trains, and threatens to continue to so use the same; that said appropriation and use of the land thus occupied by the road have damaged the land, and appellant, in the sum of \$2,000. The prayer was for \$2,000, and a perpetual injunction against the further use of the road across appellant's land, in the running and operation of appellee's trains thereon, etc. The substance of the sixth paragraph is that appellant is the owner of, and entitled to the possession of, described strip of land 30 feet wide; that appellee, a railway corporation incorporated under the laws of this state, unlawfully and without right, 25 years before the commencement of this action, went into the pos-

session of the strip of land, and has continuously, without appellant's consent, held the possession and use of it, and without right kept him out of the possession of the same, to his damage in the sum of \$2,000. The prayer was for the possession of the land, and for \$1,000 damages.

It will be observed that the sixth paragraph is in ejectment, for the possession of the land occupied by the railway company by its road-bed. For that purpose the paragraph is clearly bad. It is averred in that paragraph, as will be seen, that the railway company entered and constructed its railway upon the strip of land 25 years before the bringing of this action, in 1884. It is also averred that the railway company took possession and had held the strip of land without the consent of appellant, and has ever since excluded him therefrom. It thus appears that the company had held the possession of the strip of land adversely to appellant for 25 years before he took any steps to recover it by action; and thus it appears that appellant's right to eject the company from the land is barred by the 20-years statute of limitations. The rule is settled in this state that a demurrer will not be sustained to a complaint on the ground that it shows a cause barred by the statute of limitations, unless it also appears that the cause does not come within any of the exceptions to the statute where there are such exceptions. *Epperson v. Hostetter*, 95 Ind. 583, and cases there cited; *Lehman v. Scott*, 113 Ind. 76, 14 N. E. Rep. 914. If there are no exceptions to the statute, or if it appear from the complaint that the cause does not come within the exceptions where there are any, a demurrer will be sustained if it appear from the complaint that the statutory period of limitations has expired, and the case is otherwise within the statute. There are exceptions to the statute of limitations applicable here. One of them is that any person, being under legal disabilities when the cause of action accrues, may bring his action within two years after the disability is removed. Rev. St. 1881, § 296. Infants are persons under legal disabilities within the terms of the above section. Rev. St. 1881, § 1285; *Lehman v. Scott*, 14 N. E. Rep. 914. It clearly enough appears here that appellant's cause of action, as made by the sixth paragraph of his complaint, does not fall within this exception. It is shown by the averments in that paragraph that he had been the owner of the land for at least twenty-five years, and that during that time it had been occupied by the railway company. If he was but one day old at the time the company entered upon and took possession of the land, he attained the age of twenty-one years four years before this action was commenced; and thus it appears that the railway company held adverse possession of the strip of land for more than twenty years, and that appellant did not commence his action within two years after his disability was removed. It clearly enough appears, also, that the appellee was not, during any of the time during which it held the strip of land, a non-resident of the state, or absent on public business, within the terms of section 297, Rev. St. 1881, which constitutes another exception to the statute of limitations. It is averred that the railway company was incorporated under the laws of this state, and that it continuously held the possession of the strip of land, and maintained and operated its road thereon; and thus it appears that the company was a resident of this state, and was continuously present, operating its road. That the company may have taken possession of the strip of land in the first place as a trespasser did not prevent the running of the statute of limitations. Adverse possession is often wrongful, and may often commence by a trespass, but that does not prevent the running of the statute of limitations. That statute is a statute of repose, and may settle the title in an original wrong-doer. The holding in the case of *Sibley v. Ellis*, 11 Gray, 417, is correctly stated in the syllabus, as follows: "Open and adverse use for twenty years will establish a right of way, although the use began in a trespass."

The conclusion above reached, also disposes of the claim for damages as made in the paragraph under consideration. In an analogous case, the su-

preme court of Massachusetts said: "The court are of the opinion that where a mill-owner and his predecessor have in fact enjoyed and exercised the right of keeping up his dam and flowing the land of another for a period of twenty years, without payment of damages, and without any demand or claim of damages, or the assertion of the right to damages, it is evidence of a right to flow without payment of damages, and will be a bar to such claim. It is very clear that to raise a dam on one's own land, by which the water is set back on another's, without grant from the latter, would be a tort, for which case would lie. If such a claim is continued for twenty years, without action, complaint, or protest on the part of the land-owner, it is evidence of a right; and, as such right may be and often is acquired by grant, it is taken to be presumptive evidence of a grant, and may be so pleaded." *Williams v. Nelson*, 23 Pick. 141. See, also, *Roots v. Beck*, 109 Ind. 472, 9 N. E. Rep. 698, and cases there cited. When the presumption of a grant is thus raised by 20 years' occupancy, it cannot be said that damages may be awarded against an occupant for having done that which he might legally do as the owner of the land. When time has made the occupancy right and legal, it has swept away all claims for damages by reason of that occupancy. A person cannot be held liable for the occupancy of land which he had a right to occupy as against all others. The case of *Cox v. Railroad Co.*, 48 Ind. 178, is relied upon by appellant in support of his contention that the 20-years statute of limitations will not defeat a recovery for damages resulting from the alleged unlawful detention of the land by the railway company. It is argued that that case lends support to the contention that the railroad as constructed and maintained, and the operation of the trains over it, was and is a continuing nuisance, and that each day's continuance is a new nuisance, for which damages may be recovered. With reference to that case, it should be observed, in the first place, that it arose out of an unauthorized construction of the railway upon a public street; and, in the second place, that it does not appear in the case that the street, or any part of it, had been adversely or otherwise occupied by the railway company for a period of 20 years. In those particulars, the case is distinguishable from that before us. It should be observed, also, that the section quoted in the opinion in that case from *Angel on Limitations* is authority in support of the proposition that an adverse occupancy for a period of 20 years will defeat a claim for damages resulting from such occupancy as made here. The section thus quoted is in harmony with the Massachusetts case above, and with the rule laid down by Mr. Wood in his work on *Limitations of Actions*, at page 376, § 181, as follows: "While, as we have stated, each continuance of a nuisance is treated as a new nuisance, and furnishes a new ground of action which affords a good ground of recovery, although the statute may have run upon former injuries from the same nuisance, yet this proposition only holds good when the action is brought before the person erecting or maintaining the nuisance has acquired a prescriptive right to do so by the lapse of such a period as bars an entry upon lands adversely held by another; that being the period universally adopted in this country for the acquiring of prescriptive rights," etc. That a right to maintain a public nuisance cannot be acquired by prescription, and that each day's continuance of such a nuisance is a new nuisance for which a public prosecution will lie, notwithstanding the nuisance may have been maintained for more than 20 years, is well settled. To that extent, and no further, go the authorities cited by appellant. See *State v. Phipps*, 4 Ind. 515. See, also, *Wood, Nuis.* (2d Ed.) 769, 770; *Pettis v. Johnson*, 56 Ind. 139. It may be observed, however, that there are cases where the state may be estopped from maintaining such a prosecution. See *Hamilton v. State*, 106 Ind. 361, 7 N. E. Rep. 9. The above authorities show, also, that a right to maintain what is strictly a private nuisance may be acquired by prescription, and that the time necessary to perfect a prescriptive right is the period which bars an entry upon lands ad-

versely held by another, which, in most of the states, is 20 years. In that regard those authorities are fully supported by the law writers and the adjudicated cases. See Wood, Nuis. 763 *et seq.*; Id. § 704 *et seq.*, and cases there cited; 1 Hil. Torts, (4th Ed.) 653, and cases there cited. See, also, *Snowden v. Wilas*, 19 Ind. 10; *Mitchell v. Parks*, 26 Ind. 354; *Postlethwaite v. Payne*, 8 Ind. 104. If we regarded the case of *Cox v. Railroad Co.*, *supra*, as really in conflict, to any extent, with our conclusion here, we should feel constrained to overrule it to that extent. If, then, it may be said here that the road, as constructed and operated over appellant's land, without his consent and without compensation first paid, was, in any sense a nuisance, it was nothing more than a private nuisance, and it is very clear that there can be no recovery for damages resulting from such construction and operation, because more than 20 years of occupancy and user have made that construction and operation lawful. Our conclusion is that the sixth paragraph of the complaint was not good, and that the demurrer thereto was properly sustained.

While the second paragraph is not, in a strict sense, for the possession of the land, and the ejectment of the railway company therefrom, practically it amounts to the same thing. For all practical purposes, the company might as well be ejected from the land as to be perpetually enjoined from operating its trains over the road. It is shown by the averments in the paragraph that the road was constructed upon and across the land in 1853, 31 years before the action was commenced, in 1884. If it be said that the construction and operation of the road, because without the consent of appellant and his predecessor in the ownership of the land, was thus constructed and operated against their will, then we shall have a case of adverse possession for more than 20 years, and all that has been said in relation to the sixth paragraph of the complaint is applicable here, and the second paragraph must be held bad. While the construction of the road upon the land is alleged to have been without the consent of the owners of it, there is no averment that they at any time objected, or took any steps to prevent such construction. For more than 30 years they stood by, and allowed the railway company to expend its money in the construction and repair of the road. They ought now to be held as acquiescing in the construction and operation of the road. It is too late now to eject the company from the land, or to invoke the aid of a court of equity to enjoin it from operating the road, which would be practically the same thing. It was intimated in the case of *Cox v. Railroad Co.*, 48 Ind. 178, relied upon by appellant, that the land-owner might at any time enjoin the use of the road by the railway company, had the company claimed the right to continue the use of it. So far as that case holds, or impliedly holds, such a doctrine, it has been distinguished and impliedly disproved in the later cases, by the statements that no question was there made upon the delay in bringing the action, and by the holdings that, after a long delay, courts of equity will not interfere by enjoining the operation of the road by the company. *City of Logansport v. Uhl*, 99 Ind. 531. We cannot do better here than to repeat what was said in the recent case of *Railway Co. v. Smith*, 15 N. E. Rep. 256, viz.: "As has been seen, injunctive relief will only be granted when application therefor is reasonably made. A land-owner who stands by and acquiesces until a railway company has expended its money, and constructed its track across his land, so that the track at that point became a part of its line, will not thereafter be entitled to invoke the aid of a court of equity in arresting an enterprise in which the public as well as the railroad company have an interest. Upon considerations of public policy, as well as upon recognized principles of justice, courts of equity will refuse to interfere after a railroad corporation has entered upon land with the consent or by the license of the owner, and has expended money in the construction of its road upon the strength of such license or consent, or where the land-owner has acquiesced in the use of

his land by the railroad company until the public interest or convenience become involved. *Campbell v. Railroad Co.*, 110 Ind. 490, 11 N. E. Rep. 482; *Railroad Co. v. Jones*, 103 Ind. 386, 6 N. E. Rep. 8; *Buchanan v. Railway Co.*, 71 Ind. 265; *Ror. R. R.* 741, 750, 751; 2 Wood, Ry. Law, 794." The holding in the case of *Railway Co. v. Allen*, 15 N. E. Rep. 446, is correctly stated in the syllabus, as follows: "Where a railway company enters upon land without right, and, with the knowledge and acquiescence of the owner, constructs a railroad thereon, and operates the railroad in the public service until public rights have been acquired, this will, on the ground of public policy, preclude him from severing the line of the railway by a possessory action," etc. See, also, *Railroad Co. v. Clifford*, 15 N. E. Rep. 524; *Railway Co. v. Nye*, 113 Ind. —, 15 N. E. Rep. 261; *McAulay v. Railroad Co.*, 33 Vt. 311. The paragraph under consideration does not make a case which would justify the court in enjoining the operation of the road by the company. Neither does it make a case for damages. It is clearly shown that the road was constructed upon the land before appellant became the owner of it. It is settled in this state that, where land is taken by a railway company, all damages for such taking must be recovered in one action, and that the owner of the land cannot maintain successive actions therefor. In such action, all injuries that may naturally and proximately result from the construction and operation of the railway may be recovered. Such damages accrue to, and must be recovered by, the person who owned the land at the time the road was constructed. The claim for such damages is a chose in action, which does not pass to the grantee of such owner by deed or otherwise, unless by a special stipulation. In order to entitle a grantee to maintain an action for such damages, he must first procure an assignment of such claim. *Railway Co. v. Allen*, 15 N. E. Rep. 451, and cases there cited.

Before proceeding to a consideration of the second paragraph of appellee's answer, the demurrer to which was overruled, it is necessary to notice, briefly, the third, fourth, fifth, and eighth paragraphs of the complaint to which it is addressed. The substance of the third paragraph is that in 1883 appellant was the owner of a described tract of land, over which appellee owned and operated its railway; that, at that time, the appellee, without right, wrongfully and unlawfully, entered upon his said land, and without right tore down and rendered worthless plank and rail fences of the value of \$200; that the fences were necessary, at the places where they had been constructed, for the proper cultivation of his land; and that appellant threatens to tear down the fences as often as they may be rebuilt upon the line from which it removed them. Prayer for judgment for damages, and for an injunction to prevent appellee from interfering with the construction and maintenance of the fences. The substance of the fourth paragraph is that appellant is the owner of and entitled to the possession of a strip of land 30 feet wide, which is particularly described, and that appellee has unlawfully kept him out of the possession of it for 10 years, to his damage. Prayer for possession and damages. The fifth paragraph is very much the same as the third. The substance of the eighth paragraph is that for 20 years past appellant has been the owner of a described tract of land; that in 1853 appellee, then a railway corporation under the laws of this state, by the consent of the owner of said land, appellant's predecessor in the ownership of the land, constructed its railway upon and across the land, and continued to use the same until the 1st day of July, 1882, with the knowledge and consent of appellant and his said predecessor in ownership, at which time appellant objected to any further use of the road upon said land, and demanded the possession of the land occupied by the road; that the appellee refused to yield the possession; that it has never had compensation assessed nor tendered to him. Prayer for the possession of the land occupied by appellee's road, and for the ejectment of it therefrom. If the second paragraph of the answer were addressed to the above eighth

paragraph of the complaint alone, there could be no question of its sufficiency, because, whether good or bad, it would be sufficient for that paragraph, which is clearly bad. It shows that for more than 20 years appellant and his grantor acquiesced in the occupation of the land by the railway company. After such an acquiescence, it is too late now to ask for an ejectment of the railway company from the land. The answer, however, as we have seen, is addressed to other paragraphs which appear to be good. It is necessary, therefore, to examine the answer. It must be regarded as intended to meet those paragraphs of the complaint which charge appellee with the unlawful removal of the fences, and the unlawful possession of the strip of land. The substance of the answer is that the New Albany & Salem Railroad Company was incorporated under an act entitled "An act to provide for the continuance of the construction of all or any part of the public works of the state by private companies," approved on the 28th day of January, 1842, (Acts 1842, p. 3,) and was so organized and incorporated for the purpose of completing, as a railroad, a certain proposed macadamized highway running from New Albany to Salem which had been partially constructed under the improvement act of 1836; that, by said act of 1842, said railroad company was empowered to so build said railroad, and extend the same to the north part of the state, and was given all the franchises and powers of the state in that behalf; that in 1848 an act was passed and approved (Acts 1848, p. 456) in which it was provided that said railroad company should enjoy all the powers conferred upon the state by the "Act to provide a general system of internal improvement," approved January 27, 1836, (Acts 1836, p. 6.) and said act of 1842, *supra*; that by an act of January 30, 1849, it was further enacted that said railroad company, by its board of directors, should, in the assessment of damages in relation to all necessary rights of way, possess the same powers and perform the same duties that were possessed and performed by the board of internal improvement, as prescribed in the sixteenth and seventeenth sections of said act of 1836; that, being so organized, said company constructed its railroad from New Albany to Salem, and, having caused the proper surveys to be made in 1853, extended its line to Michigan City, and appropriated land therefor; that, at the time the railroad was constructed across the land now owned by appellant and described in the complaint, it was owned by one Chambers, who had full knowledge of the acts of said company in taking possession of the land, and constructing its road thereon, and made no objection nor claim for damages; that appellee is the owner of the road so constructed by the New Albany & Salem Railroad Company, and, by itself and its said predecessor in title, has been in the full possession thereof, operating the same since 1853 until the present time; that, during all of that time, no owner of the land ever objected or claimed damages until this action was commenced; that, in appropriating a right of way through the land now owned by appellant, said New Albany & Salem Railroad Company took no more than was necessary for the construction and operation of its road, and that the amount so taken did not exceed 60 feet, which strip so taken and appropriated is the land claimed in appellant's complaint; that in 1883 appellant entered upon appellee's road-bed, and within the 60 feet so appropriated through his land, and erected fences thereon so close to the track of the road as to interfere with the proper repair and management thereof, and thus forcibly asserted a right to said right of way theretofore appropriated as aforesaid; that appeller, by its servants and agents, peaceably removed the fences from its right of way, using no more force than was necessary, which is the grievance complained of in the third and fifth paragraphs of the complaint; and that the right of way thus appropriated is the land which appellant asks the possession of in the fourth and eighth paragraphs of his complaint. It will not be necessary for us to here go into an extended examination of the several acts under which the New Albany & Salem Railroad Company was incorporated, and un-

der which it had authority to appropriate land for its right of way. The board of internal improvement had authority to enter upon and appropriate any land necessary for the prosecution and completion of the improvements contemplated in the act of 1836. Acts 1836, p. 13, § 16. The New Albany & Salem Railroad Company was given the same authority, and "to enter upon and take possession of any land which may be necessary for the construction of any such work, and to make the same available." See *Peck v. Railway Co.*, 101 Ind. 366. The averments of the answer, in some respects, are not as formal and specific as they might have been made, but we think that, as against the demurrer, it is sufficiently shown that a strip of land 60 feet wide through the land now owned by appellant was appropriated, and that a strip that wide was necessary for the completion of the road, and to make it available; and, further, that appellant constructed his fences upon the strip of land thus appropriated and used by the railway company for about 30 years. Our conclusion, therefore, must be that appellant cannot recover from the railway company the land thus occupied, and cannot build fences upon it; and, further, that the railway company had a right to remove the fences as it did, and is not liable therefor; and, finally, that the demurrer to the answer was properly overruled.

It is further insisted on behalf of appellant that the court below erred in overruling a demurrer to the sixth paragraph of appellee's answer. That paragraph is addressed to the first paragraph of the complaint, in which it is charged, in substance, that appellant has been the owner of certain described lands since 1862, across which appellee, in 1883, owned and operated its railroad; that, prior to that date, appellee had constructed a bridge on the line of its road over a stream of water flowing through his land; that the bridge was negligently constructed, and up to 1883 negligently maintained, so low and short, and with such trestles under it, that the water of the stream, which collected above it, did not and could not pass under it; that by reason of such obstruction, in 1883, the water was diverted from its channel, and backed up and set back upon appellant's lands, and destroyed his fences and growing crops. The substance of the sixth answer is that the bridge was first built in 1853, where it now is, and has since remained, by appellee's predecessor in the title to the railroad, the New Albany & Salem Railroad Company, and has been maintained in its present condition ever since; that it was so built, and has all the time been maintained, with the full knowledge of and without objection from appellant or his predecessor in the title to the land; that with full knowledge on their part of the manner in which the bridge was constructed and has been maintained, and of the liability of the overflow of the land by the stream, neither of them, at any time, complained of or made any objection to the bridge as constructed and maintained; and that appellant "has so acquiesced and consented with full knowledge that defendant [appellee] has expended large sums of money on said bridge and said track, and other bridges leading thereto; wherefore defendant says that he [appellant] is estopped from asserting any claim for damages by reason of the premises." After a careful consideration, we are of the opinion that the first paragraph of the complaint makes a case for damages, and that the case as thus made is not met and overthrown by the above paragraph of answer. That a railway company will be liable for the overflow of adjoining lands, which results from the negligent construction of a bridge over a natural water-course, is well settled. 1 Redf. R. R. (6th Ed.) 341 *et seq.* Whatever damages resulted, or might reasonably result, from the appropriation of the land, and the proper construction of the road thereon, accrued in favor of Chambers, who owned the land at the time that portion of it occupied by the road was appropriated. The right to recover those damages did not pass to appellant. When we have said this much, we think we have gone as far as we should in denying a right of recovery to a subsequent owner of the land. That the bridge would be

negligently constructed, or, if so constructed, that it would at any time cause injury and damage by causing the stream to overflow the lands outside of the right of way, could not have been sufficiently known until such an overflow occurred, to authorize the assessment of damages in advance; and, assuming that such an overflow might be occasioned by the bridge, it would be impossible, in advance of such overflow, to make even an approximately correct estimate of the damages that might result. When the injury did occur by reason of such overflow, it was not the probable and proximate result of the construction of the road, but the result of an act of negligence in connection with more than a usual amount of water in the stream. See *Railway Co. v. Morris*, 35 Ark. 622. While the complaint is not as definite as it ought to be, it is apparent that the overflow in 1883 was at a time of high water, and would not have occurred but for such high water. Because the overflow here complained of did not occur while Chambers owned the land, because such an overflow was not the result of the improper construction of the road, and because it could not have been so known that such an overflow would result from the negligent construction of the bridge that damages could have been assessed in advance, it cannot be said that the damages here complained of did or could accrue in favor of Chambers. See *Mills*, Em. Dom. § 217, and cases there cited; *Pierce*, R. R. 179, and cases there cited; *Railroad Co. v. Dantel*, 20 Grat. 344. It has been said that a cause of action may be said to be the right of the plaintiff, and the obligation, duty, or wrong of the defendant, and that these combined constitute the cause of action. *Veeder v. Baker*, 83 N. Y. 156, (160:); *Baker v. State*, 109 Ind. 47, 61, 9 N. E. Rep. 711. Accepting that definition as correct, it may be said here that the right of the plaintiff was to have his land free from the overflow, and to recover the damages resulting therefrom, and that the wrong of the railway company was the negligent construction and maintenance of the bridge. These could not combine until the overflow occurred, and hence the cause of action accrued in favor of appellant, and not in favor of his grantor. Mr. Redfield, in his work on Railways, (6th Ed. vol. 1, p. 595,) says: "The general rule in regard to the time of the accruing of the action is that, when the act or omission causes direct and immediate injury, the action accrues from the time of doing the act; but where the act is injurious only from its consequences, as by undermining a house or wall, or causing water to flow back at certain seasons of high tide or high water, the cause of action accrues only from the consequential injury. In the case of *Backhouse v. Bonomi*, 9 H. L. Cas. 503, it was held that no cause of action accrued from defendant's excavation in his own land until it caused damage to plaintiff's." The case of *Renaud v. Railway Co.*, 14 U. C. Q. B. 109, arose out of the imperfect and negligent construction of a bridge over a stream crossed by the railroad, and the consequent flooding of the lands of the plaintiff. It was contended in that case that the plaintiff, who claimed damages by reason of the overflow of his land, could not recover, for the reason that the injury proved resulted from the construction of the defendant's works, and that the plaintiff's only remedy was under the arbitration clause of the charter; and, further, that as it did result from the construction of the defendant's works, and the bridge had been constructed upwards of two years before the commencement of the suit, the plaintiff could not recover. That contention was based upon a statute which provided that all suits "for indemnity for damages or injury sustained by any person or persons by reason of the said railway shall be instituted within six calendar months next after the time of such supposed damage sustained, or, if there shall be a continuation of damage, then within six calendar months next after the doing or committing of such damage shall cease, and not afterwards." The contention on the part of counsel for the railway company presented the question whether the cause of action accrued at the time the bridge was constructed, or at the time the injury was caused by the overflow. If at

the former time, the action was brought too late under the statute. Upon the question thus presented, ROBINSON, C. J., said: "As regards the limitation of time for bringing the action, we think that the plaintiff was properly entitled to succeed, both on the second and fourth pleas, for that the cause of action first arose when the damage was suffered, there being no complete cause of action till the damage was sustained. The defendant was guilty of no illegal act that could have been complained of as a trespass, and till it proved to be injurious there was no right to sue." BURNS, J., said: "No matter how unskillfully the works were constructed, if they answered the purposes of the defendant's railway, no one could complain of that; but it is when those unskillful works occasion injury to others in places where, perhaps, it was supposed they could not exist or have an influence, that a cause of action arises to such persons. The plaintiff complains that his land was overflowed by means of the defendant's works, and, as proved, that most certainly did happen within six months next before the bringing of the action." In the case of *Vanhorn v. Railway Co.*, 18 U. C. Q. B. 356, the same question was involved, and ROBINSON, C. J., again said: "I think no objection lies in this case to the action which is brought, not for anything being done that was necessarily done in carrying on the work, but for an alleged injury not foreseen, and first experienced long after the railway was completed, and an injury attributable solely to the unskillful and negligent manner of constructing a culvert. As to the action not being brought in time, I am of the opinion that the objection is not tenable, for there was no right of action till the plaintiff had received injury from the freshet," etc. BURNS, J., said: "Upon the first point made for nonsuit, the question is, when did the plaintiff's cause of action arise? Was it when the railway was first constructed, or at the time the plaintiff's land was flooded. The words of the twentieth section of 14 & 15 Vict. c. 51, are that 'all suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six calendar months next after the time of such supposed damage sustained.' It was not possible for the plaintiff to know whether the defendant's works would or would not do him an injury until those works were tested, and no test could be applied until it was done by nature. * * * If this plaintiff had brought an action before his land was flooded, upon the idea that it might be so at some future period, surely the answer would have been that he was premature, for no one could know that he would ever sustain any injury. When the land was overflowed, then his case came within the rule of *damnum et injuria*, and then his cause of action arose." See, also, *Dickson v. Railroad Co.*, 71 Mo. 575. Our conclusion upon this feature of the case is that the sixth paragraph of the answer cannot be held good upon the theory that it shows that the right of action set up in the first paragraph of the complaint accrued, or could have accrued, in favor of Chambers, and did not accrue in favor of appellant.

It results from what we have said, also, that appellant's right of action, as set up in the first paragraph of the complaint, was not barred by any statute of limitations, nor affected by the lapse of time simply, unless it may be said that the railway company had, prior to the overflow of 1883, acquired such a prescriptive right to maintain the bridge as it was at that time as to exonerate it from all liability for damages resulting from such overflows; or, in other words, had a prescriptive right to overflow appellant's lands. Had the company acquired such a right? This inquiry may be considered in connection with that portion of the eighth instruction in which the jury were instructed that they could not award damages to appellant for the injury occasioned by the overflow of his land outside of the right of way, if they should find that the bridge had been constructed and maintained continuously, uninterruptedly, and adversely for 20 years or more. That instruction was predicated, doubtless, upon the theory that, if the bridge had been maintained in

the manner stated for 20 years, the railway company had thereby acquired a prescriptive right to maintain it, and therefore was not liable for the damages resulting from the overflow caused by it, although it may have been negligently constructed and maintained; in other words, that the railway company had thus acquired a prescriptive right to overflow appellant's land by maintaining an insufficient and negligently constructed bridge upon its right of way. There are important elements lacking here, which are essential to a prescriptive right in the railway company to flood appellant's lands. The whole case is upon the theory that all of the injury complained of, and, so far as shown, all that has resulted to appellant's lands by reason of the defective bridge, was caused by the overflow of 1883. That overflow was the result of a freshet in the stream, in connection with the insufficient bridge. Assuming that the railway company owned the right of way through appellant's lands, as is assumed in the answer and instruction, there is no claim in either, nor, as we understand, in the evidence, that in times of ordinary water the bridge caused any overflow of appellant's lands, or in any way operated as an invasion of any of his rights. So long as no injury resulted to appellant, it was entirely immaterial to him in what manner the bridge was maintained by the railway company upon its own land. The bridge being upon its land, his rights could in no way be invaded by its maintenance until he in some way suffered an injury by such maintenance. Until then it was neither harmful, nor a matter of inconvenience even, to him. Until a person's rights are in some way invaded, they cannot be destroyed, nor transferred to another by prescription. Time, in this state 20 years, is an essential element in the establishment of a prescriptive right, and in a case like this begins to run only from a date at which a cause of action accrues in favor of the party against whom the right is asserted. As we have seen, in this case no cause of action accrued to appellant by reason of the negligent construction of the bridge until the overflow of his land in 1883, much less than 20 years ago. In speaking of the right by prescription to exercise a noxious trade, Mr. Wood, in his work on Limitation of Actions, at page 377, § 182, says: "But, in order to establish the right as against any party complaining, the burden is imposed upon the defendant, who sets up the right as a defense, of proving that for the period of twenty years he has sent over the premises in question, from his works, an atmosphere equally as polluted and offensive as that complained of. Proof that he has polluted the air is not enough; he must show that for the requisite period he has sent over the land an atmosphere so impure and polluted as to operate as an actual invasion of the rights of those owning the premises affected thereby, and in such a manner that the owner of the premises might have maintained an action therefor. Less than that is insufficient. He must also show that his user at the time when the action is brought, is not substantially in excess of that which he has exercised during the period requisite to the right. * * * In order to establish a right by prescription, the acts by which it is sought to establish it must operate as an invasion of the particular right which it is sought to quiet to such an extent that, during the whole period of use, the party whose estate is sought to be charged with the servitude could have maintained an action therefor." Mr. Wood, in work on the Law of Nuisances, at section 708, says: "There is a difference between a prescriptive right to do some act upon one's own premises that operates injuriously to another, and a right to do the same act upon another's premises. In the latter case, each act of user, before the user ripens into a right, is a trespass, for which an action may be maintained at any time; while in the former no action can be maintained until some right has been invaded. In the one case there is an actual invasion of the property itself, while in the other there is a mere invasion of some right. * * * The rule is * * * that, to constitute an adverse user requisite to sustain the right, it must be shown that the user had actually invaded the rights of

the persons against whom the claim is made in reference to the particular matter which is the subject of complaint, and that the user, during the entire statutory period and the invasion of the right, have produced an injury equal to and of the character complained of, and of such a character and to such an extent that at any time during that period an action might have been maintained therefor." Applying to the case in hand the above rules of law, laid down by the authors named, which are abundantly established by the cases cited by them, and by many others that might be cited, it must be held that it is not shown by the sixth answer that the railway company had a prescriptive right to flood appellant's lands; for the reason, among others, that it is not shown that by the erection and maintenance of the bridge it in any way invaded any of his rights prior to the overflow of 1883, nor that any cause of action accrued to him, on account of such erection and maintenance of the bridge, prior to that date. Neither is it shown by the evidence that there was any such invasion of appellant's rights, or that such cause of action accrued to him, prior to the overflow of 1883. For these reasons the sixth paragraph of the answer is bad, and the eighth instruction is erroneous. It is averred in that paragraph of the answer that appellant and his predecessors in the title to the land had knowledge of the construction of the bridge, and of the manner of its construction, and made no objections. These averments, when admitted as true, do not make an estoppel against appellant. It is not averred that he knew that the bridge would flood his land, nor that he acquiesced in such flooding. See *Miller v. Stowman*, 26 Ind. 143, 149.

The fifth paragraph of the answer is also bad, in that it purports to answer the whole complaint, and answers but a portion of it. Whether or not the flood of 1883, which, in connection with the bridge, caused the overflow of appellant's land, was an extraordinary flood, and such as the railway company was not bound to anticipate and provide against in the erection and maintenance of the bridge, are questions which we need not and do not now decide. There are a number of other questions discussed by appellant's counsel, but we do not think that it would be profitable to extend this already lengthy opinion to decide them upon this appeal.

Judgment reversed, at appellee's costs, with instructions to the court below to sustain appellant's motion for a new trial, and to sustain his demurrer to the fifth and sixth paragraphs of appellee's answer.

(114 Ind. 73)

BAUGHN *et al.* v. BAUGHN.

(*Supreme Court of Indiana*. May 19, 1888.)

TRIAL—VERDICT—TWO VERDICTS—JUDGMENT.

The judgment must follow the verdict; and where the jury returned two verdicts, as follows: "We, the jury, find for the plaintiff, and assess his damages in the sum of eight hundred dollars;" and: "We, the jury, find for the defendant on the counter-claim and set-off, and assess the damages in the sum of three hundred dollars,"—it is error to overrule a motion for a *ventre de novo*, and render judgment for the plaintiff for \$500.

On rehearing. Appeal from circuit court, Delaware county; ORLANDO J. LOTS, Judge.

For opinion on former hearing, see 15 N. E. Rep. 466.

T. B. Redding and *Gregory & Silverbury*, for appellants. *Brown & Brown*, for appellee.

ELLIOTT, J. We adhere to our opinion that the verdict in this case is not such as a judgment can be pronounced upon, and that the motion for a *ventre de novo* should have been sustained. It is not possible, on the face of the verdict, to determine what the judgment shall be; for it cannot be ascertained whether the jury intended to award a recovery to the plaintiff or to

the defendant. If the defendant was entitled to \$300, as the jury find, on his counter-claim, then, of course, the plaintiff could not recover. If, on the other hand, the plaintiff was entitled to recover \$800, and so the jury find, the defendant could not recover anything on his counter-claim. In this state of conflict in the finding of the jury, the only thing for the trial court to do after receiving the verdict was to award a *venire de novo*. Doubtless, that court might properly have ordered a correction of the verdict before the discharge of the jury, but, after their discharge, this, of course, could not be done. Petition overruled.

(114 Ind. 558)

MERCER v. MERCER.

(*Supreme Court of Indiana. May 19, 1888.*)

1. DIVORCE—PLEADING—CRUELTY.

A complaint for divorce by the wife against the husband alleged that for 12 years the defendant had treated the appellee in a cruel and inhuman manner; that he had struck, kicked, and choked her, neglected to secure for her medical attention during her illness, or to give her any attention himself. *Held*, the specific acts charged constituted cruel and inhuman treatment, and the complaint was sufficient.¹

2. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—TIME WHEN DISCOVERED.

A complaint for a new trial, filed after the term at which the decree was rendered, which does not show that the newly-discovered evidence upon which it is founded was not discovered during the term at which the decree was rendered, is defective.²

Appeal from circuit court, Rush county; SAMUEL A. BONNER, Judge.

Action for divorce by Rebecca J. Mercer against John R. Mercer. Decree for plaintiff. Defendant appealed.

Ben. L. Smith and Wm. J. Henly, for appellant. *John Q. Thomas and Davis & Morgan*, for appellee.

ELLIOTT, J. The appellee petitioned for a divorce from the appellant, and obtained the decree she sought. The complaint is challenged for the first time by the assignment of errors. The complaint alleges that the appellant has for 12 years treated the appellee in a cruel and inhuman manner; that he has struck, kicked, and choked her; and that he has neglected to secure for her medical attention in her illness, or to give her any attention himself. We hold the complaint to be clearly sufficient, for the specific acts charged constitute cruel and inhuman treatment within the meaning of the statute. The sufficiency of the affidavit filed with the complaint is not called in question by the assignment of errors. The appellant's complaint for a new trial, filed after the term at which the decree was rendered, is defective in many respects. It is enough to point out one defect, and that is that it does not show that the newly-discovered evidence was not discovered during the term at which the decree was rendered. *Hines v. Driver*, 100 Ind. 315. We can-

¹ Respecting cruelty as a ground for divorce, see *Leach v. Leach*, (Me.) 8 Atl. Rep. 349; *Minde v. Minde*, (Mich.) 32 N. W. Rep. 868; *Burlage v. Burlage*, (Mich.) 32 N. W. Rep. 866; *Whitacre v. Whitacre*, (Mich.) 31 N. W. Rep. 327, and note; *Vanduzer v. Vanduzer*, (Iowa,) Id. 956; *Williams v. Williams*, (Tex.) 2 S. W. Rep. 823, note; *Haley v. Haley*, (Cal.) 14 Pac. Rep. 92; *Holyoke v. Holyoke*, (Me.) 6 Atl. Rep. 830, and note; *Hawkins v. Hawkins*, (Md.) 3 Atl. Rep. 753; *Whaley v. Whaley*, (Iowa,) 27 N. W. Rep. 810, and note; *Sharp v. Sharp*, (Ill.) 6 N. E. Rep. 21; *Williams v. Williams*, (Fla.) 2 South. Rep. 768; *Peck v. Peck*, (Mich.) 33 N. W. Rep. 893; *Eggarth v. Eggarth*, (Or.) 16 Pac. Rep. 650; *Lyle v. Lyle*, (Tenn.) 6 S. W. Rep. 879; *Wilson v. Wilson*, (R. I.) 13 Atl. Rep. 102.

² On the general subject as to when a new trial will be granted, on the ground of newly-discovered evidence, see *Boot v. Brewster*, (Iowa,) 36 N. W. Rep. 649, and note; *Railway Co. v. Wood*, (Tex.) 7 S. W. Rep. 372; *McCormick v. Railroad Co.*, (Colo.) 17 Pac. Rep. 542; *Petefish v. Watkins*, (Ill.) 16 N. E. Rep. 248; *Pemberton v. Johnson*, (Ind.) 15 N. E. Rep. 801; *Achorn v. Andrews*, (Me.) 12 Atl. Rep. 793; *Insurance Co. v. Harvey*, (Va.) 5 S. E. Rep. 553; *Railway Co. v. Walker*, (Tex.) 7 S. W. Rep. 791.

not say that the trial court in fixing the appellee's alimony abused its discretion, and we must therefore sustain its judgment on that subject. *Peck v. Peck*, 113 Ind. 168, 15 N. E. Rep. 12. Judgment affirmed.

(115 Ind. 1)

BRAVARD v. CINCINNATI, H. & I. R. Co.

(*Supreme Court of Indiana*. May 28, 1888.)

1. CONSTITUTIONAL LAW—PUBLICATION OF STATUTES.

The publication, in pamphlet form, of the railroad laws of 1853 in advance of the publication of the Revised Statutes, was authorized by a joint resolution of the general assembly, and thus constituted the publication and circulation of the general railroad law of the state within the meaning of Const. Ind. art. 4, § 124, which provides that no act shall take effect until published and circulated in the several counties of the state by authority, except in case of emergency.

2. RAILROAD COMPANIES—RIGHT TO ACQUIRE LAND.

Under Acts Ind. 1852, § 12, (1 G. & H. 508,) authorizing the incorporation of railroad companies, with the power to receive grants of real estate and other property in aid of its construction and maintenance, when a grant of right of way to a railroad company has been executed in anticipation of and as an inducement to its organization, it is competent for the railroad company to receive such grant, and, after its organization, to ratify the grant, and make it obligatory upon the grantor.

3. SAME—EJECTMENT.

The failure of a railroad company to construct its road within the time limited by the statute cannot be taken advantage of by a land-owner over whose land the road may have been eventually constructed, to eject the company from his land.

4. SAME—REMEDY FOR LAND TAKEN.

Where a railroad company enters upon land without the owner's consent, and without condemning it, and the owner stands by and acquiesces until the company has constructed its road, and made it at that point a part of its railroad line, such owner forfeits every remedy against the company except an action for damages.

Appeal from circuit court, Rush county; SAMUEL A. BONNER, Judge.

Action by Benjamin D. Bravard against the Cincinnati, Hamilton & Indianapolis Railroad Company, to recover the possession of a certain strip of ground appropriated and used by the company as part of its right of way and line of road. Judgment for defendant, and plaintiff appeals. Const. Ind. art. 4, § 124, provides that no act shall take effect until published and circulated in the several counties of the state by authority, except in cases of emergency.

Smith & Henley, C. Cambern, and Thos. J. Newkirk, for appellant. *R. D. Marshall*, for appellee.

NIBLACK, C. J. This was in form an ordinary action by Benjamin D. Bravard against the Cincinnati, Hamilton & Indianapolis Railroad Company to recover the possession of a strip of ground appropriated and used by the company as a part of its right of way and line of road. The circuit court tried the cause without a jury, and the finding and judgment were for the defendant. It was shown by the evidence that the plaintiff below, and the appellant here, was the owner by devise from his father, Lewis Bravard, of the tract of land of which the strip in controversy constitutes a part; that the said Lewis Bravard was, on the 2d day of February, 1853, the owner in fee of that tract of land, and that he on that day executed to the Ohio & Indianapolis Railroad Company a release of the right of way over that land; that the Ohio & Indianapolis Railroad Company did not organize until the 4th day of February, 1853, two days after the right of way was granted as above; that on the 20th day of April, 1853, the Ohio & Indianapolis Railroad Company and the Junction Railroad Company were, by articles of agreement, consolidated under the name of the latter company; that the Junction Railroad Company, as thus reorganized, was, in November, 1872, purchased by the appellee, the Cincinnati, Hamilton & Indianapolis Railroad Company, at a master's sale, under a decree of foreclosure rendered by the circuit court of the United States

for the district of Indiana, by means of which the appellee succeeded to all the rights and liabilities of the Junction Railroad Company; that, before the consolidation took place, the Ohio & Indianapolis Railroad Company made a preliminary survey of a proposed line of road over the tract of land now belonging to the appellant as stated; and that, after the consolidation, the Junction Railroad Company continued the preliminary survey, and located its line of road over and upon the strip of land in question; that no work was done on the appellant's land until the summer of 1867, when the line of road, as it now runs and is operated, was constructed; that Lewis Bravard owned and lived upon the tract of land since acquired by the appellant at the time the line of road was so constructed, and did not object to the road being built over the land; that the amount of land taken and appropriated in the first instance, and now used by the appellee, is two acres and eighty-nine hundredths of an acre. The appellant bases his right to recover in this action upon the grounds—*First*, that on the 4th day of February, 1853, there was no general law authorizing the incorporation of railroad companies in force in this state; *secondly*, that, as the grant of the right of way was executed by Lewis Bravard before the Ohio & Indianapolis Railroad Company was assumed to be organized, it was at all events inoperative and void; *thirdly*, that, as the Junction Railroad Company did not construct its line of road within the time limited by the railroad law of 1852, it forfeited all right which it may have first acquired to construct such line of road, and became a mere trespasser upon the lands, which it thereafter proceeded to further appropriate and use in building its road; *fourthly*, that, as no compensation was ever assessed and paid for the strip of land in dispute, he has a right to reclaim and to recover the possession of that strip, notwithstanding his and his ancestor's long acquiescence in its use by the appellee. On the 9th day of June, 1852, a joint resolution of the general assembly of this state was approved, which authorized the secretary of state to publish and circulate the general railroad law of that year, and certain other acts of the same legislature, in pamphlet form, in advance of the publication and distribution of the general system of laws thereafter known as the Revised Statutes of 1852. This was accordingly done, and constituted a publication and circulation of the general railroad law, and other laws specially named in the joint resolution, by authority, within the meaning of the present constitution of the state, by means of which these laws came into force some months previous to the 4th day of February, 1853.

A railroad company, or any other similar corporation, organized under a general law, has undoubtedly the power to ratify and confirm any preliminary thing which may have been properly done in aid of, or which may have been offered as an inducement to, its organization. This extends to the payment of preliminary expenses which may have been incurred, to the subscription of stock, and other kindred matters. The thirteenth section of the act of 1852, authorizing the incorporation of railroad companies, (1 Gav. & H. 508,) conferred upon a railroad company the power to receive, hold, and take such voluntary grants and donations of real estate, and other personal property, as shall be made to it, to aid in the construction, maintenance, and accommodation of such railroad. This necessarily included the right of way over, as well as any other appropriate interest in, real estate. Construing this provision of the statute in connection with other and conceded powers of a railroad company, we think it was competent for Lewis Bravard to grant the right of way over his land to the Ohio & Indianapolis Railroad Company, in advance and in aid of its organization, and for that company, after its organization, to ratify and accept the grant, and thus make it obligatory upon him. This grant by Lewis Bravard seems to have been made to the Ohio & Indianapolis Railroad Company by its corporate name, from which we infer that it was executed in anticipation of, and as an inducement to, its organization, which speedily thereafter ensued. The subsequent entry upon the land, and

location of a line of road over it, was, under the circumstances, an implied ratification and acceptance of the grant, and made it effectual as a relinquishment of the right of way to the company. The failure of a railroad company to construct its road within the time limited by the statute may afford good cause for enforcing a forfeiture of its corporate powers by proper legal proceedings instituted for that purpose, but such a failure cannot be taken advantage of by a land-owner over whose land the road may have been eventually constructed, to eject the company from his land. *Railroad Co. v. Clifford*, 113 Ind. —, 15 N. E. Rep. 524. In addition to what we have said, it may be stated that the accepted doctrine now is that where a railroad company enters upon the land of another without the consent of the owner, and not by the exercise of the right of eminent domain, it may be ejected from the land, or enjoined from appropriating or using it, if the owner shall proceed with reasonable promptitude; but that if the owner stands by, and acquiesces until the company has expended its money and constructed its road across his land, and until the road at that point has become a part of its railroad line, whereby the public, as well as the company, have acquired an interest in the maintenance of the enterprise, he forfeits every remedy except that of proceeding to have his damages assessed and collected from the company. *Railway Co. v. Smith*, 15 N. E. Rep. 256; *Railway Co. v. Allen*, Id. 446; *Railroad Co. v. Nye*, 113 Ind. 223, 15 N. E. Rep. 261.

In any view of the evidence which we feel justified in taking, the court did not err in its finding and judgment in favor of the appellee. The judgment is affirmed, with costs.

(115 Ind. 6)

STATE *ex rel.* MAGGARD v. CALDWELL *et al.*

(Supreme Court of Indiana. May 28, 1888.)

1. SHERIFFS AND CONSTABLES—LIABILITIES—ESCAPE OF PRISONER—REARREST.

In an action against the constable and his sureties for willfully suffering the escape of W., an answer alleging that, after the arrest and escape of W., the relatrix prosecuted, in the court below, her suit in bastardy against said W. to a final judgment, which decreed that she should recover from W., or that he should be arrested and stand committed to jail, and that the sheriff did thereafter arrest said W., and committed him to jail, sets up a valid partial defense in mitigation of damages.

2. WRITS—RETURN—EVIDENCE DEPOSES THE RECORD.

When a constable has, without objection, given evidence in apparent contradiction to his return on a warrant, he may be questioned further for the purpose of explaining such contradiction.

Appeal from circuit court, Scott county; RALPH APPLEWHITE, Special Judge.

Action by the state on the relation of Alice Maggard against Joshua D. Caldwell, constable, and the sureties on his bond, to recover damages for willfully and negligently allowing the escape of a prisoner from his custody. Judgment for defendants, and plaintiff appeals.

W. K. Marshall, for appellant. C. L. & H. E. Jewett, for appellees.

Howk, J. This was a suit by plaintiff's relatrix, Alice Maggard, against the defendants, upon the official bond of defendant Caldwell, as constable of Vienna township, in Scott county, Ind., to recover damages for an alleged breach of his official duty. In her complaint relatrix first alleged that, at the April election, 1884, defendant Caldwell was duly elected a constable of said Vienna township for the term of two years thence next ensuing; that he and his co-defendants executed and acknowledged his official bond now in suit, conditioned for the faithful and honest discharge of his official duties as such constable; and that he took and subscribed the official oath required by law, and entered upon the discharge of his official duties. As a breach of the condition of the bond in suit, relatrix averred that, in 1884, she filed her verified complaint before a justice of the peace of such township, charging therein

that one Austin Wiggam was the father of her bastard child, of which she had been delivered; that thereupon a warrant was issued by such justice for the arrest of said Wiggam, and placed in the hands of defendant Caldwell, as such constable, in 1884; that, by virtue of such warrant, defendant Caldwell, as such constable, on the same day, arrested said Wiggam, and had him in his custody under such warrant; but that, soon after such arrest, and on the same day, defendant Caldwell, as such constable, "negligently, willfully, and carelessly" suffered said Wiggam to escape from his custody; that such defendant Caldwell thereupon returned said warrant to such justice, showing thereby the arrest and escape of said Wiggam; that afterwards such justice proceeded with the trial of such suit in bastardy, and found and adjudged that said Austin Wiggam was the father of the bastard child of the relatrix herein; that such justice transmitted the papers in said bastardy suit, without delay, to the court below, where the cause was docketed, and, in the absence of said Wiggam, was tried and determined by the court, and relatrix herein recovered judgment in such suit for the sum of \$400 for the support of her bastard child, and the costs of suit taxed, etc., at the March term, 1885, of such court; that such judgment remained wholly unpaid, and that, by reason of the negligence and malfeasance of defendant Caldwell in suffering said Wiggam to escape as aforesaid, said judgment was wholly lost and uncollectible. Wherefore, etc. Defendants Caldwell, Davis, and Dismore, severing in their defense, jointly answered (1) by a general denial of the complaint; and (2) by a partial answer in mitigation of damages. Defendants Cruson and Sierp, also severing in their defense, jointly answered in three paragraphs, of which the first was a general denial of the complaint, and the second and third paragraphs each stated special or affirmative matters by way of defense. Replies were filed by relatrix, putting the cause at issue. The issues joined were tried by a jury, and a verdict was returned for the defendants, and, over the motion of plaintiff's relatrix for a new trial, the court adjudged that she take nothing by her suit herein, and that defendants recover of her their costs, taxed, etc.

In this court errors are assigned by plaintiff's relatrix which call in question (1) the overruling of her demurrer to the second paragraph of the joint answer of defendants Caldwell, Davis, and Dismore; (2) the overruling of her demurrer to the third paragraph of the joint answer of defendants Cruson and Sierp; and (3) the overruling of her motion for a new trial herein. We will consider these alleged errors in the order of their statement, and decide the questions thereby presented.

In the second paragraph of their joint answer defendants Caldwell, Davis, and Dismore, for a partial answer in mitigation of damages, alleged that, after the arrest and escape of said Austin Wiggam, as stated in the complaint herein, the relatrix prosecuted her suit in bastardy against said Wiggam to final judgment in the court below; that at its March term, 1885, such court adjudged that relatrix herein, Alice Maggard, should recover of said Wiggam the sum of \$400 for the support of her bastard child, to be paid in four equal installments of \$100 each; that in such bastardy suit it was further adjudged by the court below that, if said Wiggam should fail to pay or replevy said judgment, he should stand committed to the jail of Scott county. Said defendants averred that said Wiggam did not pay or procure replevin bail for the payment of the aforesaid judgment of \$400, or any part thereof; and that because of his refusal so to do, and in pursuance of such judgment, the sheriff of Scott county committed said Wiggam to the jail of such county in execution of said judgment. The court below committed no error, we think, in overruling the demurrer of relatrix to the foregoing paragraph of answer. If the facts stated in such paragraph are true,—and as they are well pleaded the demurrers admit their truth,—they constitute a good partial defense precisely to the extent they were pleaded, namely, in mitigation of the relatrix's dam-

ages. If, in pursuance of the judgment which relatrix herein recovered in her bastardy suit, the judgment defendant Wiggam was committed to the jail of Scott county, it is very clear that she could recover nothing more in this suit than the damages she had actually sustained by reason of Wiggam's escape from the custody of defendant Caldwell, as constable, prior to the rendition of such judgment. The case of *Patterson v. Pressley*, 70 Ind. 94, wherein it was held, substantially, that a judgment in a bastardy suit that the defendant be committed to the jail of the county until the judgment be paid or replevied, is without authority of law if the defendant is not in custody at the time such judgment is rendered, is overruled in the later case *Lucas v. Hawkins*, 102 Ind. 65, 1 N. E. Rep. 358. In the case last cited it is said that the attention of this court was not called to section 986, Rev. St. 1881, in force since May 6, 1853, in *Patterson v. Pressley*, *supra*, or a different conclusion would probably have been reached. We do not doubt that the judgment recovered by the relatrix herein, whereof mention is made in her complaint in this action, that defendant Wiggam be committed to the jail of Scott county until he paid or replevied the relatrix's judgment against him, was fully authorized by the provisions of our statute regulating proceedings in bastardy. The facts stated by said defendants, in the paragraph of answer we are now considering, were sufficient, therefore, as a partial defense, in mitigation of the damages which the relatrix was seeking to recover in this action. See *State v. Newcomer*, 109 Ind. 243, 8 N. E. Rep. 920.

2. The third paragraph of the joint answer of defendants Cruson and Sierp was pleaded by them as a partial defense in mitigation of the damages which relatrix sought to recover in this action. In such paragraph of answer said defendants alleged, among other things, that at its March term, 1885, the court below tried and determined such bastardy suit of the relatrix herein against said Austin Wiggam, in the absence of said Wiggam, and rendered judgment against him in favor of relatrix herein for \$400, with interest and costs, and adjudged, further, that said Wiggam stand committed until he paid or replevied such judgment; that, said Wiggam having failed to pay or replevy said judgment, a writ was duly issued by the clerk of the court below to the sheriff of Scott county, in pursuance of such judgment, for the arrest of said Wiggam, and his commitment to the jail of such county; that, by virtue of such writ, said Wiggam was duly arrested and committed to the jail of such county until he should pay or replevy the aforesaid judgment; that no substantial right of relatrix herein was in any way lost, destroyed, or impaired by any act of defendant Caldwell, as such constable, or of his co-defendants, as his sureties; that no damages have been sustained by relatrix herein on account of any action of defendant Caldwell, as such constable, or of his co-defendants, as his sureties. Wherefore, etc. The difference between the averments of this third paragraph of answer, and those of the second paragraph of answer heretofore considered, is one of form and phraseology, rather than of substance or of facts pleaded. What we have said, in considering the sufficiency of the second paragraph of answer, seems to us to be equally applicable to the third paragraph of answer. The facts stated in such third paragraph are abundantly sufficient, we think, to constitute a good partial defense in mitigation of the damages which relatrix has sued to recover in this action. They show very clearly that, by the alleged escape of said Austin Wiggam from the custody of defendant Caldwell, as constable, relatrix had sustained nothing more than nominal damages, as Wiggam had been arrested and committed to the jail of the county in execution of her judgment. This was the end of the law so far as Wiggam's person was concerned, and, if he had never escaped from the custody of defendant Caldwell, as constable, she could not have had any further or better remedy against Wiggam's body than the answer shows she had notwithstanding such escape. The third paragraph of answer was good for what it purported to be,—a partial defense in mitigation of damages. The

demurrer to such third paragraph, therefore, was correctly overruled. Section 986, *supra*; *State v. Newcomer, supra*.

8. Under the alleged error of the court below in overruling the motion for a new trial, it is earnestly insisted in argument by the learned counsel of relatrix that it was error to admit evidence offered by defendants tending to impeach and contradict the constable's return of the warrant issued for the arrest of said Wiggam in the bastardy suit of relatrix, and to show that defendant Caldwell, as constable, had in fact never arrested said Wiggam. It is no doubt true, as a general rule, that the return of a constable on a warrant in his hands, showing what he had done officially by virtue of such warrant, is binding and conclusive, not only on such constable, but also, perhaps, on his sureties on his official bond, and cannot be contradicted by parol evidence, except in an action against such constable for making a false return. *Lindley v. Kelley*, 42 Ind. 294; *Splahn v. Gillespie*, 48 Ind. 397; *Stockton v. Stockton*, 59 Ind. 574.

We are of opinion, however, notwithstanding this general rule, that relatrix is in no condition to complain of the admission of the evidence to which her counsel objects in the cause now before us. The warrant issued to defendant Caldwell, as constable, for the arrest of said Wiggam in the bastardy suit of relatrix, was issued by a justice of the peace of Scott county, and could be served only, so far as appears, within such county. It is shown by the record of this cause that, on the trial thereof, defendant Caldwell was a witness for defendants, and was permitted, without any objection from the relatrix, to testify substantially as follows: "I was the constable and had the warrant in the suit against Wiggam. I went over into Jennings county to arrest Wiggam, and had four other men with me. I put three of them on one side of the house, and one man on the other side, and I went into the house. There were three rooms in the house. Wiggam was in the middle room. I told Wiggam I had a warrant for his arrest, and to consider himself under arrest. Wiggam told me to get out. I told him I guessed not, but he said I would. He began to back out, but just before he got to the door I jumped between him and the door. He then went back, and the lights were put out, and I could not see any one. I stepped out and called for a light, and after while one of the women got a light, and I started to go in the house. Just then the men halloed that he was running away. I ran around the house and chased him part of the way." Here defendants' counsel asked the witness the following question: "State what directions and instructions Judge Truelock, who was plaintiff's attorney in the case before the justice of the peace, gave you, or what he said to you about making out your return to this warrant." To this question relatrix objected, on the ground that it was not competent for defendants, by parol evidence, to contradict, vary, or control the constable's return on the warrant, because such return was conclusive as to the matters stated therein. The objection was overruled, and the witness answered, in substance, that he had made a statement of the facts about his efforts and failure to arrest Wiggam to Judge Truelock, the attorney of relatrix herein, who requested him to make his return, as he did, showing the arrest and escape of said Wiggam, so that the suit in bastardy might be prosecuted to final judgment. Manifestly, the evidence admitted over the objection of relatrix did not contradict, vary, or control the constable's return, and was not, apparently, offered for any such purpose. By his previous testimony, admitted without any objection by or on behalf of relatrix, defendant Caldwell had flatly contradicted his return on the warrant, by showing that he had never in fact arrested Wiggam. Then the question was propounded to him to which relatrix objected. The obvious purpose of the question, as it seems to us, was to give the witness an opportunity to explain the apparent contradiction between his previous testimony, on the trial of this cause, and his return on said warrant. This he did, by his answer to such question, and this

he had the right to do. The court did not err in overruling the objection of relatrix to the question propounded to the witness.

Complaint is made on behalf of relatrix of the instruction of the court to the jury trying the cause. As we view this case, it is hardly necessary for us to set out or comment on any of these instructions. The relatrix, in her complaint, has sued to recover damages for the breach of official duty by defendant Caldwell, as constable, in suffering the willful or voluntary escape from his custody of said Wiggam, after he had been lawfully arrested on the warrant issued on the verified complaint in bastardy of the relatrix herein. This was the theory of the complaint herein, and the theory upon which the issues were formed and submitted to the jury for trial, as is clearly shown in the record of this cause. Upon this theory the case must be considered and decided here. Conceding that the constable's return is conclusive as to the fact of Wiggam's arrest, yet the evidence wholly fails to show that defendant Caldwell, as constable, committed the breach of official duty wherewith he is charged in the complaint of relatrix herein, by suffering the willful or voluntary escape of said Wiggam from his custody. On the theory upon which this cause was tried, there is no substantial error, we think, in any of the instructions given by the court, either of its own motion or at the request of defendants. On the whole case as presented by the record, it has seemed to us that the merits of the cause have been fully and fairly tried, and that a right conclusion has been reached in the verdict and judgment in favor of defendants. In such a case, it is settled by many of our decisions that an erroneous instruction, if there be any, will not authorize or require the reversal of the judgment. *Norris v. Case*, 90 Ind. 143; *Ledford v. Ledford*, 95 Ind. 283; *Sanders v. Weelburg*, 107 Ind. 266, 7 N. E. Rep. 573; *State v. Ruhiman*, 111 Ind. 17, 11 N. E. Rep. 793. The motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

(115 Ind. 15)

PROCTOR *et ux.* v. COLE.

(*Supreme Court of Indiana.* May 28, 1888.)

NEGOTIABLE INSTRUMENTS—ACTION ON—SET-OFF.

Where the holder of a promissory note has acquired it for value, the maker cannot plead as a set-off a note acquired after the assignment for a merely nominal consideration.

Appeal from circuit court, Elkhart county; WILBUR STONEX, Special Judge.

Action by Reuben B. Cole against William Proctor and Frances Proctor, his wife, on three promissory notes, and for the purpose of foreclosing the mortgage securing them. In defense, the defendants assert the plea of set-off. Judgment for plaintiff, and defendants appeal.

J. M. Vanfleet, for appellants. *Baker, Defrees & Baker*, for appellee.

ELLIOT, J. This suit is prosecuted upon three promissory notes, and a mortgage securing them. The controversy has already been before this court, but in a somewhat different form. *Proctor v. Cole*, 104 Ind. 373, 3 N. E. Rep. 106, 4 N. E. Rep. 303. The present appeal brings the case to us upon the following special finding: "That on the 31st day of January, 1880, the defendant William Proctor executed the notes sued on, and on the same day he and his wife, the defendant Frances Proctor, executed the mortgage set out with the complaint, to secure the said notes, which mortgage was executed in due form of law, and duly recorded; that the notes were made payable, with six per cent. interest and attorney's fees, to the order of Henderson Cole, at St. Joseph Valley Bank, Elkhart, Ind., in eighteen and twenty-four months after date, respectively; that afterwards, on the 23d day of February, 1880, and before the maturity of either of the notes, Henderson Cole assigned the

notes to Erastus B. Cole, by a written assignment, and afterwards, on the 26th day of February, 1880, he indorsed them in blank; that on the 23d day of February, 1880, at the time when the notes in suit were assigned by Henderson Cole to Erastus B. Cole, they were in the hands of Baker and Mitchell, the attorneys of Henderson Cole, for safe-keeping; that, on said 23d day of February, Henderson Cole gave to Erastus B. Cole an order on Baker and Mitchell for the delivery to him of the notes; that on the 26th day of February, 1880, Erastus B. Cole presented the order to Baker and Mitchell, and received from them the notes, and on the same day took them to Henderson Cole, who then indorsed the notes in blank, by writing his name across the back of each of them; that the consideration for the transfer of the notes in controversy to Erastus B. Cole was as follows: In 1864, the wife of Henderson Cole, then residing in Indiana, sold property belonging to her, and received therefor the sum of \$3,500.00, which she sent to her husband, Henderson Cole, in Colorado, where he then resided, who used it in his own business. Afterwards she removed to Colorado also, and while both were residing in Colorado he promised, at her request, to pay this money, if he ever became able to do so, by paying it to Erastus B. Cole and Minnie Cole, the children of Henderson Cole and his said wife; that in 1868, Henderson Cole's wife died in Colorado, and afterwards, on the 23d day of February, 1880, in accordance with and in fulfillment of the promise, Henderson Cole assigned and transferred the said notes to Erastus B. Cole,—he agreeing to pay to his sister Minnie one-half, which she agreed to; that on the 25th day of February, 1880, the defendant William Proctor took such steps, and such proceedings were had, that the Elkhart circuit court, on the 25th day of February, 1880, issued a restraining order, enjoining Henderson Cole from transferring the notes in controversy, which order was served on Henderson Cole on the 25th day of February, 1880; that Erastus B. Cole first learned of the injunction proceedings after he received possession of the notes, and before they were indorsed; that on the 1st day of March, 1880, Erastus B. Cole took the notes in controversy to his uncle, Reuben Cole, the plaintiff in this action, who resided in Michigan, and asked him to buy them; that the plaintiff offered Erastus Cole \$2,000 for the notes, which offer was accepted, and thereupon Erastus B. Cole sold and delivered the notes to the plaintiff for that sum; that the plaintiff, in payment therefor, then gave Erastus B. Cole an order on Myron E. Cole for \$500, and also executed and delivered to Erastus B. Cole his two promissory notes, one for \$1,000, payable in 30 days, and one for \$500, payable in seventeen months, to the order of Erastus B. Cole, at St. Joseph Valley Bank, in Elkhart, Ind.; that, when the plaintiff gave the order on Myron E. Cole, he had no money in his hands, but he had a credit with him for that amount, and, when he gave the order, he executed and delivered to Myron E. Cole his note of \$500, payable in bank at Elkhart, Ind., to the order of the said Myron E. Cole; that the order on Myron E. Cole was duly accepted by him, and the note of \$1,000 was paid by the plaintiff at its maturity to Erastus B. Cole, and that the \$500 note remains untransferred and unpaid, and in the hands of the clerk of this court, where it was placed by order of the court; the \$500.00 note by Myron E. Cole is also untransferred, is past due, and remains unpaid; that the plaintiff had no knowledge of any defense to the notes in controversy, nor of the injunction proceedings then pending in the Elkhart circuit court against Henderson Cole on the 1st day of March, 1880,—not until he had paid the note of \$1,000; that on the 15th day of April, 1869, Henderson Cole executed his note of \$2,000, payable to the order of M. E. Cole; that afterwards M. E. Cole indorsed said note to Alma S. Wells, who transferred the note to the defendant William Proctor, on the 25th day of February, 1880; that afterwards William Proctor recovered judgment in Elkhart circuit court against Henderson Cole on this note for \$4,198; that this judgment was recorded on the 12th day of April, 1880, at which time also the in-

junction was made perpetual; that no part of the said judgment has been paid, and that it is the set-off claimed by the defendant in this action; that the note of Henderson Cole, transferred by Alma S. Wells to William Proctor, was transferred for the consideration of one dollar,—the said William Proctor agreeing, at the time, in writing, that he would pay said Alma S. Wells an amount equal to one-half of the net proceeds that he might be able to make out of said note, either directly by way of collection, or indirectly by way of set-off, and that, if he made nothing, he should pay nothing to said Alma; that on the 13th day of April, 1880, the defendant William Proctor brought an action in the Elkhart circuit court against Erastus B. Cole, in which it was in issue whether the said Erastus B. Cole was the equitable owner of the notes here in controversy on the 23d day of February, 1880, and prior to the time when the defendant William Proctor came into possession of the note of Henderson Cole, by assignment from Alma S. Wells, and was denied by the defendant that the defendant William Proctor, then the plaintiff, was the owner of the note assigned by Alma Wells to him, and of the judgment rendered thereon, but it was alleged that he, the said Proctor, held the same in trust only, which facts were in issue in said action, wherein the jury trying said cause found the ownership of the note claimed by said Proctor to be as hereinbefore stated, and such proceedings were had in said cause that the said Elkhart circuit court, at its February term, 1884, found for the defendant therein, and adjudged that the said Erastus B. Cole was, on the said 23d day of February, 1880, the owner of the notes here in suit as by him alleged; that a reasonable attorney's fee on the notes in controversy is \$150; that there is now due on the notes in controversy the sum of \$3,020.74, payable without relief from valuation and appraisement laws; and that there is now due on the judgment of William Proctor against Henderson Cole the sum of \$5,716.75."

The law is with the appellee on the facts, and the judgment of the trial court is right. We do not deem it necessary to discuss in detail the propositions stated by the appellee's counsel in support of the judgment, nor do we find it necessary to decide the question of practice discussed by them. We are satisfied that such a set-off as that relied on by the appellants, acquired and held as it is, cannot prevail against the title of the appellee. The right of the appellee is superior to that of the appellants' set-off, and to it their claim must yield. In *Proctor v. Cole*, *supra*, we fully examined the nature of the appellants' claim, and found that they had actually paid for it a merely nominal consideration,—the trifling consideration of one dollar. We do not believe that such a claim can, in justice or equity, be allowed to defeat the claim of an indorsee who purchased in good faith, and yielded a valuable consideration. The appellee acted in good faith. He agreed to pay value for the notes he bought, and he did pay by the execution of negotiable instruments. He certainly is in a much better situation than the appellants, even if it be conceded that the title of his indorser, Erastus B. Cole, was infirm; but, according to the judgment of the court in a former action, there was no infirmity in the title of Erastus B. Cole. It would seem, therefore, that the question of title was adjudicated. Granting, however, that there was no adjudication in favor of Erastus B. Cole, still the facts found show that he had such a title as would defeat a set-off. Conceding still further that his title was infirm, yet, as against a set-off such as that asserted by the appellants, the title of the appellee is superior. He not only bought the note in good faith, and executed negotiable instruments for the consideration; but, prior to notice of the appellants' asserted set-off, he had actually paid the sum of \$1,500. Appellants' counsel assumes that a set-off is the same as a defense growing out of the transaction in which the notes were executed, and upon this assumption builds his argument. This assumption is not valid, and with it the entire argument falls. The set-off asserted is not a defense originating in the transaction out

of which the notes sprang, but is an independent and distinct defense originating subsequent to the execution of the notes. *Hankins v. Shoup*, 2 Ind. 342; 1 Daniel, Neg. Inst. § 746. There is a clear and well-defined distinction between a defense originating after the execution of a note, and growing out of an independent transaction, and a defense growing out of the transaction in which the note was executed. *Beard v. Dedolph*, 29 Wis. 136; *Ranger v. Cary*, 1 Metc. 369; *Baker v. Arnold*, 3 Caines, 283. The distinction between an independent defense, such as a set-off, and a defense arising out of the transaction in which the note was executed, has long been recognized. It is expressly recognized in *Hankins v. Shoup*, *supra*, and a recent writer says: "But a set-off arising out of a different transaction between the maker or acceptor and the payee cannot be used against a purchaser for value after maturity." 2 Rand. Com. Paper, § 679. The cases of *Dresser v. Railway Co.*, 98 U. S. 92, and *Crandall v. Vickery*, 45 Barb. 156, are not in point, for in those cases the defense was fraud in procuring the execution of the note. But in the case before us we need not go so far as any of the authorities we have cited, for the title of the appellants to their asserted set-off is not of such a nature as to entitle them to defeat even the equitable holder of a promissory note. *Proctor v. Cole*, *supra*, and authorities cited. If it were granted that Cole's title is not perfect, still it is in every respect stronger and better than that of the appellants to their set-off, and should prevail against it. *Pitly v. Martin*, 80 Ky. 463. It is assuming much more than the law justifies to assume that the appellants are *bona fide* holders, and as such entitled to defeat the appellee. The total sum invested by them is a nominal one, and the investment of such a sum does not clothe a party with the rights of a *bona fide* purchaser. It is of the very essence of the claim to hold *bona fides* that the party should have parted with value. Counsel argue that, as the appellee had only paid \$1,500 in money before notice of appellants' claim, he cannot recover more than that sum. It seems to us that the argument bears with much more force against his clients, who have paid only one dollar. We cannot conceive how one who has invested no greater sum than that can justly be heard to urge the defeat of another's bargain, who has bought in good faith, executed negotiable instruments, and who has actually paid \$1,500 in money. Regarding the appellee as a mere equitable assignee, and not, as he may well be regarded, as an indorsee for value and in good faith, his rights are paramount to those of the appellants. It is said that it is plain that Erastus B. Cole was not a *bona fide* purchaser, "because he took the legal title by indorsement after notice of the injunction, and he thereby became a *lis pendens* purchaser, and was bound by the final judgment making the injunction perpetual." It need only be said, in answer to this argument, that the special finding states that in an action brought by William Proctor it was acknowledged that Cole was the equitable owner of the notes in suit on the 23d day of February, 1880. Judgment affirmed.

MITCHELL, J., did not take any part in the decision of this case.

(115 Ind. 363)

HAMMONS *et al.* v. BIGELOW *et al.*¹

(Supreme Court of Indiana. May 29, 1888.)

1. MORTGAGES—FORECLOSURE—PERSONAL JUDGMENT AGAINST MORTGAGOR'S VENDEE.
A complaint in foreclosure, to support a personal judgment against mortgagor's vendee, must aver, not merely a purchase by him, but a conveyance to him, and that he has assumed the mortgage debt as part of the purchase price.
2. SAME—NON-JOINDER OF MORTGAGOR.
A complaint in foreclosure against the vendee of the mortgagor, without joining the latter, must aver a conveyance to defendant. It is not enough to state that he purchased the premises.

¹ Rehearing denied.

3. RELEASE AND DISCHARGE—BY AGENT—EXCEEDING AUTHORITY—NOTICE.

Where plaintiff, at the request of defendant, sent bonds to a bank for collection, with instructions to receive a sum less than their face if the money was paid at a certain time, and defendant at a later date paid an amount less than the bank was authorized to accept, for which the bank gave a release, defendant was liable for the balance, as it appeared that he knew the extent of the bank's authority.

Appeal from circuit court, Jay county; J. R. BOBO, Judge.

Action by William A. Bigelow *et al.* against Robert T. Hammons *et al.* to foreclose mortgage on real estate. There was judgment for plaintiffs, and defendants appeal.

Taylor, Smith & Bailey and *Headington & La Fallette*, for appellants.
Randall & Vesey, for appellees.

ELLIOTT, J. The first paragraph of the appellee's complaint is founded upon a bond and mortgage executed by Jacob Starrs and wife to Paul K. Randall, deceased. It is averred that, "after the execution of the mortgage, Robert T. Hammons purchased the mortgaged premises of Starrs, and as part of the purchase money agreed to pay and discharge the mortgage." There is no allegation that the land was conveyed to Hammons, and the appellants vigorously contend that, because there is no such allegation, the pleading is bad. In answer to the argument of appellant's counsel, the counsel for appellees say: "The complaint does show, however, that Hammons purchased the land, and as part of the purchase money assumed the mortgage. We think that the word 'purchase' includes conveyance, as a purchase would be incomplete without a conveyance. But, if there was no conveyance, Hammons, as a purchaser, would have such an interest as would make him a proper party to the foreclosure proceeding, if his interest was known to the mortgagee."

Two questions are involved in counsel's position. The first is as to the personal liability of Hammons. It is our judgment that the law is against the appellees on this question. Hammons is only liable upon the ground that his promise constitutes part of the purchase money of the land, and to give validity to that promise it must be shown that he received the consideration by which it is supported. The theory which sustains the rule (a rule, by the way, not assented to without stubborn protest from some of the authorities) that the grantee is liable upon his parol promise to pay the debt of his grantor, is that the promise is to pay a part of the purchase money, and is, in effect, a promise to pay the promisor's own debt. This theory it is which enables the courts to avoid the statute of frauds, and it is essential to the existence of the theory that the promisor should obtain the land which constitutes the consideration for his promise. But, aside from the principle we have referred to, there is an elementary rule which bears strongly against the appellees, and that is the rule that a party who sues on a contract not importing a consideration must aver the consideration, and show that it has been paid or yielded. This rule is very often applied to grantors who sue for unpaid purchase money, and they are uniformly required to aver either a conveyance, or a tender of conveyance. Indeed, the rule is even broader than we have stated it; for in all cases the plaintiff who sues on a contract must show that he has performed his part, or show an excuse for not performing it.

The second question involved in counsel's position is this: Can a suit to foreclose a mortgage be maintained against a husband and wife, sole defendants to the suit, where the only allegation of title is that the husband "purchased the mortgaged premises?" This is the question, as the record presents it, although it is not the question which counsel argue. The question is not whether Hammons and his wife would be proper parties to answer as to their interest in a suit brought against the mortgagor, but whether the suit can be maintained against them as sole defendants. We do not doubt that, if the mortgagor had been a party, that Hammons would have been a proper party.

But that is not the question here; but the question here is, can one who is averred to have "purchased the mortgaged premises" be sued without averring that he received a conveyance or acquired title to the land? In other words, is there any cause of action against him? In our opinion, there is not. It is not enough, in such a case as this, to aver that the defendant has purchased the mortgaged premises; it must be shown that he has acquired the mortgagor's title. If this be not so, then we should have the strange anomaly of a suit for foreclosure against a sole defendant who has not obtained title to the land. The very purpose of a foreclosure, under our law, is to obtain a decree for the sale of the land, and it is impossible to conceive how such a decree can be obtained where the only defendant before the court has not acquired title. 2 Jones, Mortg. § 1394.

The second paragraph of the complaint contains substantially the same allegations respecting the execution of the bond and mortgage by Starr as the first, but it avers that Starr "sold and conveyed the premises to Robert T. Hammons, who, as part of the purchase price thereof, assumed to pay the mortgage and bonds." This averment removes the objection which we have held fatal to the first paragraph, but there are other objections to the second paragraph which require examination. It is therein averred that, after the maturity of the mortgage notes, the plaintiffs, at the request of Hammons, sent the bond and mortgage to the Citizens' Bank at Portland, Ind., for collection, with instructions to accept \$8,721 in full payment of the debt, which was \$250 less than the amount of the debt, if the payment was made on or before the 1st day of July, 1885, but, if not paid on or before that day, 7 per centum interest should be added to the amount. It is also alleged that Hammons did not pay any part of the debt until the 1st day of August, 1885; that on that day there was due, as principal and interest, \$8,624, and the sum of \$150 for attorney's fees; that on the day last named Hammons paid to the bank \$8,619.70, being \$160 less than the plaintiffs authorized the bank to receive, as Hammons knew, and being \$300 less than the amount due; that the bank, in disobedience of its instructions, delivered to the defendant a release. It is further averred that there is due upon the bond and mortgage the sum of \$500, which is unpaid. The appellant's counsel assume that the second paragraph of the complaint avers simply that nothing more than the amount stipulated to be paid as attorney's fee is due upon the bond and mortgage, but in this they are in error; for the pleading shows that more was due and unpaid. It is further insisted that the appellees are bound by the act of the bank, because it was their agent; but this position is not tenable, for the reason that the complaint avers that the appellant knew the extent of the agent's authority. We think the second paragraph of the complaint is good, in so far as the demurrer assails it upon the ground that it does not state a cause of action.

The objection that there was a defect of parties defendant was also made by the demurrer. This objection is valid as to the first paragraph of the complaint, but not as to the second. The owner of the land is a necessary party to a suit to foreclose; but, where the land has been sold and conveyed, the mortgagor is not a necessary party, although he is a proper party. 2 Jones, Mortg. § 1394.

The judgment is reversed, with instructions to sustain the demurrer to the first paragraph of the complaint.

(115 Ind. 495)

ROOT v. BURTON, Sheriff, et al.¹
(Supreme Court of Indiana. May 28, 1888.)

APPEAL—DISMISSAL—EFFECT.

Where a judgment is rendered upon stipulation which provides that there shall be no order of sale issued thereon until the determination against the appellant of

¹ Rehearing denied.

an appeal from a former judgment between the same parties, the dismissal of the appeal by the appellant, who was defendant in both actions, renders the second judgment enforceable.

Appeal from circuit court, Pulaski county; DE WITT C. JUSTICE, Special Judge.

Petition for injunction by Harry Bennett Root, by next friend, against John L. Burton, sheriff, *et al.*, to restrain the sale of real estate. There was judgment for defendants, and plaintiff appeals.

D. Turpie, for appellant. *Nye & Nye*, for appellees.

MITCHELL, J. On the 25th day of February, 1884, there was an action pending in the Pulaski circuit court, by means of which Harriet Barnett, as plaintiff, was seeking to enforce a lien for taxes against certain lands then owned by Kate H. Root, who was a party defendant to the pending suit. Issues having been duly joined, judgment was rendered in favor of the plaintiff, by agreement, for \$355.32, which judgment, it was agreed, should constitute a lien upon and be enforceable against the lands described in the complaint. It appears that another judgment, involving the validity of other tax claims, had been rendered in the same court against Mrs. Root in favor of the same party, and that an appeal had been taken therefrom to this court, where the cause was pending at the date above mentioned. As part of the agreement, in pursuance of which the judgment first above mentioned was rendered, it was stipulated that no order of sale should issue on the second judgment until the pending appeal from the judgment first taken had been determined. It was further stipulated that if the cause appealed should be decided on its merits in favor of the appellant, Kate H. Root, then the judgment last taken should be null and void, and not collectible, but in the event the decision should be against Mrs. Root, then the judgment should be collectible by legal process. The agreement was duly spread upon the order book of the court, and the decree which followed directed the judgment to be enforced according to the "conditions and stipulations agreed upon." Afterwards, on the 23d day of September, 1885, Mrs. Root paid Mrs. Barnett \$128, about half of the amount of the judgment first rendered and appealed from, and in consideration of the sum paid, the pending appeal was dismissed by mutual agreement. It was further agreed that the judgment should be assigned to Harry Bennett Root, the appellant in this case. No mention was made of the judgment last taken and still remaining in the Pulaski circuit court, or of the agreement first above referred to, when the appeal was dismissed. Subsequently an order of sale was duly issued upon the judgment last rendered and placed in the hands of John L. Burton, sheriff of Pulaski county, directing him to make the amount of the judgment taken in pursuance of the above-mentioned agreement, by a sale of the land described in the decree. The appellant, having succeeded to the ownership of the land by the death of his mother, brought this suit by his next friend to enjoin the sale. A demurrer was sustained to the complaint, and this ruling presents the only question for decision in the case.

It is contended, in favor of a reversal of the ruling below, that by the terms of the agreement which became part of the decree, the collectibility of the judgment now sought to be enjoined was dependent upon a condition precedent, viz., a decision of the pending appeal against the judgment defendant. It is said, in effect, that, at the time the condition was agreed upon, the event upon which the judgment was to become enforceable, viz., the decision of this court in favor of the appellee, was possible and practicable, and that the subsequent dismissal of the appeal at the request and with the consent of the appellee, upon a consideration paid by the appellant, in that case, rendered the event impossible. The conclusion is said to follow that the collection of the judgment cannot now be enforced. We cannot adopt this view. The reasoning in appellant's behalf leads to the opposite conclusion. To begin with, the plain-

tiff took an unconditional judgment by agreement for \$355.22 which was declared to be a specific lien upon certain real estate described. One of the necessary legal qualities of a judgment or decree is that it is collectible and enforceable by execution, or by a sale of the property upon which the judgment is declared to be a specific lien. Unless an execution or order of sale is stayed as the law provides, or by mutual agreement, it goes, as a matter of course, upon the filing of a *præcipe*. By mutual stipulation the order of sale in the decree last taken was to be withheld until the determination of a certain appeal taken by the defendant, Kate H. Root. Presumably, the agreement to delay was for her benefit. It saved her the necessity of another appeal. The present judgment was to become null and void, and not collectible in the event the decision upon the merits in the case appealed was favorable to Mrs. Root. Until that event happens, the judgment manifestly continues operative, and in force. Accepting as sound the proposition that if one for whose benefit a condition has been annexed to a contract voluntarily waives the condition, or renders it impossible of performance, the parties are thenceforth remitted to their rights as they stood without the condition, and the conclusion follows, logically and inevitably, that by voluntarily dismissing her appeal, Mrs. Root waived the stipulation or condition annexed to the decree by making it impossible for the contingency ever to happen upon which the nullification of the judgment taken against her depended. The appeal can never be decided on its merits in favor of Mrs. Root, because she has dismissed it, and the time has expired within which another appeal can be taken. The solution of the matter must therefore depend, in holding that the dismissal of the appeal, which could only be done by Mrs. Root, waived all the conditional features annexed to the judgment and placed the parties in the same situation as if the decree had been originally unaccompanied by any agreement. *Tanner v. Smith*, 10 Sim. 410; 2 Law Rev. 97. The agreement in pursuance of which the judgment was to become null and void, on condition that the pending appeal should be decided in favor of the appellant, must be considered as having been abandoned by mutual consent. *Railroad Co. v. Dunn*, 17 Ind. 603; *Byrne v. Insurance Co.*, 20 Ind. 103; *O'Donald v. Railroad Co.*, 14 Ind. 259; *Rush v. Rush*, 40 Ind. 83. Of course, upon the assumption that the stipulation which accompanied the judgment was such that in order to render the decree enforceable, a decision favorable to the appellee in the case appealed was essential, the conclusion contended for by the appellee would follow. But the situation was exactly the reverse. It was necessary, in order that the judgment might become void and uncollectible, that the appellant should prosecute the pending appeal to a favorable result. When she failed in that, or voluntarily did that which made it impossible for her to succeed, the judgment became collectible and enforceable *ex proprio vigore*. *Padgett v. State*, 93 Ind. 396. The operative and essential part of the agreement annexed to the judgment was that proceedings should be stayed thereon until the pending appeal in the other case was determined, and that a decision favorable to the appellant should nullify the judgment then taken. So much of the stipulation as recited that the judgment should become collectible in case of a decision adverse to the appellant was, in legal effect, mere surplusage. A failure to render the judgment invalid and uncollectible left it necessarily collectible. The judgment is affirmed, with costs.

(115 Ind. 98)

ELLIOTT v. GREGORY.

(Supreme Court of Indiana. May 29, 1888.)

HUSBAND AND WIFE—CONTRACTS OF WIFE—NECESSARIES—PLEADING COVERTURE.

In an action for medical services rendered defendant at her special instance and request, and on her express promise to pay, an answer that, at the time the services were rendered and the alleged promises made, defendant was the wife of A.; that

the services were for necessary care and attention rendered her while she was the wife of A.; and that the indebtedness on account of said services was the debt of A., for which defendant could not make herself liable,—is not an argumentative denial, but a confession and avoidance, on the ground of coverture, and so bad under Rev. St. Ind. 1881, § 5115, abolishing all the legal disabilities of women to make contracts except in specified cases.

Appeal from circuit court, Posey county; WILLIAM F. PARRETT, Judge. Action by Cyrenius Elliott against Charlotte Gregory for medical services. There was judgment for defendant, and plaintiff appeals.
E. D. Owen, for appellant. *W. P. Edson*, for appellee.

NIBLACK, C. J. Complaint by Cyrenius Elliott, a practicing physician, against Charlotte Gregory upon an account for medical services rendered to the latter at her special instance and request, and upon her express promise to pay for such services. The defendant answered that, at the time of the rendition of the services mentioned in the complaint, and at the time of the making the supposed promise therein alleged, she was a married woman and the wife of Alvis Gregory; that the services charged for were for necessary medical care and attention rendered to her during the time she was the wife of the said Alvis Gregory; and that the indebtedness to the plaintiff on account of such services was the debt of the said Alvis Gregory, for which she, the defendant, as his wife, could not make herself liable. A demurrer to this answer was overruled, and the court, without requiring a reply, impaneled a jury to try the cause, the result being a verdict and judgment for the defendant. Error is assigned only upon the overruling of the demurrer to the answer of Mrs. Gregory. Counsel inform us that the answer was treated at the trial as amounting only to an argumentative denial of the allegations of the complaint, but the record discloses nothing on that subject.

In support of the sufficiency of the answer, it is sought to be maintained that it did, in legal effect, amount only to an argumentative denial of the complaint, and that, therefore, it constituted a good defense to the action. But we do not so construe the answer. It was an answer in confession and in avoidance. It impliedly admitted the rendition of the services sued for, and Mrs. Gregory's promise to pay for the same, and then set up her coverture as a protection against her liability to pay for such services. These made the pleadings a formal as well as a substantial answer of coverture. This, under existing statutes and our decisions upon them, was not a good defense to the complaint. Section 5115, Rev. St. 1881, declares that "all the legal disabilities of married women to make contracts are hereby abolished, except as herein otherwise provided." In the construction of this section, we have held that a married woman's ability to contract is now the rule, and that her disability to do so constitutes the exception. *Arnold v. Engleman*, 103 Ind. 512, 3 N. E. Rep. 238; *Bennett v. Mattingly*, 110 Ind. 197, 10 N. E. Rep. 299, and 11 N. E. Rep. 792. The answer under consideration did not base Mrs. Gregory's defense upon any of the exceptional disabilities still imposed on married women. On the contrary, the allegations of the complaint, which were impliedly admitted by the answer, made a case affirmatively in which coverture was no disability. The circuit court consequently erred in overruling the demurrer to the answer. It ought not, however, to be inferred from what we have said, that a husband is not now liable for medical attendance upon his wife as much as he ever would have been, in the absence of some express agreement or arrangement to the contrary.

The judgment is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

(115 Ind. 106)

ROUSHLANGE v. CHICAGO & A. RY. CO

(Supreme Court of Indiana. May 29, 1888.)

EMINENT DOMAIN—ADDITIONAL COMPENSATION—ENCROACHMENTS.

A railroad company, which has bought and paid for its right of way, must still pay for an upheaval of adjoining land caused by its subsequent construction in a marshy place of a fill which has spread beyond the limits of the right of way. *Mitchell and Howk, JJ.*, dissenting.

Appeal from circuit court, Lake county; *ELISHA C. FIELD*, Judge.

Action by John Roushlange against the Chicago & Atlantic Railway Company to recover damages for encroachment on land. There was judgment for defendant, and plaintiff appeals.

Martin Wood and Thos. J. Wood, for appellant. *J. S. Slick and W. O. Johnson*, for appellee.

ZOLLARS, J. It is averred, in appellant's complaint, that the railway company had constructed its road across his land, "after purchase made and consideration paid for the right of way by the defendant to the plaintiff, and after the plaintiff had conveyed the right of way to the defendant by a good and sufficient deed." It is averred, also, that a portion of the land over which the railroad was constructed was marshy; that through that portion the railway company made an embankment about 12 feet high; that, after the road had been used for about six months, the embankment thus constructed began to sink; that, to keep the grade up to the original height, the railway company deposited upon the top of the embankment a large amount of earth, sand, and other material; that, as the same was deposited, the embankment kept sinking until the road-bed finally became settled and solid; that a large amount of the earth and other material thus deposited, as it sank, spread and extended under the surface of the land beyond the land of the railway company, and upheaved the plaintiff's land adjoining the right of way, and rendered worthless several acres of it, etc. There is no charge of negligence against the railway company, unless the facts stated show it to have been negligent in the construction of its road. Claiming that no negligence is charged, its counsel insist that the complaint does not make a case against it, admitting all of the averments therein to be true, as the demurrer does.

These general propositions are established by the authorities:

First. A deed of land to a railway company for its right of way is presumed to include a license to do what is necessary and lawful in the construction and management of its road thereon, to the same extent and with the same effect as if the land had been compulsorily taken by condemnation proceedings. But, notwithstanding the deed, the company remains liable for injuries arising from negligence and unskillfulness in the construction of its road. *Pierce, R. R. 133, 134.* See, also, 1 *Ror. R. R. 313, 314*; *Mills, Em. Dom. (2d Ed.) § 110.*

Second. As, in condemnation proceedings, it is presumed that the assessment of damages includes all damages proper to be assessed, so deeds of rights of way are presumed to include all damages arising from the proper construction of the road. The price agreed upon is presumed to be the same that the commissioners would have arrived at on an assessment of damages. *Id.*; *Railway Co. v. Smith*, 111 Ill. 363.

Third. The rule as to what damages may be assessed by the commissioners in a condemnation proceeding is that the value of the land appropriated should be considered, together with any injury to the residue of the land naturally resulting, or that might reasonably be expected to result, from the appropriation and construction of the road in a proper and lawful manner. *Railroad Co. v. McClure*, 29 Ind. 536; *Railroad Co. v. Horn*, 41 Ind. 479, (484); *Rail-*

way Co. v. Allen, 100 Ind. 409, (412;); *Railroad Co. v. Dantel*, 20 Grat. 344; *Railway Co. v. Smith*, *supra*.

Fourth. Such assessment of damages will not be presumed to cover damages resulting from the negligent construction of the road, or any portion of it, nor damages resulting from improper encroachments upon land outside of the right of way. The above stated rules of law require a holding here that, unless the rights of the railway company are enlarged, or its liabilities limited by the terms of the deed, appellant can recover such damages, and only such damages, as might properly have been assessed had the right of way through his land been taken by condemnation proceedings instead of by grant. The complaint shows that the appellant granted to the railway company a right of way through his land for the construction and operation of its road. It is not claimed that the deed conveyed any rights except the right of way, and such as are incidental to the general grant. It is not stated in the complaint how wide the strip thus granted was, but it is shown that, in the construction of the road, the company has occupied land outside of the strip granted. The general rule is that, in the construction of its road upon an acquired right of way, a railway company is not liable beyond the compensation assessed or agreed upon, where such compensation is fixed prior to the building of the road, unless it is guilty of negligence in such construction. That rule, however, must be limited to cases where the railway is constructed upon and within the limits of the right of way so acquired. Clearly, if a railway company should condemn or purchase a right of way of a certain width, and pay the damages assessed or agreed upon as resulting from the construction of its road upon that strip, it could not successfully claim the right to so construct its road as to cover land outside of the limits of such strip, without the payment of additional compensation, or additional damages resulting from such construction. If that were so, the company might condemn a strip of land 20 feet wide, and in the building and maintenance of high, and necessarily wide, embankments, cover and occupy a strip 50 or 100 feet wide, without the payment of compensation or damages resulting from such occupancy. The real question in the case before us is not one of negligence, but of an encroachment upon land outside of the company's right of way. When the company discovered that its road-bed was sinking, could it, without making compensation, or the payment of damages, have gone upon appellant's land and constructed walls or banks to prevent the road-bed from sinking and spreading? Clearly not. That it did not do, but, what in effect was the same thing, it filled in earth and other materials until the embankment spread out beyond the right of way upon appellant's adjoining lands, and upheaved the surface, and caused the injury described in the complaint. It may be that the company had no knowledge that the filling would cause the spreading of the embankment and the upheaval of appellant's land. Whether or not it had such knowledge is not stated in the complaint, nor do we think that it is material in this case. By reason of the filling upon the embankment, it was caused to spread upon appellant's land, and caused the injury. That the railway company may have had no knowledge that the filling would cause the injury is not sufficient to exonerate it from liability. The fact remains that appellant granted to the railway company a strip of land upon which to construct and operate its road, and it has so constructed it as to make it rest, not only upon the strip thus granted, but also upon his adjoining land not granted. The railway company is thus occupying land which was not granted to it, and which neither party intended should be either granted to it or occupied by its road. The road is no less an encroachment upon appellant's land because its foundation is beneath the surface. That fact might affect the amount of damages, but it does not alter the rights of the parties. The railway company had a right to construct its road upon the strip of land granted, but it has no right to occupy additional land without compensation or the

payment of damages. The strip of land was granted before the road was constructed, and hence the consideration paid must be presumed to have been measured by the value of the land granted, and the anticipated damages, in the light of surrounding circumstances, and the knowledge of the parties at that time. It surely was not intended at that time that the road-bed should cover and rest upon land outside of the strip granted. Nor could it have been anticipated that, in the construction of the road, land outside of the right of way would be occupied by the road-bed, or any portion of it. It would not be reasonable, therefore, to assume that, in fixing the compensation, the parties included damages for such encroachment. Had the strip of land been taken by condemnation instead of by grant, the commission or jury in assessing the damages, could not have included damages from such encroachment—*First*. Because they could not have assumed that the railway company would voluntarily so construct its road as to make it rest partially upon land outside of the right of way. To have assumed that, and to have assessed damages accordingly, would have been to assume that the railway company would commit a trespass, and to have assessed, in advance, damages resulting from such trespass. *Second*. Because they could not have known in advance that the result of the fill would be to cause the embankment to so spread as to encroach upon appellant's land and cause injury. Such an injury could not reasonably have been expected to result from the proper construction of the road. It will not be presumed that the parties included in the price agreed upon at the time of, and for the grant, any amount for injuries which could not properly have been considered by the commissioners and jury, had the right of way been taken by condemnation proceedings. The case is clearly distinguishable from the case of diminishing the water of a spring upon the grantor's land, or a case of laying drains which are necessary, in connection with culverts under the road, to the proper maintenance of the road. Here, the road-bed is made to rest, not only upon the land granted, but also partially, upon land not granted, outside of the right of way, and for which there has been no compensation. If here the company may, by virtue of the grant of the right of way, without the payment of damages, so construct its road as to cover one or two acres of land outside of the grant, we know of no reason why other railway companies, under similar grants, may not procure a narrow strip of land as a right of way, and, without further compensation or damages, so construct their road as to occupy a strip one, two, three, four, or more times as wide as the strip so granted.

Whatever the railway company may be able to show by an answer and evidence, we think that the complaint makes a case for damages, and that the demurrer thereto was improperly sustained.

For that error the judgment is reversed at appellee's costs.

MITCHELL and HOWE, JJ., do not concur in the foregoing opinion.

(115 Ind. 51)

ALEXANDER v. TOWN OF NEW CASTLE.

(*Supreme Court of Indiana*. May 29, 1888.)

1. MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—PROXIMATE AND REMOTE CAUSE.
A town is not liable to one who is injured by falling into an excavation in the street, when the fall was wholly occasioned by the act of another, who willfully seized plaintiff, and threw him into the pit, the negligence of the town, if any, not being the proximate cause of the injury.
2. APPEAL—REVIEW—QUESTIONS OF FACT.
Where there is evidence tending to support a verdict, the appellate court will not disturb it on the ground that it is not supported by the evidence.

Appeal from circuit court, Henry county; MARK E. FORKNER, Judge.

Brown & Warner and *Hernly & Brown*, for appellant. *Brown & Brown*, or appellee.

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NIBLACK, C. J. This was an action brought by Harvey W. Alexander against the town of New Castle, for injuries alleged to have resulted from negligently permitting a sidewalk to be out of repair. The first paragraph of the complaint charged that the town allowed a pit to be dug, or an excavation to be made in the side of one of its streets, and wrongfully and negligently suffered and permitted such pit or excavation, with full knowledge of its dangerous character, to remain open and uninclosed, whereby the plaintiff, without any fault on his part, fell into the same, and was injured. The second and only other paragraph contained some additional averments not material to any question involved in this appeal. The town answered,—*First*, in denial; *second*, that one Heavenridge was found upon one of its streets in possession of a gaming apparatus; that the plaintiff engaged with the said Heavenridge in a game of chance for the purpose of procuring evidence against him, and causing his arrest; that thereupon the plaintiff filed his affidavit before a justice of the peace, charging Heavenridge with gaming, and obtained a warrant for the latter's arrest; that the plaintiff then induced the justice to appoint him a special constable to make the arrest, which he made accordingly; that the justice, after hearing the evidence, adjudged Heavenridge to be guilty as charged, and ordered him to be committed to the jail of the county; that the plaintiff, as such special constable, proceeded to take Heavenridge to jail as ordered, and, in doing so, attempted to pass the pit or excavation in question; that when opposite the same, Heavenridge seized the plaintiff and threw him into the pit or excavation, whereby he was injured as charged in the complaint; that by this means Heavenridge was enabled to escape from the custody of the plaintiff. A demurrer to the second paragraph of answer, for the alleged insufficiency of its facts as a defense, was overruled, and a trial terminated in a verdict and judgment for the town, the defendant below.

Complaint is first made of the overruling the demurrer to the second paragraph of the answer, and this complaint is based upon the claim that as the pit or excavation, so wrongfully and negligently permitted to remain open and uninclosed, afforded Heavenridge the opportunity of throwing the plaintiff into it, as a means of escape, it was, in legal contemplation, the proximate cause of the injuries which the plaintiff received. However negligent a person or a corporation may have been in some particular respect, he or it is only liable to those who may have been injured by reason of such negligence, and the negligence must have been the proximate cause of the injury sued for. Where some independent agency has intervened, and been the immediate cause of the injury, the party guilty of negligence in the first instance is not responsible. On that subject, Wharton, in his work on the Law of Negligence, at section 134, says: "Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that casual connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter as to which I am not contractually bound. Another person, moving independently, comes in and, either negligently or maliciously, so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence so that I cannot be sued for the mischief which the person so intervening directly produces, he is the one who is liable to the person injured. I may be liable to him for my negligence in getting him into difficulty, but I am not liable to others for the negligence which he alone was the cause of making operative." So, if a house has been negligently set on fire, and the fire has spread beyond its natural limits, by means of a new agency; for example, if a high wind arose after its ignition, and carried burning brands to a great distance, thus causing a

fire and a loss of property at a place which would have been safe but for the wind, the loss so caused by the wind will be set down as a remote consequence for which the person setting the fire should not be held responsible. 1 *Thomp. Neg.* 144. Our cases are in harmony with the general principles herein announced. *Smith v. Thomas*, 23 Ind. 69; *Pennsylvania Co. v. Hensil*, 70 Ind. 569; *City of Greencastle v. Martin*, 74 Ind. 450; *Billman v. Railroad Co.*, 76 Ind. 166; *City of Crawfordsville v. Smith*, 79 Ind. 308; *Railroad Co. v. Buck*, 96 Ind. 346; *Bloom v. Insurance Co.*, 97 Ind. 478; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16. Heavenridge was clearly an intervening as well as an independent human agency in the infliction of the injuries of which the plaintiff complained. The circuit court, consequently, did not err in overruling the demurrer to the second paragraph of the answer. The circuit court gave the jury several instructions, one of which was as follows: "If the sidewalk and street named in the complaint were in ordinarily safe condition, for ordinary public travel, the plaintiff cannot recover, the town not being bound to provide against extraordinary conditions or circumstances of travel or passage along its streets or sidewalks." As an abstract proposition, this instruction stated the law correctly. 2 *Dill. Mun. Corp.* § 1006. However inapplicable, therefore, it may have been to the controlling facts or the distinctive features of the present case, the plaintiff had no cause to complain of it as an erroneous instruction. A question is sought to be made upon the sufficiency of the evidence to support the verdict, but no failure in that respect has been specifically pointed out. There was evidence tending to sustain the defense set up by the second paragraph of the answer. We cannot, therefore, rightly disturb the verdict upon the evidence. *Id.* § 1007. The judgment is affirmed, with costs.

(115 Ind. 115)

BRANNEN v. KOKOMO, G. & J. G. R. Co.

(*Supreme Court of Indiana.* May 29, 1883.)

1. NEGLIGENCE—CONTRIBUTORY—IMPUTED.

Where an intoxicated driver of a wagon containing passengers attempts, by rapid driving, to pass a toll-gate without paying toll, and the keeper thereupon lowers the pole, and injures a person in the wagon, the toll company is not liable, in the absence of proof that the passenger was not negligent in failing to do his best to stop the driver, and that the horses were so close to the gate as to warrant the presumption that the keeper acted willfully.¹

Appeal from circuit court, Howard county; DANIEL WAUGH, Judge.

Action by Samuel F. Brannen against the Kokomo, Greentown & Jerome Gravel-Road Company to recover damages for personal injuries. There was judgment for defendant, and plaintiff appeals.

Blackledge, Blackledge & Moore, for appellant. *Bell & Purdum*, for appellee.

ZOLLARS, J. In their special verdict the jury found that in 1884 the appellee was a gravel-road corporation owning and operating the Kokomo, Greentown & Jerome Gravel Road as a toll-road; that on the 30th day of October, 1884, Mary Carter was the employe and agent of the company, authorized to collect toll from travelers over the road; that she occupied a toll-house about one mile east of the city of Kokomo; that Jacob Templin, her son, lived with her, and assisted in the collection of tolls; that, about 8:30 P. M. of said day appellant was riding in a spring wagon drawn by two horses, and driven by David Brannen,—he being the owner of the horses and wagon; that there was

¹As to imputed negligence, see *Railroad Co. v. Hogeland*, (Md.) 7 Atl. Rep. 105, and note; *Slater v. Railway Co.*, (Iowa,) 32 N. W. Rep. 264; *Davis v. Guarnieri*, (Ohio,) 15 N. E. Rep. 350.

in the wagon, besides appellant and said Brannen, four other persons, all of whom were on their way from Kokomo to near Greentown, some 10 miles from that city; that the horses were but three years old, and one of them not gentle; that Brannen, the owner and driver, was considerably intoxicated, and when near the toll-gate, and intending to pass it without the payment of toll, stopped the horses, and, without speaking to them, struck them with a whip, which caused them to start, and go in a lope and rapid gait, passing the toll-gate; that said Jacob Templin, who was collecting toll at the time, believing that the horses were thus driven with the intention of the persons in the wagon to run by the gate without the payment of toll, for the purpose of stopping them, and compelling the payment of the proper toll, suddenly drew down the pole erected for the purpose of preventing persons passing without the payment of toll, and in so doing, and by reason of the rapid driving, the same struck the front end of the wagon, and threw from it the six persons, and the three seats upon which they were riding, and appellant was injured, and suffered damage in the sum of \$50; that had not the driver struck the horses, and caused them to move so rapidly, the pole would not have been let down, and appellant would not have received the injury; that, the horses being young, it was an act of imprudence to strike them with a whip before passing the toll-gate, which act of imprudence or willful misconduct contributed to appellant's injury; that neither of the persons in the wagon tendered or offered to pay any toll until after appellant had received the injury. Upon the special verdict, the substance of which we have given above, appellant moved for judgment in his favor in the sum of \$50. That motion was overruled, and judgment was rendered for appellee for its costs. For a reversal of that judgment, appellant prosecutes this appeal.

That Brannen, the owner and driver of the team, was guilty, not only of negligence, but also of a positive wrong, in attempting to pass the gate, as he did, without the payment of toll, is clear beyond question. Whether or not, in a case like this, where the injured party was voluntarily riding in a private conveyance, the negligence of the owner and driver, over whom he had no control, and who was a fit person to manage the horses, should be so imputed to him as to defeat a recovery on his part, assuming that he was without personal fault, and that the only wrong on the part of the defendant was negligence, is a question upon which the authorities are not in accord. This court, however, has heretofore adopted and followed the line of decisions which hold that in such a case negligence will not be so imputed. *Town of Albion v. Hetrick*, 90 Ind. 545, (550); *Railroad Co. v. McMurray*, 98 Ind. 358, (369.) See, also, *Railroad Co. v. Spencer*, Id. 186. It is the settled law in this state, also, that, where the ground of the action is negligence, it must be a case of unmixed negligence; that is, the plaintiff, in order to recover in such an action, must be free from negligence which contributed to the injury. It is equally well settled here that in such an action the plaintiff must allege in his complaint that he was free from negligence which contributed to the injury; that it must in some way be made to appear from the evidence that he was free from such negligence; and that if, from the whole evidence, it cannot be determined whether or not he was free from such negligence, the finding and judgment must be against him. *Stevens v. Road Co.*, 99 Ind. 392; *Eberhart v. Reister*, 96 Ind. 478; *Railway Co. v. Lockridge*, 93 Ind. 191; *Lyons v. Railroad Co.*, 101 Ind. 419; *Railroad Co. v. Butler*, 103 Ind. 31, 2 N. E. Rep. 138; *Railway Co. v. Greene*, 106 Ind. 279, 6 N. E. Rep. 603; *City of Fort Wayne v. Coombs*, 107 Ind. 75, 7 N. E. Rep. 743; *Stock-Yards Co. v. Mann*, 107 Ind. 89, 7 N. E. Rep. 893; *Railway Co. v. Hiltzhauser*, 99 Ind. 486. See, also, *Pierce, B. R.* 298, and cases there cited. In the case before us the facts were found by the jury, and hence as to whether appellant, upon those facts, was or was not negligent, is a question of law for the court. *City of Indianapolis v. Cook*, 99 Ind. 10; *Conner v. Railway Co.*, 105 Ind. 62, 4 N.

E. Rep. 441; *Railroad Co. v. Spencer*, *supra*; *Town of Albion v. Hetrick*, *supra*; *Railway Co. v. Watson*, 15 N. E. Rep. 824. As we have stated, when the issue is one of negligence, in order that the plaintiff may recover, it must be made to appear from the evidence that he was not guilty of negligence contributing to the injury. In this case, we are not called upon to pass upon the evidence, but upon the facts which the jury have found from the evidence. While there may be ground for argument as to whether the facts found affirmatively show appellant to have been guilty of wrong and contributory negligence, we think that there is no reasonable escape from the conclusion that the facts so found fail to show that he was not guilty of such wrong and negligence. The correctness of this conclusion will be made more apparent by a reference to some of the facts stated in the special verdict, without undertaking to state just how much weight should be given to each separately. In the first place, the intoxication of the driver, and his course in striking the young horses, and attempting to run them through the gate without the payment of toll, show, at least, that he was reckless and bold, if, indeed, he was not an unfit person to manage the team. In the second place, appellant must have known that toll was due, and should be paid at the toll-gate. He knew, also, that no toll was paid or tendered before the attempt to pass the gate. There is nothing to show that he in any way remonstrated or objected to the course adopted by the driver to pass the gate without the payment of toll. For aught that is shown in the special verdict, he was acquiescing in the purpose of the driver, and all that he did in attempting to carry out that purpose. Having reached the conclusion that appellant is not shown to have been free from wrong or negligence which contributed to the injury, it must follow that he cannot recover, unless appellee is chargeable with something more than negligence. If, upon the facts found, it may be declared as a matter of law that, in the lowering of the gate-pole, appellee is chargeable with a willful wrong, appellant may recover, all other necessary facts being found in his favor, notwithstanding he is not shown to have been free from contributory negligence. Contributory negligence ceases to be a defense when the wrong on the part of the defendant is, within the meaning of the law, willful. *Railroad Co. v. Graham*, 95 Ind. 286; *Ivens v. Railway Co.*, 103 Ind. 27, 2 N. E. Rep. 134. It remains, therefore, to determine whether the court ought to say as a matter of law that, upon the facts found in the special verdict, appellee was guilty of a willful wrong which caused the injury to appellant. In defining willfulness which will justify a recovery notwithstanding contributory negligence on the part of the plaintiff, it was said in the late case of *Palmer v. Railroad Co.*, 14 N. E. Rep. 70, that there may be a willful act, in a legal sense, without a formal and direct intention to kill or wound any particular person; or, in other words, there may be a constructive or an implied intent without an express one. In the case of *Pennsylvania Co. v. Sinclair*, 62 Ind. 301, it was said: "When an intention to commit the injury exists, whether the intention be actual or constructive only, the wrongful act ceases to be a merely negligent injury, and becomes one of violence or aggression." In the case of *Railway Co. v. Bryan*, 107 Ind. 51, 7 N. E. Rep. 807, it was said: "To constitute a willful injury, the act which produced it must have been done under such circumstances as to evince a reckless disregard for the safety of others, and a willingness to inflict the injury complained of." And, again, in the case of *Stock-Yard Co. v. Mann*, 107 Ind. 89, 7 N. E. Rep. 898, it was said: "It is beyond question that, to entitle one to recover for an injury to which his own negligence may have contributed, the injurious act or omission must have been purposely and intentionally committed, with a design to produce injury, or it must have been committed under such circumstances as that its natural and reasonable consequences would be to produce injury to others. There must have been either an actual or constructive intent to commit the injury. The act must have involved conduct

quasi criminal in character." See, also, *Railway Co. v. Ader*, 110 Ind. 376, 11 N. E. Rep. 437. In the case of *Railroad Co. v. Eaton*, 53 Ind. 307, it was said: "As a matter of evidence, proof that the misconduct of the defendant was such as to evince an utter disregard of consequences, so as to imply a willingness to inflict the injury complained of, may tend to establish willfulness on the part of the defendant." See, also, *Gregory v. Railroad Co.*, 112 Ind. 385, 14 N. E. Rep. 228. The law under which appellee was incorporated, provides that the directors of the company may erect toll-gates, and exact toll from persons traveling on the road. Rev. St. 1881, § 3640. The purpose of the gate clearly is to enable the company to prevent the passage of travelers over the road without the payment of toll. In other words, it is intended to be a means of coercing the payment of the proper toll. The gate could be of no consequence if the company had not the right to close it, and thus prevent such passage of travelers over the road until the payment of the legal toll by them. That the company has the right to close the gate, and detain travelers until they pay the proper toll, is further shown by section 3643, which provides a penalty for the unreasonable detention of such travelers after they have paid the toll. Section 3644 imposes a penalty upon persons who shall run by the toll-gate without the payment of toll, or who shall defraud the company out of the legal toll; but it does not, either expressly or by implication, take from the company the right to close its gates, and thus prevent the passage of travelers on the road until the proper toll shall have been paid. The company, then, had the right to close the gate as a means of coercing the payment of the legal toll, and, in so doing, its act was neither "unlawful" nor "wrongful," as charged in the complaint, unless, by reason of the time and manner of the closing, it was guilty of negligence or a willful wrong. As we have seen, it cannot be held liable, in this action, on the ground of negligence, because it is not made to appear that appellant was free from negligence which contributed to the injury. There is not sufficient in the special verdict to justify the court in declaring, as a matter of law, under the rule of the cases above, that the injury was willfully inflicted by the servant of the company, assuming that Templin is shown to have been a servant or agent of the company so that it became liable for his acts. It is stated in the verdict that, believing that the horses were driven fast, with the intention, on the part of those in the wagon, of running by the gate without the payment of toll, for the purpose of stopping them, and compelling the payment of the proper toll, Templin suddenly drew down the gate-pole. That does not show that Templin had any actual intention or purpose to injure appellant, or others in the wagon. On the other hand, it shows that he was attempting to do what he had a legal right to do, viz., to stop them, and thus compel the payment of the proper toll. Nor is it shown that what he did was "done under such circumstances as to evince a reckless disregard for the safety of others, and a willingness to inflict the injury complained of." It is stated in the verdict that, when near the toll-gate, Brannen stopped the horses, and, without speaking to them, struck them with a whip, which caused them to start in a lope and rapid gait, but it is not stated how near to the gate they were thus struck and started. It may be that they were so near as to make the lowering of the gate-pole not only negligence, but so reckless as to manifest a willingness to inflict the injury. On the other hand, the distance may have been such as to reasonably induce Templin to believe that he could lower the pole before the horses would reach it, and that by so lowering it those in the wagon would stop the horses before coming in collision with it.

Upon any view that may properly be taken, there is not sufficient stated in the verdict to justify the court in concluding, as a matter of law, that the injury to appellant was willfully inflicted. Having reached the conclusion above stated, it will not be necessary for us to consider the contentions of appellee's counsel that the complaint does not charge that the injury was willfully in-

flicted, and that the facts stated in the special verdict do not sufficiently show that Templin was a representative of the company so as to make it liable for his acts. Judgment affirmed, at appellant's costs.

(115 Ind. 93)

CUTSINGER et al. v. BALLARD et al.

(*Supreme Court of Indiana. May 29, 1888.*)

1. **SPECIFIC PERFORMANCE—PROOF OF CONTRACT.**

In an action for specific performance of a contract to convey land from father to son, evidence that the father agreed, when his son became of age, that if he would stay on the farm and work, he would give him a reasonable compensation in land, and that the son consented to be so paid, and in pursuance of the agreement worked six years after he came of age; that the father always referred to the land as his son's, and said he intended to make a deed for it, but did not do so for fear that his son would sell the land and go away; that the son entered upon the land, making valuable improvements, and held it 26 years,—will support a finding that there was a contract for conveyance.¹

2. **SAME—STATUTE OF FRAUDS.**

An agreement between a father and son that the son is to receive a piece of land for work done for his father is taken out of the statute of frauds by the son performing his part of the agreement, being put in possession, making valuable improvements, and holding the land for 26 years.¹

3. **SAME—DEMAND.**

In an action for partition, where an answer alleges a parol contract between the ancestor and defendant for the conveyance of part of the land sought to be partitioned, defendant need not demand a conveyance before filing his answer,—since plaintiff, by bringing suit and alleging that the land is part of the estate left by decedent, repudiates the contract made by the ancestor.

4. **SAME—LACHES.**

No mere lapse of time will bar the remedy of specific performance between the parties, when the consideration has been fully performed, since the vendor then becomes a trustee, and can gain no adverse rights without an open disavowal.

Appeal from circuit court, Johnson county; K. M. HORD, Judge.

Action by Julia A. Cutsinger and others against John Ballard and others for partition of land. Answer by cross-bill by Ballard, claiming part of the land under parol contract to convey. There was judgment for defendant Ballard, and plaintiffs appeal.

Woolen & Banta and White & Buckingham, for appellants. *Miller & Barnett*, for appellees.

MITCHELL, J. Julia A. Cutsinger and others, as plaintiffs, alleged in their complaint that they were tenants in common with John Ballard and his co-defendants of certain real estate in Johnson county, of which Taylor Ballard, their common ancestor, died seized. Prayer for partition according to the respective interests of the parties. The defendant John Ballard set up, by way of cross-complaint, that he was in possession and was the equitable owner, under a contract made with his father, Taylor Ballard, in his life-time, of a certain described tract of land which was embraced in the description of the real estate which the plaintiff was seeking to have partitioned. He asked for the appointment of a commissioner to convey the land to him, and for a decree quieting his title. The court made a special finding of the facts, and stated conclusions of law thereon. So far as respects the issues tendered by the cross-complaint the findings and conclusions were favorable to the cross-complainant. The facts material to be stated were that John Ballard attained his majority in the year 1853, at which time his father agreed with

¹As to the part performance that will take a parol contract for the conveyance of land out of the statute of frauds, see *Martin v. Patterson*, (S. C.) 2 S. E. Rep. 859, and note; *Clark v. Clark*, (Ill.) 13 N. E. Rep. 553; *Gallagher v. Gallagher*, (W. Va.) 5 S. E. Rep. 297, and note; *Stub v. Grimes*, (Minn.) 37 N. W. Rep. 445; *Pitt v. Moore*, (N. C.) 5 S. E. Rep. 389; *Everett v. Dilley*, (Kan.) 17 Pac. Rep. 661; *Evans v. Miller*, (Minn.) 86 N. W. Rep. 640; *Reno v. Moss*, (Pa.) 13 Atl. Rep. 716.

him that, if he would remain at home and work on the farm, he would pay him a reasonable compensation in land. The appellee remained as requested, and worked for his father until the year 1859, rendering services which the court finds to have been reasonably worth \$1,440. At that time his father agreed to convey the land described in the cross-complaint to him as compensation for the services theretofore rendered. The land was unimproved woodland, worth about \$1,000. The appellee agreed to accept it as full compensation for his work, and, in reliance upon the promise of his father, went into possession and cleared, fenced, and ditched the land. He also erected a house, barn, and other out-buildings, making valuable improvements of a lasting and permanent character of the value of \$2,000. He remained in possession continuously ever since, claiming title to and using the land as his own, his father all the while recognizing his title and claim. Taylor Ballard died in January, 1885, without having made a deed. Without questioning the propriety of the conclusions of law stated, the appellants contend that the evidence does not support the finding of facts.

Starting with the proposition that the contract, being in parol, must be adjudged void unless the evidence shows that it was taken out of the operation of the statute by some of the exceptions allowed by courts of equity, the appellants insist that there was no proof that the appellee took possession of the land in dispute under a contract of sale, or that the improvements were made by him in pursuance of any contract. It is insisted, moreover, that there was no clear and satisfactory evidence of a contract between the father and son, and that the court was not, therefore, justified in finding the facts as returned. It is undoubtedly the rule, in cases like the present, that specific performance of an oral contract to convey land will not be decreed unless the terms of the contract are either admitted or established by clear, definite, and satisfactory evidence. The party seeking to enforce performance must prove the contract substantially as laid in his pleading, by satisfactory evidence, and he must in like manner show such a part performance on his part of the identical contract set up, and such acts done in reliance thereon, as that injustice would be done and a fraud perpetrated if the contract were held inoperative under the statute of frauds. *Purcell v. Miner*, 4 Wall. 513; *Williams v. Morris*, 95 U. S. 444; *Loddell v. Loddell*, 36 N. Y. 327. Courts of equity have adopted the foregoing as the rule of evidence in cases for specific performance of oral contracts; and if, at the end, the evidence leaves it a matter of conjecture whether there was a contract, or if its terms are left uncertain, or if the possession or acts of part performance are not clearly referable to the contract, a decree for specific performance ought to be withheld. *Green v. Groves*, 109 Ind. 519, 10 N. E. Rep. 401. In the present case it is shown by the testimony of a number of witnesses that Taylor Ballard declared again and again that the tract of land in dispute belonged to his son John; that he had given it to him as compensation for six years' work performed after he had become of age. It is not disputed that the appellee worked for his father for the period mentioned, nor is it denied that he entered upon the land in 1859, and made the improvements as found by the court, and that he continued in the open and notorious possession for more than 26 years before the commencement of the suit, during all of which time he claimed and used the land as his own. The statute of frauds can therefore have but slight, if any, influence upon such a case. *Freeman v. Freeman*, 43 N. Y. 34.

Although a contract for the conveyance of real estate may rest in parol, yet where it is fair in all its parts, and the purchaser has paid the consideration, and has been put into possession under the contract, and has made lasting and valuable improvements in reliance thereon, the contract will be regarded as withdrawn from the operation of the statute, and will be enforced. *Atkinson v. Jackson*, 8 Ind. 31; *Winslow v. Winslow*, 52 Ind. 8; *Wallace v. Long*, 105 Ind. 522, 5 N. E. Rep. 666; *Drum v. Stevens*, 94 Ind. 181.

While it is true that evidence which consists of the casual declarations of a party, to mere strangers to the transactions, ought to be scrutinized closely and acted upon with great caution, when it is proposed by that method to establish a contract to convey land, yet where such declarations correspond with other substantive facts which are satisfactorily established, such as the payment or performance of the consideration of the contract, the taking and continuing in possession under a known and acknowledged claim of a contract, and the making of lasting and valuable improvements under such claim, they may become the most potent and satisfactory proof. Conceding the rule to be, in cases for specific performance, that the proof must establish the contract clearly, definitely, and satisfactorily, it is nevertheless a question for the chancellor to determine whether the proof offered was sufficient to show the existence of the contract with the requisite degree of clearness and certainty. Looking into the evidence, we cannot say that it may not have established all the requisites to the enforcement of the contract within the rule already stated. *Burns v. Fox*, 113 Ind. 205, 14 N. E. Rep. 541. Whatever else may be said of the contract as shown by the evidence, it was certainly sufficient to show the character of the possession taken and held by John Ballard. Having taken and continued in the exclusive, uninterrupted, adverse possession of the land for more than 20 years, the title of Taylor Ballard was extinguished, and John Ballard became vested with a title in fee, unless it was affirmatively shown that he was in possession as tenant, or in some capacity other than that of owner, and in a relation subordinate to his father. *Roots v. Beck*, 109 Ind. 472, 9 N. E. Rep. 698; *Riggs v. Riley*, 15 N. E. Rep. 253, (present term); *School-Dist. v. Benson*, 31 Me. 381. The appellants make no such claim upon the evidence in this case. It is said, however, that there should have been a demand for a conveyance before filing the cross-complaint. There is no force in the suggestion. The plaintiffs, by bringing suit for partition, and alleging that the land in dispute was part of the real estate which descended to the heirs of Taylor Ballard, as tenants in common, repudiated the contract made by their ancestor. In such a case a demand is not necessary. *Burns v. Fox*, *supra*; *Stix v. Sadler*, 109 Ind. 254, 9 N. E. Rep. 905. So, also, the objection that the appellee was guilty of laches in seeking a remedy for the specific performance of the contract is without force, as applied to a case like the present. The appellee having fully performed his part of the contract, and thereby paid the entire purchase price for the land, his father held the title thereafter in trust for him; and until a trust is openly disavowed by the trustee, who insists upon an adverse right which is fully made known to the *cestui que trust*, no lapse of time is a bar as between the latter and his trustee. *Oliver v. Piatt*, 3 How. 396-412; *De Couche v. Savetier*, 3 Johns. Ch. 190. The evidence shows, without contradiction, in the present case, that Taylor Ballard uniformly declared that the land in dispute belonged to his son John; that he had given it to him as compensation for his work.

We have found no error. The judgment is affirmed, with costs.

(100 N. Y. 554)

In re ANDERSON.

(Court of Appeals of New York. June 5, 1888.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ESTIMATES.

Under act N. Y. 1878, c. 335, § 91, all contracts for work to be done in New York city, involving an expenditure of more than \$1,000, must be let to the lowest bidder in a manner fixed by ordinance of the common council; and it was established by ordinance that in all such cases the commissioner of public works should issue proposals, and advertise for bids, and, when necessary, cause a survey of the work to be made by a competent engineer, and that the advertisement should state as near as possible the quantity and quality of the work to be done. *Held*, that an estimate, which was only a random guess, and placed the amount of stone excavation at more than double, and earth excavation at less than one-half, the actual amount, did not form a basis for a valid contract.

2. SAME—WILD BIDS—COLLUSION.

Such estimate, taken in connection with a bid of over five times the actual worth for earth-work, and less than $1\frac{1}{4}$ per cent. of the actual cost of stone-work, thus showing on its face as the lowest, but really nearly the highest, raises a just inference that the contract was the result of fraud and collusion.

3. SAME—REMEDY OF PROPERTY OWNER.

In such a case, under Laws N. Y. 1880, c. 550, § 12, which provides that no court shall have power to vacate or reduce an assessment for any local improvement in New York city, except to reduce an assessment to the extent the same may have been increased by reason of fraud or substantial error, a property owner may have his assessment reduced the full amount which it exceeds the actual cost of the improvement.

RUGER, C. J., and GRAY and ANDREWS, JJ., dissenting.

Appeal from general term, supreme court, First department.

Petition of E. Ellery Anderson to reduce an assessment made for local improvement. Petition was granted, and the city appealed.

D. J. Dean, for appellant. Truman H. Baldwin, for respondents.

EARL, J. This proceeding was instituted for the purpose of reducing an assessment for the expense of regulating and grading a portion of Fourth avenue in the city of New York. The petitioner bases his right to relief under section 12, c. 550, Laws 1880, on the ground of fraud or substantial error in the proceedings which resulted in the assessment. Under Laws 1878, c. 335, § 91, all contracts for work to be done in the city of New York, which involved an expenditure of more than \$1,000, were to be let to the lowest bidder, under such regulations as should be established by ordinance of the common council; and it was established by ordinances that the commissioner of public works should issue proposals and advertise for bids for all contracts, exceeding \$1,000, connected with his department; and that, whenever a survey or plans should be necessary for any work duly authorized, he should cause such survey or plans to be made by a competent surveyor, architect, or engineer, as the nature of the work might require; that the several departments and officers employed by law to make contracts on the part of the corporation should issue proposals for estimates therefor, and advertise the same as required by law; and that such advertisement should state the quantity and quality of supplies, or the nature and extent, as near as possible, of the work required. The following estimates of the work to be done was contained in the proposals submitted to the bidders for the work in question: 10,000 cubic yards of earth excavation; 20,000 cubic yards of rock excavation. There were 26 bids for the work, and the contract was awarded to one Kane as the lowest bidder. He bid for earth excavation \$1.62 $\frac{1}{4}$ per yard, and for rock excavation 2 cents per yard; and, applying these bids to the estimated amounts of excavation, he was the lowest of all the bidders,—the aggregate of his bid being \$17,100, and the other bids ranging from \$19,300, the next lowest bid, to \$58,500, the highest. Kane performed the work under the contract, and there was found to be 20,576 cubic yards of earth excavation, and 9,241 cubic yards of rock excavation. And it turned out that, instead of being the lowest bid-

v.17N.E.no.3—14

der, he was the highest but one; and he was paid for the work the aggregate sum of \$33,620, nearly twice as much as the amount of his aggregate bid. There was proof at the hearing that the full and fair value for the rock excavation was \$1.70 per cubic yard, and for earth excavation 30 cents per cubic yard, and that those prices would allow from 25 to 30 per cent. clear profit to the contractor. Thus it appears that there was actually paid, in excess of a fair value for the work done by Kane, the sum of nearly \$12,000.

We think there was substantial error in letting this contract to Kane, who was in fact nearly the highest instead of the lowest bidder for the work. No tests whatever were made before letting the work to ascertain the quantities of rock and earth respectively to be excavated, and no appropriation of money or other provision was made for making such tests. The quantities of rock and earth, respectively, as stated in the advertisement, were mere estimates or random guesses, without any basis whatever to rest upon, and the ordinance which required the quantity of each kind of material, and its nature, to be stated as near as possible, was in no sense complied with, and therefore there was no basis for a valid contract. The case would be different if a *bona fide* effort had been made to comply with the ordinance, and there had been a mistake or error as to the quantities of different kinds of materials to be excavated. We are also of opinion that, upon the facts of the case, it is a just inference that the contract was the result of fraud and collusion. Fraud is suggested by the careless and reckless way in which the estimates were made, without any adequate test or examination to ascertain the quantity or character of the different kinds of materials. An estimate of the quantity of rock at more than double the actual quantity, and the amount of earth at less than half the actual quantity, taken in connection with Kane's extraordinary unbalanced bid, could hardly have been the result of accident. The bid on its face is suggestive of fraud. The officers of the city, when they saw in the bid 2 cents per cubic yard for rock excavation, and \$1.62 $\frac{1}{4}$ for earth excavation, ought to have known, and must have known, if they read it, that some fraud was contemplated; and it may be inferred that, when the contract was let, there was actual fraud and collusion between the bidder and the representatives of the city, as the city could not have been compelled to enter into contract upon such a bid. It is not needful, however, for us to find that there was actual fraud, but it is sufficient that all the facts of the case were such as justified an inference of fraud in the court below. The *Case of Protestant Episcopal Public School*, 75 N. Y. 324, is not an authority for the city in this case. We do not hold that every unbalanced bid is *per se* fraudulent, or evidence of substantial error. An unbalanced bid that does not materially enhance the aggregate cost of the work cannot be complained of. If there is no deception or mistake as to the quantities, and if the ordinances have fairly been complied with, and the quantity and quality of the work has been estimated as nearly as practical, there is no ground for alleging substantial error merely because of an unbalanced bid under which the contract was let, and, if the cost of the work has not thereby been enhanced, there is no ground for alleging fraud. In the case cited it had been determined that the contract was free from fraud. The case of *Brady v Mayor*, 20 N. Y. 312, is not a precise authority for the petitioner, but the grounds of the decision are sufficient to sustain his contention. The petitioner has a strong equity for the reduction of this assessment. He has had no benefit whatever from the excessive amount paid to the contractor, and there is no reason why that amount should fall upon him or his lots. The city, in making street improvements, the expense of which is to be charged to the owners of property in the vicinity of the improvements, acts in some sense as the agent of such owners in making the improvements, (*Lake v. Trustees*, 4 Denio, 520,) and it should, in the discharge of its assumed agency, be required to exercise reasonable care and diligence in connection with the work. If, by gross negligence on the part of

the city or the fraud of its officers, the expense of the work has been largely and unnecessarily increased, it is certainly unjust that the consequences of the wrong should be visited wholly upon the owners of the property in the vicinity of the improvement. It is just, in a case like this, that the excessive and unnecessary expense should be borne by the whole body of tax-payers of the city instead of being cast upon a few lot-owners. We are therefore of opinion that the order should be affirmed with costs.

DANFORTH, FINCH, and PECKHAM, JJ., concur. GRAY, J., dissents, as do RUGER, C. J., and ANDREWS, J.

GRAY, J., (*dissenting*.) The petitioner does not allege any fraud, nor was any shown to exist from the proofs. The city advertised for bids for the work, stating in its proposals an amount of earth excavation and of rock excavation, which, in the proposals, was announced to be approximate only, and there was no reservation other than of the right to reject any or all bids which the commissioner of public works might deem prejudicial to the public interests. The petitioner alleges that the estimates for bids, which were advertised, were not "approximate estimates," nor were they such estimates "as near as possible of the work required." He says the estimates were fictitious. If they were, such character must be an inference from the result to the contractor who received the contract and did the work. It is conceded that chapter 335, Laws 1873, § 91, controls. By that statute, "all contracts * * * shall be made by the appropriate heads of departments, under such regulations as now exist, or shall be established by ordinances of the common council." It further provides that, "whenever any work * * * shall involve the expenditure of more than one thousand dollars, the same shall be by contract, * * * and all such contracts shall be given to the lowest bidder," etc. The revised ordinances of 1880 provide these regulations, viz: "Sec. 3. The proposals for estimates shall be in such form as may be prescribed by the department making the same, and shall contain the following particulars: * * * Sec. 2. They shall state the quantity and quality of supplies, or the nature and extent, as near as possible, of the work required." It seems, from the proofs in the case, that the city's engineer was mistaken in his estimates of the amount of rock and of earth in the work advertised for. Because of his erroneous estimates, the petitioner seems to base thereupon a conclusion that there was a violation of the law, inasmuch as true and reasonably correct estimates were not made. I am not able to agree in the correctness of his conclusions, or in his construction of the law. The statute does not demand exactness in the estimates contained in the proposals for bids; but only that the contracts shall be made under such regulations as shall be established by the ordinance of the common council. That ordinance, as we have seen, requires that the proposals for estimates shall state the nature and extent, "as near as possible, of the work required." In the absence of fraud or collusion, we must hold that the presumption exists that the public officers perform their duty. The circumstances of this case are not such as to warrant the presumption of any fraud in the contract which the city made for the work in question. The most that could be contended for, as evidencing fraud, would be the error in the estimates of the city's engineer, and the advantage to the contractor in the result. We need not enter upon any discussion as to the difficulties in procuring exact estimates for a work of excavation to be done under a contract, whether they arise from the geological formation of the land, or in the selection of engineers most competent to make the survey. The fact remains that a survey was made; that estimates were given, which were announced to be as nearly correct as possible; and that there is no pretense of any fraud entering into the award of the contract. Superior knowledge in the bidder for this work, as to the formation of New York

island at that part, and a wrong estimate of the city's engineer, may have combined to make this a more expensive contract for the improvement than it might have been if the amount of rock had been definitely known; but so long as the law was obeyed in its requirements, substantially and in good faith, the courts should not interfere. The object of the statute and of the ordinance was to invite competition for work, and to secure its performance for the lowest price which fair competition would produce. So far as we are able to see in this case, fair competition was invited. The object of chapter 383, Laws 1870, was to give to the court jurisdiction to modify an assessment only when the expense of a local improvement had been unlawfully increased. *In re Gas-Light Co.*, 85 N. Y. 526. Various plans have been tried in order to arrive at as just and exact results as possible, but none thus far have received the approval of this court, and some have been condemned as illegal. Under the law as it stood, where the provisions thereof had been complied with, the contract vested in the lowest bidder. This court held in *Baird v. Mayor*, 83 N. Y. 254, that under the law of 1861 such was the effect of advertising for contracts under its provisions; and, in view of the parity of the language of the act of 1873, the same construction should be given to the later act. *In re Merriam*, 84 N. Y. 596, where the commissioner of public works fixed a price for rock excavation, and did not submit that item of the work to public competition, it was held, in reference to the statute of 1873, and the ordinance which I have cited, MILLER, J., delivering the opinion of the court, that they were "intending to establish a system by which work done for and supplies furnished to the city should be the subject of competition, and allotted to the lowest bidder for the same, and a substantial compliance with these requirements is essential to carry into effect the object of these regulations, which evidently were adopted to prevent a wasteful expenditure of the public money, and to promote economy as well as practical convenience in the administration of the financial affairs of the city. The statute does not provide specifically as to the terms of the contract, and the ordinance only for quality and quantity, as well as can reasonably be furnished." The learned judge then mentions the appellant's claim that to state in the proposal certain prices for certain items was not to destroy competition, and that it would be exceedingly difficult to ascertain beforehand the quantity of rock excavation, so as to make an estimate sufficiently correct to carry out the purpose of letting the contract to the lowest bidder, and says: "These suggestions are not without force, and, while there is strong ground for claiming that when the price fixed for one or more items is fair and reasonable, and there is no evidence of fraud or extravagance, and the quantity could not be ascertained without a considerable expenditure of money, and that this could be done in some instances consistently with the interests of the public, in view and with the statute and ordinances, we are, upon the whole, of the opinion that, to carry out the intention of the law to award contracts to the lowest bidder, it is requisite that the quantity of rock excavation, as near as possible, should be stated in the proposals, and that fixing the price for the same was in disregard of the law, and a violation of the statute, and the ordinance of the city which is cited." The case of *Brady v. Mayor*, 20 N. Y. 312, is not opposed to the view to which we give our support, that the contract vests in the lowest bidder by force of the law, where the law's provisions have been complied with, and no fraud or collusion is shown. In that case it was so arranged in inviting proposals that there was not to be any competition as to the rock excavation, but such was to be paid for at such price as the bidder chose to insert in his proposal; provided that, as to the other comparatively inconsiderable portion of the work, he bid lower than any one else. It was there held that the law was violated, inasmuch as by the arrangement in question public competition was not secured for all the work. That case is an authority requiring that all work to be performed for the city should be subjected to pub-

lic competition in order to preclude favoritism and jobbing. I fail to see the right or the justice in imposing upon the city at large the burden of the expense for the local improvement, or any portion of it, where the contract for doing it was awarded under the provisions of the law, and it is not alleged or shown that it was influenced by any fraud or collusion. I am therefore of the opinion that the orders of the general term and of the special term should be reversed, and the petition dismissed.

RUGER, C. J., and ANDREWS, J., concur.

(109 N. Y. 413)

PEOPLE v. PALMER.

(*Court of Appeals of New York. June 5, 1888.*)

CRIMINAL LAW—FORMER JEOPARDY—NEW TRIAL AFTER REVERSAL.

Under Pen. Code N. Y. § 30, providing that one acquitted or convicted of a crime consisting of different degrees cannot thereafter be indicted or tried for the same crime in any other degree; and sections 464 and 544, providing that the granting of a new trial places the parties in the same position as if no trial had been had, and that the trial shall proceed on that basis,—one who has been indicted of assault in the first degree, and convicted of assault in the third degree, and on appeal has obtained a reversal for errors in the trial, is triable again for assault in the first degree, since his former conviction does not amount to an acquittal as to that degree, and by his appeal from it he waived his right to plead it in bar of the new trial for which he asked.

Appeal from general term, supreme court, Third department.

The defendant was indicted, in December, 1885, for an assault in the first degree, at the Greene county oyer and terminer, and was tried before the court of sessions. He was convicted of an assault in the third degree, and appealed to the supreme court, at general term, from the judgment of conviction. That court reversed the judgment, on questions of law only, and ordered a new trial, remanding the action to the court of sessions for further proceedings. From the general-term judgment the defendant appealed, so far as it ordered a new trial, and remitted the action to the court of sessions. He appealed, also, from an order of the general term which denied his motion to amend its order of reversal, etc., so as that it should state that defendant's application to be discharged on the reversal of the judgment was denied; that the defendant did not, upon his appeal, ask for a new trial; and that the new trial is granted only as to an assault in the third degree.

Sidney Crowell, for appellant. *Frank H. Osborn*, for respondent.

GRAY, J., (*after stating the facts as above.*) The appellant contends that, as he was convicted of assault in the third degree, he was thereby acquitted of assault in the higher degrees, and cannot be again tried under the indictment, and that, upon the reversal of the judgment of conviction, there was nothing left but a charge of assault in the third degree, of which charge the oyer and terminer had not jurisdiction. While that court had jurisdiction of the offense charged in the indictment, a charge of assault in the third degree seems exclusively cognizable, in the first instance, by the court of special sessions, except a certificate that it should be prosecuted by indictment be allowed by the county judge or a supreme court justice. See Code Crim. Proc. §§ 21, 22, 56, 57. The question brought before us by this appeal is whether, when the defendant, having been found guilty and sentenced for a lower degree of the crime charged in the indictment, has appealed to the supreme court, upon exception, and has succeeded in reversing the judgment, and a new trial is ordered, and the cause remanded to the trial court for further proceedings, he can be tried again under the indictment, without regard to the former trial

and conviction. Can he plead, then, in bar of another trial, for the offense charged in the indictment? The question is of the gravest importance to the administration of justice under the laws of this state, which provides for the punishment and trial of offenders. It involves the construction and validity of certain sections of the Penal Code and of the Code of Criminal Procedure, which were enacted by the legislature in respect of appeals and new trials. If the reasoning of the prisoner's counsel is correct, then the defendant's appeal, based on errors excepted to upon his trial, must result, where not in affirmance, in his discharge. And in all other cases the prisoner would take his appeal from a judgment of conviction of a lesser degree of the crime charged, with the assurance that if he could secure a reversal of the judgment, and a new trial, he could not fare worse than before, in any event. He would risk nothing, and he might wholly escape punishment for the offense of which he stood charged. Whatever conflict of opinion existed in the courts, prior to the adoption of the Code of Criminal Procedure, as to a prisoner's position upon a new trial being ordered, we hold has been settled and removed by the passage of the act of the legislature. Much of the doubt and confusion surrounding the question as to the effect of a new trial seems due to a mistaken view of the operation of the constitutional inhibition against subjecting a person to be twice put in jeopardy for the same offense. Const. N. Y. art. 1, § 6. That provision has been the subject of much discussion in the reports and in text-books. To enter into it I do not believe to be necessary, to the end we have in view, in deciding this case upon principle, and in construing the statute. Its incorporation into the federal constitution and into the constitutions of states, was but the recognition and the application, in a stronger form of expression, of the common-law doctrine. In my opinion, nothing has been done in the legislative enactment of the sections of the Code under consideration to subvert the constitutional provision. That provision in no wise has the effect of restricting the power of the legislature to enact rules of procedure in criminal cases, so long as the enactment does not violate the protection guarantied by it to a party. In *Kring v. Missouri*, 107 U. S. 221, 2 Sup. Ct. Rep. 443, it was held that any law passed after the commission of an offense which, in relation to that offense or its consequences, alters the situation of a party to his disadvantage, was an *ex post facto* law. It was said by Mr. Justice MILLER that the law of Missouri was that when a conviction was had of murder in the second degree, on an indictment charging murder in the first degree, if the conviction were set aside, the defendant could not again be tried for murder in the first degree. He added, at page 225, as follows: "There is no question of the right of the state of Missouri, either by the fundamental law or by an ordinary act of legislature, to abolish this rule, and that it is a valid law as to all offenses committed after its enactment. The question here is, does it deprive the defendant of any right of defense which the law gave him when the act was committed, so that, as to that offense, it is *ex post facto*?" In that case the constitution of Missouri was amended after the homicide. It abrogated the old rule, and provided that when a conviction for a lower degree of the crime, upon an indictment for a higher, was lawfully set aside, the conviction for the lower degree did not operate as an acquittal of the higher. After the amendment went into effect, the defendant's plea of murder in the second degree was made. He was sentenced to 25 years' imprisonment. That sentence was set aside, and he was tried again, and, against his protest and refusal to plead over, was convicted of murder in the first degree. It was on those facts that the United States supreme court held the constitutional amendment *ex post facto* as to the defendant; but the right of the state was recognized to abolish a previously existing rule as to commission of crimes, and the trial of the person charged with the commission, and to create a new rule of procedure. The condition and rights of a person tried and convicted for the commission of a crime have been frequently

the subject of legislation. The right to review by writ of error or by appeal did not belong to the prisoner at common law. Until the third of Queen Anne, a writ of error in any criminal case was held to be merely *ex gratia*. In the *Aylesbury Case*, 1 Salk. 103, arising in that year, it was held that it must be granted *ex debito justitiæ*, except in cases of treason or felony. But Lord MANSFIELD said, (*Re v. Wilkes*, 4 Burrows, 2550,) in respect of that decision, that it meant the writ should be granted where there was a probable error, and that "it cannot issue now without a fiat from the attorney general, who always examines whether it be sought merely for delay or upon probable error." In 1801 it was enacted by the legislature of this state that writs of error in criminal cases, not capital, shall be considered as writs of right, and issue of course, subject to the regulations provided by law. Laws 1801, c. 25. The law continued thus, as to writs of error, until the adoption of the Revised Statutes, when the remedy, by bill of exceptions, was extended to criminal cases, in the same cases and in the like manner as in civil cases. It was there provided that, in the trial of any indictment, exceptions to any decision of the court may be made by the defendant, and a bill thereof shall be settled and filed, and returned upon a writ of error, or upon a *certiorari*. 2 Rev. St. (Edm. Ed.) 736, § 21. By the adoption of the Code of Criminal Procedure, writs of error and of *certiorari* in criminal actions were abolished, and thereafter the only mode of reviewing a judgment or order in a criminal action was by appeal, which may be taken as a matter of right by the defendant from the judgment of conviction. Code Crim. Proc. §§ 515, 517, 520. Section 36 of the Penal Code provided that, "where a prisoner is acquitted or convicted upon an indictment for a crime consisting of different degrees, he cannot thereafter be indicted or tried for the same crime in any other degree," etc.; but that section has reference only to cases where the prior judgment of conviction has remained unreversed. This is made evident from a reading of the sections of the Code of Criminal Procedure. They serve to show plainly that the legislature contemplated no such result as is claimed by the appellant's counsel in the event of a new trial being ordered upon a judgment reversing the judgment of conviction. Section 455 of that Code preserved to the defendant his right, which previously existed, to take exceptions to a decision of the court upon a matter of law by which his substantial rights are prejudiced. Section 543 provides that "upon hearing the appeal the appellate court * * * must either reverse or affirm the judgment appealed from, and, in cases of reversal, may, if necessary or proper, order a new trial." Section 464 provides that "the granting of a new trial places the parties in the same position as if no trial had been had;" and by section 544 it is provided that, "when a new trial is ordered, it shall proceed in all respects as if no trial had been had."

These provisions of the statute are clear and explicit, in nowise contravene the letter or the spirit of the fundamental law, and their meaning should not be perverted. It would be a grievous miscarriage of justice, and the intent of the law would be thwarted, if it should be held that a reversal, upon a previous appeal, for errors of law upon his trial, had the effect of putting it out of the power of the people to further try him under the indictment, when his guilt might be competently established. We do not think such is the result. The effect of the defendant's appeal is merely to continue the trial under the indictment in the appellate court, and, if reversal of the judgment of conviction follows, that judgment, as well as the record of the former trial, have been annulled and expunged by the judgment of the appellate court, and they are as though they never had been; while the indictment is left to stand, as to the crime of which the prisoner had been charged and convicted, as though there had been no trial. Only where the result of the former trial was in effect an acquittal of another crime charged in the indictment may he plead that result in bar of further prosecution for that crime. If the defendant takes

an appeal from the judgment of conviction, he must be deemed to ask for a correction of errors made upon his trial, and to waive his constitutional protection. Of necessity, he must be deemed to ask for a new trial. By taking the appeal to the supreme court, power is conferred upon that court to continue and review the prisoner's trial, and, upon a reversal, to pronounce such judgment as it deems just within the terms of the statute. It may affirm the proceedings below, or reverse, and either order a new trial or discharge the prisoner. That no constitutional right of the party is invaded, must be a self-evident proposition, or it is a privilege which is granted, of which he may, but not must, avail himself. I think that the sounder doctrine which recognizes a distinction between jeopardy incurred with the consent of the prisoner and jeopardy incurred without that consent. We hold the jurisdiction of the court and terminator to try the defendant again under his indictment is not affected. The offense charged was within its jurisdiction, and, the judgment of the trial court having been reversed for errors committed on the trial, the case stands as though there had been no trial. The verdict is expunged, and there is no determination in regard to the matter but the judgment of the appellate court. The defendant must go back, and stand his trial under the indictment, as though he had never been tried; for he himself has renounced the bar which was effective to prevent his further trial for the offense charged. The judgment appealed from should be affirmed.

All concur.

(109 N. Y. 496)

WEBBER v. PIPER *et al.*¹

(Court of Appeals of New York. June 5, 1883.)

MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT.

Evidence that plaintiff was injured while in defendants' employ, the accident being due to the dullness of a circular saw, and the need of its being reset; that the employers had provided sharp saws to replace dull ones; and that a co-servant, whose duty it was to sharpen and reset saws when dull, had failed to do so on this occasion, though requested by plaintiff,—shows no negligence or default on the part of plaintiff's employers.²

Appeal from general term, supreme court, Second department.

Action by Daniel Webber against Winfield Piper and another for injuries received while in defendants' employ. Judgment for defendant, which was affirmed by the general term, and plaintiff appeals.

James C. Church, for appellant. E. M. Shephard, for respondent.

FINCH, J. The plaintiff was injured while using a circular saw in the factory of the defendants, who were his employers, and gave evidence tending to establish that the accident was due to the dullness of the saw, and the need of its being sharpened and reset. These saws became dull by use, and the defendants had furnished duplicates, so that one could replace the other when there was need, without delay to the workmen. It seems to have been the duty of one Myers, who was also a servant of the defendants, to care for and repair the machinery, and reset and sharpen the saws when necessary, and the plaintiff testified that, on the morning of the accident, he asked for another saw because the one in use was dull, and Myers replied that he had no time then to sharpen a saw, and directed plaintiff to go on with his work, adding that at noon he would see what he could do. Before that time arrived, the injury occurred. On this state of facts the plaintiff was nonsuited, and that judgment has been affirmed by the general term. We are of opinion that the decision was correct, for the reason that the master's duty was performed

¹Affirming 88 Hun, 353.

²See McGee v. Cordage Co., (Mass.) 1 N. E. Rep. 745, and note; Daley v. Railroad Co., (Mass.) 16 N. E. Rep. 690.

when he furnished suitable saws, and the means and conveniences for keeping them sharp and properly set. The saw, though dull, was not defective in any legal sense, and the negligence, if any, was that of Myers, whose duty in sharpening and setting the saws was that of a fellow-servant. A contrary rule might carry us to the extent of saying that where the master furnished sufficient and adequate machinery, but its running became dangerous to the operative unless well oiled, that the owner who had furnished the oil and cans, and a suitable person to keep the journals and bearings properly oiled, was liable for the neglect or omission of that servant. There are many matters of detail in the management of safe and adequate machinery, which must be intrusted to the operatives, and as to which the master owes no duty except the employment of competent workmen; and we deem this a case of that character. The line of division between the duty of the master to furnish and maintain safe and adequate machinery, and that of the operative to manage and handle it with prudence and care, is difficult to define by any general description; but is quite obvious when each case as it arises comes under consideration. In the one before us, the neglect, if any, was in a detail of the management of the machinery. A master-builder might furnish proper tools to his workmen, but it would not be his duty to sharpen every chisel as it became dull or set every saw when that need arose. The appellant relies upon the case of *Kain v. Smith*, 89 N. Y. 375. If, in that case, the master had furnished another jigger, perfect in all respects, and safe and adequate for use, and the neglect had been that the foreman used the old one, which had become unsafe, when he might have used the new one, a very different case would have been presented. Here the master supplied saws enough, and the means of sharpening and resetting; and, if the servants neglected to avail themselves of the means of safety provided, the master was not in fault, for the saw was not defective, but merely dull from use. Its ordinary efficiency was impaired, but it had not thereby become a defective or dangerous machine. The master, on the facts before us, was not negligent or in default, and for that reason incurred no liability for the injury which happened. The judgment should be affirmed, with costs.

All concur.

(109 N. Y. 482)

BANK OF MONTREAL v. RECKNAGEL et al

(Court of Appeals of New York. June 5, 1888.)

BANKS AND BANKING—DRAFTS—BILLS OF LADING.

Defendants authorized plaintiff, a foreign bank, to allow a foreign firm to draw for defendants' account against a certain number of bales of Manilla hemp, to be purchased and shipped by a certain vessel, advice to be given plaintiff, accompanied by a bill of lading, with abstract of invoice indorsed thereon for the property shipped. Plaintiff accepted, and cashed drafts against "bales of hemp." An abstract of invoice for "bales of Manilla hemp" was indorsed on each bill by the consignor after it had been signed by the captain, but without his knowledge. A letter of advice described the shipment as "bales of hemp." The foreign firm failed and absconded, and most of the shipment proved to be matting only; the rest being Manilla hemp. *Held*, that plaintiff cannot recover of defendants the amount paid on the drafts accepted against the matting.

Appeal from general term, superior court, city of New York.

The plaintiff is a Canadian banking corporation, having agencies in London and in New York city. The defendants are a firm doing business in the latter city, under the name of Recknagel & Co. On December 1, 1881, the defendants requested the plaintiff's New York agents to open by telegraph a credit in favor of Vogel & Co., of Hong Kong, China, in the following communication, in writing: "DECEMBER 1, 1881. Please telegraph authority to Vogel & Co., Hong Kong, to draw at 6 mos. for our account against consular invoice, and full set bills of lading of 2,500 bales Manilla hemp, p. Robinson, at the rate of 4 pounds p. bale, on a basis of 8 shillings sterling, freight filled

up in bill of lading, reducing advance, if higher." The same day, plaintiff sent the following telegram to Vogel & Co.: "*Vogel, Hong Kong*: Credit 608, six months, issued Recknagel ten thousand pounds, documents, 2,500 bales Manilla hemp, per Robinson, at four pounds per bale if freight eight shillings, or reduced advance if freight higher." On the following day the plaintiff delivered to the defendants a letter of credit in favor of Vogel & Co., which was addressed to the plaintiff's agents in London, and which authorized Vogel & Co. to draw "against goods shipped per Robinson, * * * at six months' sight, for any sum or sums, not exceeding 10,000 pounds sterling, to be used as they may direct, for invoice cost of 2,500 bales of Manilla hemp, * * * to be purchased for account of Recknagel & Co., of New York, or whom it may concern, and to be shipped to New York. The bills must be drawn in Hong Kong, or in some port in —, prior to the 1st day of June, 1882, and advice given to you in original and duplicate; such advice to be accompanied by bill of lading, filled up to order of agents of the Bank of Montreal, New York, with abstract of invoice indorsed thereon, for the property shipped as above. All the bills of lading issued, except the one mailed to us and the one retained by the captain of the vessel carrying the cargo, are to be forwarded direct to you. The original invoice, properly certified, to be also forwarded to us." On the margin was written: "This credit opened by cable direct, 1st December, 1881." Upon the receipt of this letter of credit, the defendants, the same day, executed an agreement consenting to its terms, obligating themselves "to provide for all bills which shall be drawn and accepted under the same," etc., and providing as to security for the payment of their indebtedness. On December 14th and 19th, the London agents were advised by cable, and by mail, of the telegraphic credit extended to Vogel & Co. Between December 3 and 13, 1881, Vogel & Co. drew three drafts on the plaintiff's London agents; all of the same being of like form to the following, which was the first one drawn, and differing only in dates and figures: "No. 13, 8248. EXCHANGE FOR 2,400 POUNDS. HONG KONG, 3d December, 1881. At six months after sight of this first exchange, (second and copy unpaid,) pay to the order of ourselves two thousand four hundred pounds sterling, value received, and place the same to account against s-m., 600 bales hemp, p. 'R. Robinson,' under tel. cr. 608. 10,000 pounds. Dated New York, 1st December, 1881. VOGEL & Co. To the Bank of Montreal, London." The three drafts amounted, in the aggregate, to £8,080. The other two drafts were against 500 and 920 "bales of hemp," respectively. To each draft was attached a bill of lading for "bales of merchandise," "weight and contents unknown;" and there was indorsed by Vogel & Co. upon each bill of lading, after it had been signed by the captain, but without his knowledge or consent, an abstract of invoice for "bales of Manilla hemp." The draft was accompanied by a letter of advice, describing the shipment as "bales of hemp." These drafts were drawn under the telegraphic credit, and had been accepted by plaintiff's London agents before Vogel & Co. had received the letter of credit mailed by defendants to them. The drafts were paid at maturity. Upon arrival of the ship Robinson in New York, it was discovered that there were only 500 bales of Manilla hemp on board, and the remaining 1,520 "bales of merchandise" were composed of rolls of matting. Vogel & Co. were bankrupt, and had absconded. The plaintiff seeks to recover of the defendants for the amount of its acceptance of drafts of Vogel & Co. It had judgment, upon the defendants' offer, for the amount of the draft, which was accompanied with the bill of lading for the bales which actually were Manilla hemp; but, as to the other drafts, it was held below that it could not recover, as they were not accompanied with bills of lading and invoice for Manilla hemp, and because the bales identified by the bills of lading were not Manilla hemp. From the judgment of the general term, affirming the judgment at special term, the plaintiff appeals to this court.

Geo. De Forest Lord, for appellant. *Chas. M. Da Costa*, for respondents.

GRAY, J., (*after stating the facts as above.*) If Vogel & Co., in drawing upon plaintiff's London agents, complied with the terms and conditions of the cable credit, then the defendants are liable to the plaintiff; for that credit was extended in pursuance of the terms of their request. But if Vogel & Co., in any material matter, failed to comply with those terms and conditions, the plaintiff's London agents accepted the drafts at their peril, and defendants could not be held liable, unless these were in fact consignments of Manilla hemp, or unless, by the provisions of the letter of credit and the defendants' agreement respecting the same, the terms of the preceding request and of the cable credit were modified or changed in such wise as to allow of drafts by Vogel & Co., without such restrictions or conditions. The defendants' request was to "telegraph authority to Vogel & Co. to draw at 6 months for our account, against consular invoice, and full set bills of lading of 2,500 bales Manilla hemp, per Robinson, at 4 pounds per bale," etc.; and the telegram to Vogel & Co. was: "Credit 608, six months, issued Recknagel 10,000 pounds, documents, 2,500 bales Manilla hemp, per Robinson, at 4 pounds per bale," etc. There is no doubt that both bankers and shippers plainly understood the word "documents," used in the telegraphic credit, as calling for consular invoices and bills of lading; for the former cabled on the basis of the defendants' written request to that effect, and the latter sent forward their drafts accompanied by such documents. The difficulty has arisen from the failure to specify in the bills of lading the kind of merchandise which the defendants had authorized the plaintiff to accept against for them, and in the acceptance of drafts which were not against shipments of that kind of merchandise at all. We do not see that the letter of credit, and the agreement to provide for acceptance and to indemnify, alter the conditions imposed by the cable credit, or change the relative obligations of the parties. The letter of credit authorized Vogel & Co. to draw on plaintiff's London agents, "against goods shipped per Robinson, for 10,000 pounds," to be used for invoice cost of 2,500 bales of Manilla hemp, at 4 pounds per bale, filled up in a bill of lading, etc. It required the advice of the bills drawn "to be accompanied by bill of lading, * * * with abstract of invoice indorsed thereon for the property shipped as above." The agreement of indemnity was to provide for bills "drawn and accepted" under the letter of credit.

Letters of credit are governed by the same general legal principles as are all contracts. In *Orr v. Bank*, 1 Macq. H. L. Cas. 518, Lord BROUGHAM said of them: "I am inclined to think that there is no very great novelty or peculiarity in letters of credit to take them out of the general law applicable to mandates. I am not aware that there is anything in the mercantile law, or the custom of merchants, to distinguish letters of credit from any other authority to pay money." In this case the peculiarity of the credit extended by the plaintiff to Vogel & Co., at the defendants' request, is that, besides being special, in that it was addressed to a particular banking agency, was confined to it, and gave no other party a right to act upon it, it restricted the drafts drawn under it to a particular purpose, which should be vouched for in a certain manner to authorize acceptance and payment. Under the agreements effected between the plaintiff and the defendants for the extension of the credit to Vogel & Co., the defendants only became liable to plaintiff to provide for drafts accepted by its London agents within the precise terms upon which the credit was opened. The credit was authorized upon certain conditions prescribed by the parties to be ultimately bound, which they not only had the right to make, but which were assented to by the plaintiff. It is difficult to see how parties could more particularly define the terms of their engagements than was done in this case. By the proper construction of the agreement between them, the plaintiff was not bound to accept any drafts

unless they were against Manilla hemp shipped by Vogel & Co. to defendants by the ship Robinson, vouched for as to each of those facts, and the stipulated costs, etc., by documents consisting of a letter of advice and a bill of lading; and the defendants were not bound to provide for or take up any other kind of drafts. Each party was held to either accept or to provide for drafts, as the case might be, if they were accompanied by those mercantile documents evidencing the consignment of Manilla hemp in the particular manner, and at the rates of cost and freight, specified. In making their arrangements with the plaintiff, the defendants had the right to surround themselves, as to their advances through the plaintiff's agency, with all the safeguards which the nature of the case admitted. The effect of their stipulating in respect of acceptances by plaintiff of Vogel & Co.'s drafts was to protect themselves, as far as was possible, against any unauthorized acts of Vogel & Co. Every lawful provision or condition in the contracts of parties should control, and should not be disregarded in the determination of their rights, if it can be deemed to have entered into the contract with any definite or perceptible purpose. In interpreting their agreements, and in determining the respective obligations based upon their writings, courts should look at the surrounding circumstances, the situation and relations of the parties, and the subject-matter of their negotiations. In that way, the intention, where there is any uncertainty, is better given effect, and their undertaking is more certain to receive a reasonable and fair interpretation. But, when the agreement is determined into which the parties have entered, it is but just and fair that they should be held strictly to it, and all their stipulations we should assume to have been made for a purpose, and to have been considered important by them, and therefore cannot be dispensed with. *Hill v. Blake*, 97 N. Y. 216. In *Bank v. Taaks*, 101 N. Y. 442, 5 N. E. Rep. 76, ANDREWS, J., speaking of the effect of a letter of the defendants, undertaking to accept the drafts of certain parties, said, (page 449:) "Assuming that it was a general letter of credit, * * * it nevertheless amounted simply to a contract on the part of Taaks & Lichtenstein to pay advances made in conformity therewith. They had a right to stand upon the very terms of their contract, and they were not bound unless the condition upon which their obligation depended was fulfilled." In *Bank v. Griswold*, 72 N. Y. 472, CHURCH, C. J., said, (page 479:) "It is doubtless true that when the right to draw is limited in amount, or is dependent upon the condition of the performance of some act, or that certain facts exist, it must appear that the draft was within the limit, or that the act constituting the condition has been performed, or the facts exist."

Whether a provision shall have the effect of a condition absolute in its nature is often a question of much difficulty. It should be obvious from a reading of the writings of the parties that it was the understanding of the parties it should have that effect. It was said by Chief Justice TINDAL in *Glaholm v. Hays*, 2 Man. & G. 266, that the decision of the question must "depend upon the intention of the parties, to be collected, in each particular case, from the terms of the agreement itself, and from the subject-matter to which it relates. I do not think it depends upon the arrangement of the words in the writings, but on the reason and sense of the thing, as it can be collected from whatever constitutes the agreement sought to be enforced. That which is a condition must be some provision which cannot be severed from the agreement, and leave it, within a fair interpretation, as their contract." Applying these rules here, we find, in the transactions between these parties, a certain purpose or object which the defendants sought to attain, and which the plaintiff undertook to carry into effect. That purpose seems plain enough. It was to advance moneys to obtain a consignment of a certain article of merchandise known as "Manilla Hemp," and to secure, so far as possible, that the advance should be made upon that particular article, and upon no other.

When the authority to accept a draft for which another is to be bound, depends upon conditions reasonable in their nature, and readily capable of being ascertained or performed, it seems but just that the existence or performance of such conditions should be shown in order to enforce the obligation of the party. In this case the defendants' promise to indemnify the plaintiff was coupled with a condition which I think was material and important. It was an integral part of the agreement of the parties that the bills of lading should contain a statement that Manilla hemp was shipped. The defendants had agreed to advance against specific consignments of that article of hemp; such consignments to be evidenced to the acceptors by bills of lading in form for such a shipment. The words "for our account," in the defendants' request, refer to the drafts, and not to the purchase. The purpose of making the advance was not only specified, but the authority to accept was limited to the event of the fulfillment of that purpose being evidenced in a certain way. The plaintiff's agent, in accepting against a shipment of merchandise in general, or against hemp generally, departed from an important condition of the credit and of the agreement. They accepted and paid drafts which, on their face, purported to be drawn against "bales of hemp," and were accompanied by bills of lading, filled up for "bales of merchandise," "weight and contents unknown," and by letters of advice for "bales of hemp." No mention is made in those documents, which were the warrants for the acceptance of drafts, of the kind of hemp or merchandise. The indorsement of an abstract of the invoice was made by Vogel & Co., the shippers, and amounted merely to their own representation. This fact appellants concede, and also that the indorsement was made after the captain had signed and delivered the bills of lading, and without his knowledge and consent. The general expression, in the drafts and bills of lading, of "hemp" or "merchandise," in no respect met the requirements of the credit. They include the article which defendants agreed to advance against, as the greater always does the less. But that was not enough; the article itself was not stated which was the subject of the arrangements entered into in providing for a financial credit. It is quite obvious that, had plaintiff's agents followed the instructions of the cable credit, no loss could have happened, and Vogel & Co. would not have been enabled to carry out their fraudulent scheme. It cannot be pretended that Vogel & Co. exercised any authority, under the cable credit, to draw upon plaintiff; for the authority therein contained was predicated upon the drafts being accompanied by full sets of bills of lading of 2,500 bales of Manilla hemp, and other documents evidencing such a shipment. In *Woods v. Thiedemann*, 1 Hurl. & C. 478, cited by the appellants, the bill of lading accompanying the draft was a forgery. It was held that the acceptors need only look to the bills of lading, and that they did not take the risk of their genuineness. That, at most, would only be authority for the proposition that if Vogel & Co. had forged bills of lading, as called for in the telegraphic credit, defendants would be bound as between themselves and the plaintiff. The case of *Bank v. Griswold*, 72 N. Y. 472, was unlike the present one. There the defendant had empowered his agent to draw upon him for the purchase of lumber. The writing which he gave to that effect was in the nature of an instruction to the agent, and parties were warranted in relying upon the agent's representations that his drafts were in the course of his principal's business. But in the present case the defendants' agreement was simply to provide for all the acceptances, by the plaintiff, of drafts of a certain description, accompanied by vouchers evidencing the application of the drafts to a specified purpose. There was no arrangement for the advance, through the plaintiff, of moneys to Vogel & Co. to buy hemp generally, or any merchandise, in Vogel & Co.'s discretion, as agents of defendants.

The principle is urged by the appellants that all commercial instruments are to be liberally interpreted, so as to protect persons who give credit on the

faith of them. *Lawrence v. McCalmont*, 2 How. 449; *Gates v. McKee*, 13 N. Y. 235; *Bank v. Myles*, 73 N. Y. 341. But that principle only applies where the provisions of an agreement are ambiguous, loose, or susceptible of more than one fair interpretation, and we do not think that is the case here. We do not see the force in the argument that no other bill of lading could be demanded than was given here. The master of a ship is the general agent of the owners to perform all things relating to the usual employment of his ship, and, among other things, to sign bills of lading for goods put on board, and acknowledge the nature, quality, and condition of the goods. 1 Pars. Cont. (5th Ed.) 45. That was possible to be done in this case; for a bale of Manilla hemp is not covered, as the trial court found on the evidence, and the shipper might have procured a bill of lading which would have indicated the kind of hemp put on board the ship. But, whether the master could be compelled or not to identify, in the bill of lading, the merchandise shipped as Manilla hemp, that fact cannot control the disposition of this case. The agreement of the parties called for a particular statement in the bill of lading to accompany the drafts; and that statement, or the existence of facts which would have authorized it, is a condition precedent to defendants' responsibility to respond to plaintiff's demand. To further consider the elaborate argument of the able counsel for the appellants is unnecessary. The views I have expressed, lead to an affirmance of the judgment appealed from.

All concur.

(109 N. Y. 576)

PEOPLE *ex rel.* WARREN *et al.* v. CARTER *et al.*¹

(Court of Appeals of New York. June 5, 1888.)

TAXATION—ERRONEOUS ASSESSMENT—BURDEN OF PROOF.

Under Laws N. Y. 1880, c. 269, which authorizes a review on *certiorari* of assessments in respect to illegality, overvaluation, and inequality of valuation, at the instance of any person or corporation aggrieved by an assessment in any of the respects mentioned, in order to be entitled to a reduction on the ground of inequality, it does not suffice that the claimant show that, in a particular instance, property on the same roll, and in immediate proximity to his, is assessed at a lower valuation; he must prove that he is subjected to the payment of more than his just proportion of the aggregate tax.

Appeal from general term, supreme court, Third department.

This is an appeal from the order of the general term of the third department, affirming an order of the special term reducing assessments on the real property of the relators, made in *certiorari* proceedings under chapter 269, Laws 1880. The relators were assessed for the year 1886 in the city of Troy, upon three parcels of land,—one parcel, known as "River View," containing 30 acres, which was assessed at \$60,500; lot 194, on the west side of Third street, on which were two houses, numbered 47 and 49, assessed at \$29,000; and a third parcel, containing 10 acres, which was assessed at \$12,000, but which latter assessment is not now in controversy. The relators, within 15 days after the completion of the assessment roll, and its delivery to the comptroller, procured a writ of *certiorari* to be issued under the act of 1880, directed to the assessors of the city and to the comptroller, upon a petition alleging, in substance, that the said several assessments were erroneous by reason of overvaluation and inequality. In support of the allegation of inequality, the petition sets forth that the lands of the relator were no more valuable than lands in close proximity thereto, while the assessment thereof was largely in excess of the assessment of such other lands. The allegation of overvaluation or inequality set forth in the petition, and incorporated in the writ issued thereunder, were fully denied in the return made to the writ; and the court, on the matter coming before it, appointed a referee to take the proofs, and, on the coming in of his report, the court decided that the assessment of the

¹Modifying 46 Hun, 444.

"River View" property was erroneous for overvaluation in the sum of \$20,500, and reduced the amount from \$60,500 to \$40,000. The court also decided that the assessment of "lot 194, and houses 47 and 49, west side Third street," assessed at \$29,000, was unequal, "in that it had been made at a higher proportionate valuation than other real property on the same roll in immediate proximity thereto," and that the assessment on lot 194 should be reduced \$3,900, to make it proportionately equal to the assessment on the lots immediately adjoining. There was proof to sustain the finding of overvaluation in respect to the "River View" property. The only evidence to sustain the finding of inequality in the assessment of lot 194 was that the assessment of lot 193, adjoining, was relatively lower than the assessment on lot 194, and the court found that the inequality amounted to the sum of \$3,900. The defendants appeal from the order of the general term affirming the order of the special term.

R. A. Parmenter, for appellants. *Geo. B. Wellington*, for appellees.

ANDREWS, J., (*after stating the facts as above.*) All real and personal estate in this state, not specially exempted, is by law liable to taxation upon an assessment at its full value. The tax laws proceed upon the theory that all property protected by law should bear its equal share of the burden of taxation, and the statutory system, if exactly administered according to the letter of the statutes, would result in perfect equality of benefit and burden, and none would have any just ground of complaint. But no system of taxation has as yet been devised which is capable of complete and perfect administration. The ascertainment and valuation of property liable to taxation is, under our system, committed to a board of assessors. In discharging their functions, mistakes or errors are liable to be committed which prevent a perfect execution of the system of assessment. It is known that a large amount of personal property escapes taxation, either from the negligence of assessors, or because its existence cannot be ascertained. So, also, property may be listed which is not liable to assessment, or the assessors, from mistake, inadvertence, or misjudgment, may place an erroneous valuation on property, either more or less than its actual value, thereby producing inequality of taxation. The act of 1880 deals with the subject of assessments in these aspects, viz., in respect to illegality, overvaluation, and inequality of valuation, and authorizes a review *certiorari* at the instance of any person or corporation assessed who claims to have been aggrieved by an assessment in either of the respects mentioned. The remedy afforded by the act, where the assessment is illegal, or where there is an overvaluation, is simple, practicable, and complete. The question whether the assessment complained of is illegal presents purely a question of law on facts appearing on the assessment roll, or which may be readily ascertained by evidence. The question of overvaluation is in its nature simple, and free from complexity, and is solved, as is every other fact submitted to a court for determination in case of conflict, by the weight and preponderance of evidence.

The clause in the act of 1880 which gives a remedy where the valuation "is unequal, in that the assessment has been made at a higher proportionate valuation than other real and personal property on the same roll by the same officers," presents a question of much greater difficulty. It is claimed on the part of the relators that, by the true construction of this clause, it is sufficient to entitle a property owner to a reduction of his assessment that some other property of the same description, real or personal, is valued on the same roll at a less proportionate value than his own. This being established, it is claimed that the party claiming the benefit of the statute is entitled to a reduction of the valuation of his property to correspond with the valuation fixed by the assessors on the property having such lower proportionate valuation. We concur with Judge PARKER in his dissenting opinion below upon

this point. The obvious result of the construction claimed by the relators, if adopted, would be, as is pointed out by Judge PARKER, that every property owner whose property is assessed could demand that the assessment of his property should be reduced to a valuation proportionate to the lowest valuation of any similar property on the assessment roll, situate anywhere in the town or assessment district, although his own property was not assessed beyond its actual value, and although it was not made to appear that, by reason of the undervaluation of the particular property with which it was compared, the claimant would be compelled to pay more than his due share of the aggregate tax. In the nature of things, it is impossible that all valuations should represent the precise actual value of the property valued. If a particular piece of property on an assessment roll is undervalued, another may be correspondingly overvalued. Where there is no overvaluation of his own property, it does not follow that the tax-payer will be injured by an undervaluation of some piece of property belonging to another. If all the valuations on the assessment roll other than that of the party complaining were proportionately equal, and also proportionately lower than the valuation of his property, injury to the claimant might perhaps be a just inference. But an undervaluation of one piece of property may be counterbalanced by overvaluation of another piece. At all events, the mere fact that the claimant can show that his land is assessed proportionately higher than a certain other piece on the same roll does not alone show that he is aggrieved, or that he will be compelled to pay more than his just share of the aggregate tax. By the terms of the act of 1880, it must be made to appear that the party seeking the remedy afforded thereby, "is, or will be, injured by the alleged illegal, erroneous, or unequal assessment" of which he complains. The adoption of the construction of the act of 1880, contended for by the relator, would greatly embarrass the collection of taxes, and lead to burdensome litigation, while at the same time it would award relief in many, and probably in most, cases where no real right was infringed, nor an actual injury suffered. Those property owners who were alert and prompt to avail themselves of the act would succeed in shifting a part of the burden of taxation from their own shoulders, and casting it upon those less vigilant and active. Where the assessors in a particular case depart from a general rule or ratio of assessment which they have adopted, to the injury of the tax-payer in the particular case, the statute affords a remedy. Without undertaking to define the precise scope of the remedy for disproportionate valuations of property, given by the act of 1880, we think it may be safely said that the petitioner presents a state of facts from which a presumption justly arises that the inequality of which he complains will subject him to the payment of more than his just proportion of the aggregate tax, and that this presumption is not raised by proof that in a particular instance property is assessed at a proportionately lower valuation than his own. Nor does it, we think, make any difference that the assessments compared were of contiguous property. The object of the statute was to afford a remedy to a party injured by unequal valuations, not to enable him, on mere proof of a mistake or misjudgment of the assessors as to the relative valuation of his property and that of another, to have his assessment reduced, although his own property was not overvalued, and it does not appear, taking into view the aggregate assessment and valuation of the taxable property on the roll, that he will be compelled to pay more than his just share of the tax. The conclusion of the court below, that there was an overvaluation of the property known as "River View," is supported by evidence, and is not reviewable in this court. *People v. Hicks*, 105 N. Y. 198, 200, 11 N. E. Rep. 653. The order, so far as it relates to that property, should be affirmed. That part of the order relating to the assessment on lot 194 West Third street should be reversed. The court did not sustain the claim of overvaluation in respect to that lot, but reduced the assessment on the ground of disproportion.

tionate valuation as between lot 194 and lot 193. This ground, as we have held, is untenable. The order of the general term should be affirmed as to "River View" property, and the order of the special and general terms as to the assessment on lot 194 should be reversed.

All concur.

(103 N. Y. 593)

BELTON v. HATCH.¹

(Court of Appeals of New York. June 5, 1883.)

ASSOCIATIONS—STOCK EXCHANGES—FORFEITURE OF SEAT—DISTRIBUTION OF PROCEEDS.

Where the constitution of a stock exchange, under which each member binds himself in respect to the manner of his transaction of business, and of his right to continue in membership, provides that, when one has lost his membership or seat, the proceeds of the sale of such seat may, by force of constitutional provision, be appropriated to his creditors in the exchange, or to any of the corporate objects of the association, a member who, by offending against the laws of the exchange, may have forfeited his seat, has no further interest or title in it or its proceeds; and, the privileges of membership having only been conferred upon him on condition that all the rights should revert to the exchange on the happening of certain events, he, having assented to the rules of the association, cannot be heard to complain of them as being against public policy, nor can his assignee.

Samuel R. Taylor, for appellant. *James C. Carter*, for appellee.

GRAY, J. Plaintiff, as the assignee of one Des Marets, formerly a member of the New York Stock Exchange, sues to recover the proceeds received by that organization from the sale of the membership, or, as it is sometimes technically termed, the seat of said Des Marets. It is alleged by plaintiff in his complaint that Des Marets, for many years a member of the New York Stock Exchange, in October, 1883, became insolvent, and, under the laws governing that body, was suspended; that subsequently its governing committee determined that the failure was caused by doing business in a reckless and unbusiness-like manner, and resolved that Des Marets was ineligible for readmission, and, in December following the failure, the stock exchange, pursuant to its constitution and by-laws, disposed of his membership and seat for the sum of \$25,000; which sum it retained and refused to pay over to plaintiff, who demanded it as Des Marets' assignee. The complaint also alleges that the New York Stock Exchange is an unincorporated association, organized and located in New York city; that its members have voluntarily established certain rules, conditions, and articles of association, or copartnership, which are designated as their constitution and by-laws, which are signed and consented to by the members, and which govern them, their officers and committees, and which control in the conduct of the transactions and concerns of the association, and are binding and obligatory upon the members. The answer of the defendant, after admitting the allegations of the complaint which I have mentioned, sets forth much of the constitution and by-laws of the exchange, and alleges the distribution of the proceeds of the sale of Des Marets' membership to have been made among his creditors in the exchange pursuant to their provisions. The plaintiff demurred to this portion of the answer, on the ground that it was insufficient in law upon its face. Although this matter was not stated as a separate defense, *totidem verbis*, yet, as it was affirmative in its nature and constituted the defense and justification of the association in disposing of Des Marets' membership, and in retaining the proceeds arising from such disposition, we shall not consider the demurrer as improperly interposed, and will dispose of the questions raised by these pleadings. Their decision involves the legal relations to each other of the members composing the association of the New York Stock Exchange, and the extent and validity of the powers reserved by its constitution and by-laws, and conferred upon its officers and committees, in the management of its

¹ Affirming 36 Hun, 644, *mem.*

affairs, and in the control over a member. The New York Stock Exchange is a voluntary association of individuals, united, without a charter, in an organization for the purpose of affording to the members thereof certain facilities for the transaction of their business as brokers in stocks and securities, and a convenient exchange or sales-room for the conduct of such transactions. It cannot be said to be strictly a copartnership, for its objects do not come within the definition of one. A copartnership results from a contract between the parties, by which they agree to combine their property, or labor, or both, in some common enterprise and for a common profit, to be shared in the proportion stated in their agreement. The objects of a voluntary association of brokers do not, however, involve any such combination, or any communion of profits from the business transacted by the members. Like a business club, its principal object is the promotion of the convenience of its members, by furnishing facilities which aid them in doing their business, and are therefore of benefit to them. It may be said, however, that the rights of the associates are not substantially different from those of partners, so far as their rights in the property of the association are concerned. The interest of each member in the property of the association is equal, but it is subject to the constitution and by-laws, which are the basis on which is founded the association. They express the contract by which each member has consented to be bound, and which measures his duties, rights, and privileges as such. It seems most clear to me that this constitution and the by-laws derive a binding force from the fact that they are signed by all the members, and that they are conclusive upon each of them in respect of the regulations of the mode of transaction of his business, and of his right to continue to be a member. Whatever are the rights acquired by a member, and created by his admission to membership, the rules by which the membership is created or dissolved, and which control the affairs of the organization, and the relations of members, entered into those rights when created, and remained a part of them. In this proposition there is nothing against public policy, for the reason that whatever a member acquires is subject to the self-imposed condition that his title and the rights which accrue from his membership are regulated by and dependent upon the laws adopted by the association, and expressly consented to by him when he joined. When Des Marets, plaintiff's assignor, joined the exchange, it may be perfectly true that he acquired property; but it was property given by the act of those who, in giving it, accompanied the gift with conditions which were incident to and a part of the property, and it was in no sense property created by the individual's act. I consider that there is an obvious distinction between property of the individual's own creation, to which he attaches conditions, or in the disposal of which he exerts a direction whereby the claim of others are affected, and property which comes to him subject to conditions which may deprive him of its use or enjoyment. And so here, if the constitution which forms the basis of this association appropriates to his creditors in the association, or to any of its corporate objects, the peculiar property of the member, who, by force of constitutional provisions, has lost his membership, that was an incident entering into his title to it. When membership and the rights belonging to that *status* were conferred upon him, the gift was accompanied by a condition that the rights, of whatever nature, should revert to the association upon the happening of certain events; and he cannot be heard to complain, nor can third persons, claiming to derive under him. He should be held to his contract, which was reasonable, and, when entered into, prejudiced no rights of others, or conflicted with any statutory or common-law right. A person acquires by his admission to membership only such rights as the constitution and by-laws of the association give him, and, upon ceasing to be a member, by the competent judgment of the governing committee, he ceases to have any further concern or interest in the association, except it is given by its laws. The

New York Stock Exchange, by the accumulation of a great fund from a large membership, by the wise and successful management of the members, and by the acquisition of valuable facilities for the transaction of business, has given to membership an important pecuniary value. It is fair to presume that this prosperity and success were, in an important degree, due to the regulations adopted looking to the conduct by a member of his business, and the restraints imposed upon reckless or dishonest methods. Membership may be property, but it is not property in every sense. If it is property, it is incumbered with conditions, when purchased, without which it could not be obtained. *Hyde v. Woods*, 94 U.S. 523. By the constitution of this association the powers of government are vested in a governing committee, whose decision, after the trial of a member for offenses under its laws, is final. Standing committees are appointed by them, and that on insolvencies is charged with the duty of immediately investigating every case of insolvency, and to report whether the same was occasioned by reckless dealing, or by doing business for improper parties. Should the governing committee, upon this report, determine that a member's failure was caused by doing business in a reckless and unbusiness-like manner, he may be declared ineligible for readmission by a majority vote of the entire governing committee. By section 2 of article 13 of the constitution it is provided that, "in every case where a member is deprived of his membership, or declared ineligible for readmission by the governing committee by reason of any offense against or under the laws of the exchange, his membership may be disposed of forthwith by the committee on admissions." The plaintiff appellant contends that, in such a case as this of *Des Marets'* severance from membership, there was no power under the constitution to distribute the proceeds arising from the sale of his membership, and that, in the absence of some express reservation of the right to dispose of those proceeds, they are the property of the member. The vice in plaintiff's argument is in the assumption that a member has any absolute property of his own in such a case. As we have before seen, the rules of the association were an incident to the rights acquired by a person upon admission; and one of those rules was that, for conviction of an offense against or under the laws of the exchange, a suspended member might be deprived of right to readmission to membership. When expelled, he ceases to have any interest in the association. His privilege to transact his business at that place has been lost. The association may fill the vacancy caused by his expulsion or not, as they please. They cannot be compelled to do so; but if they elect to admit a new member, and can derive from so doing any profit, that is their unquestionable right, with the exercise of which others are not concerned. They may do with their own as they like. As I construe section 2 of article 13, above cited, its effect is that of an express reservation of the right to deprive a member, found guilty of an offense under its provisions, of all rights, interest, and claim whatever. The right is given to a member in good standing to propose for admission in his stead some one acceptable to the committee on admissions, and any profit he derives from his negotiations with the candidate is his. So if a member becomes honestly insolvent, and fails to qualify under the rules for readmission, or if he dies after the claims of the association are discharged, the proceeds may be paid to him or his legal representatives, as the case may be. But in the case of a member who, by misconduct cognizable by the laws of the association, forfeits his right to continue to remain a member, there is reserved by the constitution the right to dispose of his membership. These rules are reasonable, and do not contravene any rule of public policy, and, having been consented to by the plaintiff's assignor, deprived him of any interest or rights in the association, of which he had ceased to be a member. These views lead to an affirmance of the judgment appealed from.

All concur.

(100 N. Y. 600)

MEYER v. BLAIR *et al.*¹

(Court of Appeals of New York. June 5, 1883.)

CORPORATIONS—STOCK—SUBSCRIPTION—CONTRACT TO PURCHASE—FRAUD.

Where a company issues a prospectus reciting that certain of the principal stockholders have deposited a number of shares of stock with a trustee, the proceeds of which, except \$50,000, were to be used as working capital, and that a portion of said shares have been ordered to be sold for that purpose, and to pay a prior lien, and the subscription paper attached stipulates that the subscriptions for said stock shall not be binding until the whole number of shares are "reliably subscribed," an agreement by some of said principal stockholders that, if plaintiff will subscribe for said stock, they will, if he wishes, buy it from him, after a year, at the cost price, is no fraud on the co-subscribers; plaintiff's subscription being rendered no less "reliable" within the meaning of the subscription paper, and enforceable between the parties.

Appeal from general term, supreme court, First department.

Action on contract, by Christopher Meyer against Thomas S. Blair and Thomas Struthers. Judgment for defendants; and plaintiff appealed to the general term, supreme court, where the judgment was affirmed on the opinion of LAWRENCE, J., in the court below; from which order, and judgment entered thereon, plaintiff appeals.

Wm. H. Williams, for appellant. *Eliz F. Hall*, for respondents.

ANDREWS, J. The defense set up by the defendants to escape from the plain obligation assumed by them under the agreement of April 4, 1878, is founded upon no equity in their favor; and, if allowed to prevail, will defeat a contract which on its face was perfectly legal and valid, and one which the parties had a right to make. Nor is it claimed that the contract is void for fraud, mistake, or want of consideration as between the parties. The defendants fully understood the contract into which they entered. They in fact tendered it to the plaintiff as an inducement to him to become a subscriber to the stock of the Blair Iron & Steel Company; and as between the parties, and considering their relations only, there can be no doubt that the plaintiff is entitled to enforce it. But the defendants assert that, by reason of extrinsic facts, the contract was tainted with illegality; and they invoke for their defense the settled principle of public policy, frequently acted upon and applied, that "no court will lend its aid to a man who founds his cause of action upon a fraudulent or illegal act." Lord MANSFIELD, in *Holman v. Johnson*, Cowp. 348. The contract in form is a contract by the defendants to buy from the plaintiff, within one year from the date of the contract, certain shares of stock purchased by him of the Blair Iron & Steel Company, in case the plaintiff shall desire to sell the same, and to pay therefor the price paid by the plaintiff on his purchase of the same stock from the company. The supposed vice of the contract resides in the fact that the plaintiff, at the request of the defendants, the principal promoters of the company and the owners of most of the shares, concurrently with the making of the contract in question, became one of several subscribers for 6,000 shares of the Blair Iron & Steel Company, owned by the company, and which it offered for sale under the terms of a prospectus and subscription which are set forth at large in the case. In substance, the claim is that the agreement of the plaintiff with the defendant operated as a fraud on the other subscribers to the stock, because his capital was not put at risk during the year in which he could exercise the option given by the contract, and that this was a secret advantage, the securing of which was inconsistent with good faith on the part of the plaintiff towards the other subscribers. The prospectus, which accompanied the subscription, set forth, in substance, that 9,000 shares of the stock had been placed by the defendants and one Foster in the hands of a trustee for the

¹Reversing 40 Hun, 631, *mem.*

company, the proceeds of which, except \$50,000, were to be "used as working capital," and that the trustees had ordered the sale of 6,000 shares for that purpose, and to pay the prior lien of \$50,000, at the minimum price of \$50 per share, payable one-third as soon as the whole was subscribed for, and the balance as called for by the trustees; the certificates to be delivered when the whole subscription should be paid. The subscription, which was appended to the prospectus, was as follows: "We, the undersigned, hereby subscribe to the number of shares of the above six thousand shares set opposite to our names, respectively, to be paid for according to the terms above set forth; but this subscription not to be binding until the whole six thousand shares shall have been reliably subscribed." Sixteen or more persons and firms severally subscribed for shares aggregating the whole number, or 6,000 shares, of whom the plaintiff was the sixth subscriber, he subscribing for 600 shares. We are unable to concur in the conclusion reached in the courts below, that the contract in question was fraudulent as to co-subscribers with the plaintiff for the 6,000 shares sold by the company, or that it was in violation of any express or implied obligation existing between them. The cases mainly relied upon to support the claim that the contract was illegal and fraudulent are of two classes: cases of stock subscriptions to the stock of corporations, accompanied by a secret agreement between the company and the subscriber that the latter should not be bound by his subscription, or changing, in some other respect, its ostensible terms; and cases of composition between a debtor and his creditors, where a creditor, joining in the composition by a secret arrangement with the debtor, secures an advantage over other creditors, in violation of the understanding implied in all cases of compositions that the settlement with the creditors joining in the composition proceeds exclusively upon the terms of the common agreement. In both classes of cases mentioned, the collateral agreement is held to be void. In the first, the courts hold the subscriber to the ostensible contract, and permit it to be enforced in an action by the company, as the only means of preventing the consummation of the fraudulent scheme, and protecting the other subscriber. *Railroad Co. v. Eastman*, 34 N. H. 124. In the other class, the court refuses to enforce the secret bargain, and confines the creditor, who is a party to the fraud, to a remedy to recover the sum which, by the terms of the composition, he agreed to accept. *White v. Kuntz*, 107 N. Y. 518, 14 N. E. Rep. 423. The case of *Railroad Co. v. Eastman*, *supra*, is a leading case, illustrating the class of cases first mentioned. The doctrine that an agreement between one subscriber to the stock of a corporation and the company, made concurrently with the making of the subscription, which purports to annul its obligation, or materially limit and change the liability of the subscriber, to the detriment of the company, is invalid and void, is founded upon the construction that a subscription to the stock of a corporation whose stock is open for general subscription is not only an undertaking between each subscriber and the company, but between him and all other subscribers to the common enterprise, and that each subscriber has the right to suppose that the subscription of every other subscriber is a *bona fide* undertaking according to its terms. "Their respective subscriptions," say the court in the case of *Railroad Co. v. Eastman*, "are contributions or advances for a common object. The action of each in his subscription may be supposed to be influenced by that of the others, and every subscription to be based on the ground that the others are what upon their face they purport to be." See, also, *Graff v. Railroad Co.*, 31 Pa. St. 489; *Miller v. Railroad Co.*, 87 Pa. St. 95; *Melvin v. Insurance Co.*, 80 Ill. 446. The illegality of secret agreements in case of composition between debtor and creditor has been established by a uniform course of decision, upon the plainest principles of morality and justice. A composition agreement, still more than a stock subscription, is an agreement as well between the creditors themselves as between the

debtor and his creditors. Secret agreements in fraud of the composition are usually extorted by the creditor as a consideration of his entering into the composition. They are a direct fraud upon the other creditors. They contradict the representation which the composition imports, that the compromise is accepted by each creditor in full satisfaction of his debt. Moreover, where the composition provides for giving credit to the debtor for the amount to be paid on the composition, such secret agreements take or may take from him the very means to meet the composition engagements. It is unnecessary to cite authorities to sustain a doctrine so well settled. We refer to some cases showing that the courts in these transactions exact the most scrupulous good faith from all parties. *Russell v. Rogers*, 10 Wend. 474; *Solinger v. Earle*, 82 N. Y. 398; *Knight v. Hunt*, 5 Bing. 432; *Leicester v. Rose*, 4 East, 372.

The present case is not, we think, within the principle of the stock subscription cases and the cases of composition, to which reference has been made. The main object of the company in offering the stock for sale was to secure "working capital," as is shown by the prospectus. This object was known to the subscribers. If the subscription of the plaintiff was a pretense merely, or if the subscription had been accompanied by a secret agreement between the plaintiff and the company that he should be relieved from the subscription, or by which the terms of the purchase were materially changed to the disadvantage of the company, and for the advantage of the plaintiff, there might be ground for applying the rule declared in the subscription cases, and declaring the transaction to be a fraud on the other subscribers. By the terms of the subscription the subscribers were not to be bound unless the whole 6,000 shares were "reliably subscribed;" and a subscription not available to the company by reason of a secret agreement accompanying it would not be a reliable subscription within the meaning of the condition. But there was no agreement between the company and the plaintiff, secret or otherwise, direct or indirect, except the agreement contained on the face of his subscription. The plaintiff by his subscription became bound to the company to take the shares subscribed for, and this agreement has never been discharged or in any way impaired. The plaintiff remained bound by his subscription, notwithstanding the agreement with the defendants, as fully and completely as though the agreement with the defendants had never been made. Nothing has occurred to change, qualify, or limit his obligation to the company. The company sold the shares to secure "working capital." The subscription of the plaintiff, entered with the other subscriptions, secured the accomplishment of the object. The condition of the subscriptions, that the whole 6,000 shares should be "reliably subscribed," was fulfilled. It was so conceded on the trial. The defendants were interested in setting the company afoot. They were the principal holders of its stock. Presumably, they had confidence in the value of the new process for manufacturing iron and steel, covered by their invention. They sought out the plaintiff. On his declining at first to subscribe to the stock of the company, they offered him the inducement that they would take the stock off his hands within a year, at cost price, if he desired it. It appears that the same inducement was offered to other subscribers, but not to all. We think there was nothing illegal in this arrangement. There was no community of action between the subscribers. Each subscribed for such reasons as satisfied him. It is supposable that some subscribers may have been influenced by the fact that other persons known to them, in whose business judgment they had confidence, had also subscribed. But we think it would too greatly interfere with the freedom of contract to hold that, for this reason, a subscriber could not enter into an agreement with third persons, at the time of the subscription, to the effect that the latter should assume the risk of the enterprise; there being no actual fraud, and the relations between the subscriber and the company remaining unchanged. The contract in the case of

Adams v. Outhouse, 45 N. Y. 318, was in its very nature fraudulent and dishonest. It was the price of a fraudulent concealment, by one of several distributees of an estate, of assets in which all the distributees were equally interested.

We think the judgment is erroneous, and it should therefore be reversed.

(46 Ohio St. 27)

GUNSAULLUS v. PETTIT.

(*Supreme Court of Ohio. May 22, 1888.*)

JURY—RIGHT TO JURY TRIAL—JUDGMENT FOR MONEY ONLY.

The right to trial by jury does not depend upon the principles upon which relief is asked, but upon the nature and character of the relief sought. If the relief sought is a judgment for money only, the fact that, before the adoption of our reformed system of procedure, the proper remedy would have been by a suit in equity, does not affect the right of either party to a trial by jury upon any issue of fact made by the pleadings.

(*Syllabus by the Court.*)

Error to circuit court, Huron county.

F. D. Gunsaulus and *G. T. Stewart*, for plaintiff in error. *T. H. Wiggins*, for defendant in error.

MINSHALL, J. The suit below was brought by the administrator of a deceased wife against the administrator of her deceased husband, and sought to charge his estate with a claim for money had and received by him in trust for her. They intermarried in 1836; she being, at the time, the widow of Merritt Pettit, deceased, in whose lands she had a dower estate. It is claimed that her last husband, the decedent of plaintiff in error, received the rent arising from the dower estate of his wife in the lands of her former husband, amounting to \$2,950, and also the money paid by a railway company for the right of way through her dower estate, and that in 1868 he received her share in the estate of her father, amounting to \$650.59; that all these sums were received by the husband in the right of the wife, without intention to make the same his own; that he so held the money in trust for her, and had promised to invest it for her use, but died before doing so. All the material facts were controverted by the answer. The case was tried to the court, a jury being waived; the court found for the defendant, and dismissed the petition. Thereupon the plaintiff below appealed to the district court; and, the cause having been transferred to the circuit court, a motion was made therein to dismiss the appeal on the ground that either party was entitled to a jury on the issues of fact joined between them. The motion was overruled, and, a trial being had, the circuit court rendered a judgment in favor of the appellant.

In refusing to dismiss the appeal, we think the court erred. The constitutional limitation as to trial by jury is in the power to abridge, and not in the power to extend, the right of trial by that method. The right may be extended, but not abridged. So that the question is not merely whether at common law either party had, upon the issues joined, a right to trial by jury, but whether, under the provisions of our Code of Civil Procedure, such right is awarded him. The Code provides (section 5130, Rev. St.) that issues of fact arising in actions for the recovery of money only shall be tried by a jury, unless waived by the parties; and such actions are not appealable, (section 5226, Rev. St.) Hence the right of a party to trial by jury, in a given case, does not depend upon the principles upon which he may base his right to relief, but upon the nature and character of the relief sought. If the relief sought is a money judgment only, and this is all that is required to afford him a remedy, it is immaterial whether his right of action is based upon what were formerly regarded as equitable or upon what were regarded as legal principles. In either case, the remedy must be sought in the civil action of the Code; and, in

it, trial by jury is given upon all issues of fact when the relief sought is a money judgment only. See *Alsdorf v. Vanatta*, 46 Ohio St. —, ante, 73, and cases there cited, (decided at the present term.) The claim of the plaintiff below, when reduced to its substance, is that the husband of his intestate received moneys belonging to her, that he promised to hold and invest for her use. For not doing so he asks to recover a judgment for money against the administrator of the husband for the amount so received; and such judgment, and none other, was rendered by the circuit court. The fact that the court ordered that it should be a lien upon all the lands of which the husband died seized, added nothing to the relief granted; for such would have been its effect had no such order been made, if the court had had jurisdiction to hear and determine the case on appeal. The fact that, prior to the Code, the only remedy would have been by a suit in equity, does not affect the right of either party to demand a jury trial upon the issues of fact joined in the action. Hence the case of *Huber v. Huber's Adm'r*, 10 Ohio, 371, has no application to the question presented here. The case, then, was not appealable; and the circuit court erred in not sustaining the motion to dismiss the case. Judgment reversed, and appeal dismissed.

(125 Ill. 141)

KRETTZ v. BEHRENSMEYER.

(Supreme Court of Illinois. May 9, 1888.)

1. ELECTIONS AND VOTERS—CONTESTS—JURISDICTION OF COUNTY COURT.

Summons in an election contest is properly returnable to a probate term of the county court under Rev. St. Ill. 1874, p. 839, c. 87, providing that matters cognizable by county courts, among which are contested elections, "except as hereinafter provided, shall be * * * cognizable at the probate terms;" it being otherwise provided only by section 7, which enacts that all that class of cases wherein justices of the peace have jurisdiction, when the amount involved shall not exceed \$1,000, shall be cognizable at the law term of the county court.

2. SAME—WAIVER OF OBJECTIONS.

On objection to the jurisdiction of the county court, not because of the subject-matter, but on the ground that the summons was made returnable at a probate instead of at a law term, were the objection good, still, where defendant has answered at a law term, the court thereafter has jurisdiction of his person, and, having jurisdiction of the subject-matter, may lawfully proceed.

3. SAME—PETITION—VERIFICATION.

It is not indispensable that the petition should state the names of the voters whose ballots are alleged to have been improperly counted; and the petition is sufficiently verified upon information and belief.

4. SAME—ANSWER—PRELIMINARY SHOWING FOR RECOUNT.

Under an answer admitting that the ballot-boxes containing the ballots were forwarded to the county clerk, and opened by him, with two justices, within four days after the election, the preliminary showing that the ballots are unchanged is sufficient to support a decree for a recount, as, after the recount, the contestee may show that the ballots have been changed, if such is the fact.

5. SAME—PLEADING AND PROOF.

Under a petition alleging that contestant was actually elected to the office, it being incumbent upon him to show a majority of votes cast, evidence by the contestee that certain persons who voted for contestant were not entitled to vote is admissible, although the answer does not state their names, especially when the answer, which was not excepted to, alleges that, in addition to the illegal votes named therein, there were 10 illegal votes counted for contestant.

6. SAME.

Evidence by the contestee that a ballot, after having been handed to the election officers, was changed, by having a name pasted over that of contestee, though no such matter is charged in the answer, is admissible upon the issue raised by contestee's denial of the petition alleging that contestant was actually elected to the office.

7. SAME.

Evidence that a ballot was voted which does not appear among the ballots in the recount is admissible, though not pleaded in the answer, to rebut the case made out in chief by contestant.

8. SAME—EVIDENCE—COMPETENCY—AGE OF VOTER.

It is incompetent to ask a witness sought to be shown to be a minor, and unequalled to vote, what the family record says as to his age.

9. SAME—CHANGE OF BALLOT.

A voter whose ticket is alleged to have been tampered with after it had been cast, may be asked for whom he voted.

10. SAME—IDENTITY OF BALLOTS—ADMISSION.

Where, upon entering into the recount of the votes cast at a certain precinct, contestant stated that, if any question was to be raised as to the identity of the votes cast with those about to be recounted, he wished to send for the election officers of such precinct, the fact that contestee made no question as to the identity, and the recount proceeded, is not an admission on his part that a ballot was not changed after the recount was commenced, and does not exclude evidence denying the identity.

11. SAME—ORDER OF EVIDENCE.

Evidence by the contestee to show that certain legal voters voted, and that their names appeared upon the poll-list, but no ballots were returned in the ballot-box to correspond with the numbers opposite the names on the list, objected to because in the order of trial, as marked out by the court, the evidence was not admissible at that time, is admissible where, under the rulings of the court, it would not have been admissible at any other time.

12. SAME—MISNOMER OF CANDIDATES.

Testimony is admissible to explain that tickets poorly spelled, as for "Krietz" or "Critz," or even one omitting the "z," are intended for the candidate Kreitz; the names being *idem sonans*. The converse applies to a ticket for "Dehbenmeyer," as intended for a candidate Behrensmeyer; the names not being *idem sonans*.

13. SAME—DECLARATIONS OF VOTER AFTER ELECTION.

Declarations of a voter, after the election, as to an intended change of domicile by him, are incompetent to prove that he was disqualified to vote.

14. SAME—OBLITERATION OF NAME OF OFFICE.

The partial obliteration, in a ballot, of the printed name of the office by the name of the candidate written in may be orally explained as unintentional.

15. SAME—UNNUMBERED BALLOTS—DESTRUCTION.

There being, on the recount, one unnumbered ballot more than names on the poll-list, the court destroyed the ballot. *Held* error, under Rev. St. Ill. 1874, cap. 46, § 57, providing for rejection of unnumbered ballots found to be in excess of the number of names "on each of the poll-lists," as it does not appear that the court ascertained the number upon more than one list.

16. SAME—BALLOTS BEARING TWO NAMES.

A ballot bearing the names of both candidates for an office, one printed and the other in writing, is properly rejected under Rev. St. Ill. 1881, c. 46, § 58, providing that, "if more persons are designated for any office than there are candidates to be elected, * * * such part of the ticket shall not be counted for either candidate."

17. SAME—BALLOTS FOLDED TOGETHER.

In Illinois, two ballots folded together, the outside one alone numbered, showing plainly an attempt to vote twice, are properly rejected on recount.

18. SAME—REJECTED BALLOT.

A ballot offered by one whose residence is questioned, taken by the judge, who finally refuses to put it in the ballot-box, the voter not insisting, or offering the evidence required by the statute, is properly rejected on recount.

19. SAME—MISNOMER OF CANDIDATES.

The only candidates for treasurer being John B. Kreitz, Charles F. A. Behrensmeyer, and B. A. Dickerman, votes for John M. Kreitz, although that was the name of a brother of John B. Kreitz, who had, at a prior time, held the office of sheriff and some minor office, are properly counted for John B. Kreitz; he being ordinarily known as "John," and his brother as "Mat.," and the vote being evidently intended for John B. Kreitz.

20. SAME.

There being others of the name of the candidate Behrensmeyer resident in the county, votes for "Behrensmeyer" are properly counted for him; no others of that name being candidates.

21. SAME—ERASURES AND SUBSTITUTIONS.

A ballot with a name substituted for one erased, viz.:

(Written.)

"Charles F. A. Behrensmeyer.

(Printed.)

"For county treasurer,
"John B. Kreitz."

(Erased in pencil.)

—is a vote for Behrensmeyer for treasurer.

22. SAME.

A ballot with a name substituted for one erased, viz.:

(Printed.) "For county treasurer,
(Written.) "Charles F. A. Behrensmeyer.
"John Jimison.
(Printed.) "For county superintendent of schools,
(Erased in pencil.) "Newton J. Hinton."
—is a vote for Jimison for superintendent, and not two votes for treasurer.

23. SAME—PAROL EVIDENCE.

In a ballot with a name for treasurer erased, and another added, viz.:

(Printed.) "For county treasurer,
(Erased in pencil.) "John B. Kreitz."
(Printed.) "For county superintendent of schools,
(Written.) "John Jimison.
"Charles F. A. Behrensmeyer."
—parol evidence is not admissible to explain it to be a vote for Behrensmeyer for treasurer.

24. SAME—TORN BALLOT.

A ballot found in the ballot-box, torn lengthwise into two pieces, will be presumed to have been torn accidentally; and, in the absence of proof of other intention of the voter, it will not be held to be canceled.

25. SAME—NAME OF OFFICE ERASED.

A ballot in which the name of the office is canceled, and the name of one of the candidates written immediately below, is properly not counted.

26. ALIENS—MINORS—NATURALIZATION BY MOTHER'S MARRIAGE.

Minor children of foreign parents, whose mother, after the death of the father, marries a citizen, become citizens.

27. SAME—RECORDS OF NATURALIZATION—SECONDARY PROOF.

When records of naturalization are destroyed, secondary evidence of their contents is admissible, as of the contents of other records.¹

Appeal from Adams county court; B. F. BERRIAN, Judge.

Election contest. Judgment for the contestant, from which the contestee appeals. One of the witnesses, August Bansman, testified that he was born in Germany, never obtained naturalization papers, but voted at the election contested. He came to America in 1855, at the age of two years, with his mother, his father having died in the old country; and his mother in the same year, or shortly afterwards, married a citizen of the United States.

C. A. Babcock and Carter & Goyert, for appellant. *Wm. McFaddon*, for appellee.

SCHOLFIELD, J. Charles F. A. Behrensmeyer filed his petition in the county court of Adams county on the 26th of November, 1886, to contest the election for the office of county treasurer of that county, to which John B. Kreitz had been declared elected by the canvassing board. It is alleged in the petition that the petitioner had been, and on that day was, and from thence hitherto has been, and he still is, an elector of Adams county, Ill.; that he was an elector of said county at the date of the election next hereafter mentioned; that on November 2, 1886, in pursuance of law, an election was held in said county for, among other offices, that of county treasurer of said county; that said election was held at the various election precincts and districts in said county,—the polls having been opened at each such precinct and district according to law; that, in the said several and respective precincts and districts, ballots were at said election received for said office of county treasurer; that, after the polls were closed, a count was made by the judges of election of and at the respective precincts and districts aforesaid of the votes and ballots at each of said election precincts and districts cast; that, upon such count, the judges of the respective precincts and districts aforesaid made certificate of the number of votes cast for the several and respective persons voted for for the different offices, including therein the said office of county treasurer,

¹ As to the admissibility of secondary evidence to show the contents of public records, see *Rhodus v. Sansom*, (Tex.) 6 S. W. Rep. 849, and note; *Bush v. Lisle*, (Ky.) Id. 890; *State v. Birmingham*, (Iowa,) 88 N. W. Rep. 121.

as said votes were counted by said judges, and said judges of said respective precincts and districts thereupon caused the ballot-boxes containing the ballots voted in the said respective precincts and districts, with their said certificate of the number of votes cast last above named, to be forwarded to the county clerk of Adams county, Ill., who, together with two justices of said county, within four days of said election, opened the returns of said election, and canvassed the same as required by law. It is further alleged that, at said election, your petitioner was the Republican candidate, John B. Kreitz was the Democratic, and B. L. Dickerman the Prohibition, candidate, for the office of county treasurer aforesaid; and that said Kreitz had 4,618 votes, your petitioner 4,604, and said Dickerman 272 votes, for the last-named office, as the result was declared by said canvassing board; and that, upon the result as last above named, the county clerk of said Adams county issued and delivered to said Kreitz a certificate of election to the office of treasurer aforesaid. That on information and belief, that the canvassing board reached result by adding together the votes for candidates for county treasurer as the same were stated in certificate of judges of the respective precincts and districts aforesaid, and that any errors in the count of the election judges entered into the result as declared by said canvassing board. The names of precincts in county of Adams, outside of Quincy, are then stated, and that the town of Quincy was divided into 16 election districts, numbered 1 to 16, inclusive, after which it is further alleged that, at Melrose precinct, 14 or more votes were cast at said election for, and intended for contestant, and which ought to have been counted for him, but which judges refused to count and did not count for him, and that said last-named judges counted for Kreitz 8 votes or upward cast for contestant, and which ought to have been counted for contestant for said treasurer. That William Childers voted at Melrose, and was an illegal voter. That at Burton 3 votes cast for contestant for said treasurer, and which ought to have been counted for petitioner, the judges of election refused to and did not count for him; and that they, by mistake, counted 5 or more votes for Kreitz for that office cast for contestant. That, at Ursa precinct, 16 legal votes, and at Mendon 9 legal votes, and McKee 5 legal votes, and Honey Creek 9 legal votes, and at Liberty 5 legal votes, and at Richfield 10 legal votes, and at Third district of Quincy 10 legal votes, and at the Fifth district of Quincy 10 legal votes, and at the Sixth election district of Quincy 8 legal votes, and at the Tenth district of Quincy 12 legal votes, and at the Twelfth district of Quincy 12 legal votes, and that at the Fourteenth election district of Quincy 5 legal votes, and at the Fifteenth election district of Quincy 16 legal votes, and at the Sixteenth election district of Quincy 12 legal votes, were cast for contestant for said treasurer, which the judges of election of the respective precincts and districts ought to have counted for contestant, but refused to count and did not count for him for said office. And it is further alleged, on information and belief, that, at each of said last 14 precincts and districts, votes for contestant for said office were actually counted for Kreitz by the election judges, the precise number of which is unknown to contestant, but which he asks to have ascertained by a recount; that F. C. Inman voted illegally at Third district of Quincy for Kreitz for treasurer, and that he was not 21 years of age when he so voted; that at Liberty three persons voted illegally for Kreitz for treasurer, but contestant has not yet been able to ascertain their names; that at Liberty more ballots were in the ballot-box than on the poll-list, and that the judges of said precinct did not correctly count the ballots of the precinct; that, at the Tenth district of Quincy, the judges found among the ballots two folded together, both for contestant, one numbered and one not, and that the judges threw out both, and did not count either ballot; that, at each of the election precincts and districts of Adams county other than those above named there were cast divers legal votes for contestant for treasurer, which the judges of the respective precincts and dis-

tricts refused to count for him for treasurer, which ought to have been counted for him, and that, at each of the precincts and districts last named, votes cast for contestant for said treasurer were by the judges of election thereof counted by mistake for Kreitz for that office; that, at some of the precincts and districts of said Adams county, other illegal votes than those above named were cast by persons not legal voters for Kreitz for said office of treasurer, and counted by the election judges for him; that the judges of election of the several election precincts in said Adams county made mistakes in counting the ballots cast for treasurer at the respective precincts as existing at said election.

And the answer of the defendant denies that petitioner, on January 1, 1886, and from that time to and inclusive of date of election, on November 2, 1886, was an elector of Adams county, Ill.; admits an election held for county treasurer of that county on November 2, 1886, in said county; and that at said election polls were open at each of the voting precincts of said county, and that ballots were cast and received thereat; admits that, after the polls were closed, a count was made, by the judges of the different precincts, of the votes cast thereat; and that, upon such count being made in each precinct, the judges thereof certified the number of votes cast for the different persons voted for the different offices, including therein the office of county treasurer, as the votes were counted by said judges; admits that said judges of said precincts, except in the case of the township of Ellington, thereupon caused the ballot-box containing the ballots voted at said respective precincts, with their said certificate of the number of votes cast thereat, to be forwarded to the county clerk of said Adams county, and that said clerk and two justices afterwards, and within four days of said election, opened the returns of said election from all said precincts, including Ellington, and canvassed same. It further admits petitioner was the Republican, and B. L. Dickerman the Prohibition, and respondent the Democratic, candidate for said county treasurer; and that the result of the election, as declared by said canvassing board, was 4,618 votes for Kreitz, 4,604 votes for contestant, and 272 votes for Dickerman; and that said county clerk issued respondent a certificate of election; that said canvassing board merely added together the result as certified by the judges of the different precincts as to county treasurer; denies that any errors and vices entering into the result, as certified by the judges, was preserved in the result as announced by canvassing board; avers that there were no errors or irregularities in said returns, as certified by election judges, except as hereinafter stated; admits that precincts and election districts of the county, or as set out in petition of contestant; denies that at Melrose precinct 14 or more legal votes were cast for Behrensmeyer which ought to have been counted for him, which judges refused to count for him; denies that at Melrose judges counted 8 or more votes for Kreitz which belonged to Behrensmeyer, and asserts that the judges of Melrose counted every vote there cast for him, and denies that William Childers was an illegal voter; denies that at Burton 8 or more votes were cast for Behrensmeyer which judges refused to count for him, and denies that the judges of Burton precinct counted 5 or more votes for Kreitz which were cast for contestant; denies that at Ursa, Mendon, McKee, Honey Creek, Liberty, Richfield, the Third, Fifth, Sixth, Tenth, Twelfth, Fourteenth, Fifteenth, Sixteenth districts of Quincy, legal votes were cast for Behrensmeyer, and not counted by the judges of election for him, and avers that, each of the last-named precincts, the judges counted for Behrensmeyer every vote cast for him, and certified the same correctly to the county clerk; denies that, at each of the 14 precincts last named, there were ballots cast for Behrensmeyer which the judges counted for Kreitz; denies that there should be a recount; denies that F. C. Inman, voting at Third district of Quincy, was an illegal voter under 21 years of age, but asserts he was 21 years of age; denies that at Liberty 8 illegal votes were cast and counted by the judges for Kreitz for said treasurer, and avers that no illegal

votes were cast at Liberty precinct for Kreitz, and denies that there were more ballots in the box containing the ballots cast than shown on poll-books, and denies that the ballots were not correctly counted by the judges of that precinct; denies that at Tenth district of Quincy, on counting ballots cast, the judges found two ballots folded together, both for Behrensmeyer, the outside one numbered, and that the judges did not count either ballot; denies that, at each of the other election precincts of said Adams county than those specifically mentioned by petitioner in his petition, there were cast any legal votes for Behrensmeyer for said treasurer which ought to have been counted for Behrensmeyer, and which the judges of election refused to count for him, and denies that, at the last-named precincts or any other, there were cast for Behrensmeyer votes which the judges by mistake counted for Kreitz for said office; denies that at any precinct of said county any illegal votes were cast for Kreitz for treasurer; denies that judges at said respective election precincts counted any votes for Kreitz not legal votes; denies any mistake of election judges in counting, to prejudice of petitioner; avers that any mistakes of judges in counting votes were to Kreitz's prejudice; denies that a recount would disclose mistakes prejudicial to Behrensmeyer; denies that Behrensmeyer was at said election elected to said office of treasurer, and denies that Kreitz was not elected; avers Kreitz was elected by a plurality of the legal votes cast at said election, and avers that Behrensmeyer did not receive a larger number of votes than defendant; denies that petitioner is entitled to relief prayed.

It then avers that, at each precinct and district in said county, 10 legal votes were cast for defendant for treasurer which ought to have been counted for Kreitz, but which judges refused to count for him, and that at each precinct and district last aforesaid the judges of election counted 10 votes for petitioner which ought to have been counted for Kreitz; that, at each and every of the election precincts and districts last aforesaid, four unnumbered ballots were found, each folded within a numbered ballot, and that each numbered and unnumbered ballot was for Kreitz; that in each of said ballot-boxes, in addition, four unnumbered ballots were found, two of said unnumbered ballots being inclosed within a numbered one, and the other two of said last-named four unnumbered ballots were folded within another numbered ballot, and that each numbered as well as unnumbered ballot was for Kreitz for treasurer, and that, in addition, three additional unnumbered ballots were found in each ballot-box, said three unnumbered ballots being folded within a numbered ballot; that each of the numbered and unnumbered ballots were for Kreitz for treasurer; that the judges of election threw out the numbered ballots with the unnumbered, and not because of any excess of ballots over the names on poll-books, or because cast by persons not entitled to vote; avers that ballots so thrown out ought to have been counted for Kreitz; avers that, over and above the illegal votes hereinafter mentioned, 10 illegal votes were counted by the judges for Behrensmeyer for the said office of treasurer; avers that in Keene precinct, after the polls closed, on November 2, 1886, and its ballot-box had been opened, a person not a judge, clerk, or challenger was admitted to the room, and while then and there, unauthorized under statute, and unsworn, took the place of a clerk of the election, the clerk leaving the room; that such person participated in the count, and then and there made a tally sheet, and kept tally of the votes as called off by judges of the election, and that all the other tally sheets made by the judges and clerks of the precinct were made and copied from that one; alleges that said substitution for said clerk was unlawful, to the injury of defendant, and in fraud of his rights, and that the vote of this precinct should be excluded from the returns for treasurer; avers that in Ellington, after polls closed and ballot-box opened, a person not a judge or clerk or a challenger was admitted to the room, and, though unsworn, participated in the counting of ballots, and handled the

same, and read the names therefrom, and assisted in stringing them; avers that after the ballots had been counted and strung, and partly sealed in an envelope for that purpose, and placed in possession of a judge of the precinct, that the returns from Ellington were not accompanied by the ballots, but that the ballots remained in the judge's possession one or two days after this certificate, tally sheet, poll-books, and other returns had been returned to the county clerk, and that, when the ballots were returned to said clerk, they were returned by a daughter of said judge, who was not an elector, and the ballots were then and there, with the envelope which had formerly inclosed them, wrapped in a newspaper, with the envelope torn and muddy,—said ballots, if all of them were returned, were not returned as by law directed; avers that the person admitted to the room, and the judge having the ballots, were not friendly politically to defendant, and that Ellington township ought to be excluded from the returns for treasurer in consequence; avers that at Eleventh district of Quincy, when polls closed, some of the clerks and judges removed the ballot-box containing the votes cast in said precinct to the private house of one of the clerks of election, while the other judges and clerks went home, and, after an absence of some time, met at said house, and counted and canvassed the votes; that during said count the judges of election, or one of them, found two unnumbered ballots, each folded in a numbered ballot, and destroyed them, and did not take them into account at all; that said unnumbered and numbered ballots were not destroyed because of an excess of ballots over names of poll-list, nor for any legal or valid reason; avers that, while the election was being held, an elector presented his ballot, having name of defendant on it for treasurer,—presented his ballot to the judges,—for the purpose of putting it into the ballot-box; that a judge, instead of putting it in the box, laid it aside, and never did put it in the box, and that the elector was thereby deprived of his vote; that none of the judges and clerks of this precinct were friendly to defendant politically; that, for acts last named, the returns of the precinct ought to be excluded; avers that, in the Tenth district of Quincy, the judges of election, after polls closed and ballot-box was opened, and the count entered on, found two unnumbered ballots, each folded in a numbered ballot, and all of the four ballots having defendant's name for treasurer, and the judges destroyed the four ballots, and did not take either into account, and that for this reason the votes of the precinct should be excluded from the returns for treasurer; avers that if the vote of the Tenth and Eleventh districts be not excluded, that in that event the numbered ballots inclosing the unnumbered ballots so destroyed should be counted for defendant; avers that, in each election district over and above the unnumbered ballots already mentioned, the judges found in each precinct two other unnumbered ballots, each folded within a numbered one, the numbered and unnumbered one being for defendant for treasurer, and that the judges of each precinct destroyed both the numbered and unnumbered ballots in each case, and not for any excess of ballots over names on poll-list, nor because cast by illegal voters; avers following illegal voters voting for Behrensmeyer in First district of Quincy, to-wit, Henry P. Williams, Ebenezer Barker, William Adcox, Sam Barnum, Edward Janes, James Kennedy, L. W. Bryson, Fred Brewer, William H. Euter, Lester Janes, and William Burrall; avers following illegal voters voting for Behrensmeyer in Second district of Quincy, to-wit, A. S. Sissiley; avers following illegal voters voting for Behrensmeyer in Third district of Quincy, to-wit, D. L. Lyons, Bernard Kessing; avers following illegal voters voting for Behrensmeyer, Fifth district of Quincy, to-wit, Thomas S. Kelly, G. C. Weisner; avers following illegal voters voting for Behrensmeyer in Sixth district of Quincy, to-wit, Fred Zang, Charles Wermker; avers following illegal voters voting for Behrensmeyer in Ninth district of Quincy, to-wit, T. W. Weishner, A. F. Boeline, Christ. Le Brosse, John Boll, Anton Zatory, William Fenkhams, and Henry Knapheide; avers

following illegal voters voting for Behrensmeyer in Tenth district of Quincy, to-wit, Henry Zink, Frederick W. Sturhahan; avers following illegal voters voting for Behrensmeyer in Eleventh district of Quincy, to-wit, August Lucke, Philip Hocker, R. J. Crook, August Prante, Fred Prante, Gottlieb Bogy, Henry Graewe, Henry Buckmeyer, Henry Sunderman, H. Strottmeyer, and W. H. Hillborn; avers following illegal voters voting for Behrensmeyer in Fourteenth district of Quincy, to-wit, Silas Bogarth, Charles Sanders, R. V. McKinsons, Walter Terrill; avers following illegal voters voting for Behrensmeyer in Fifteenth district of Quincy, to-wit, Lea Jackson, John Mitchell, — Bassett, — Brown, Allen Crosby, — Craver, George Buehner, and Larkin Gardner; avers following illegal voters voting for Behrensmeyer in Ellington precinct, to-wit, Isaac Vorhies, William Phanschmidt, Louis Steffen, Mathias Wright, Louis Kruse, and Henry Luecke; avers following illegal voter voting for Behrensmeyer in Gilmer precinct, to-wit, William Ferguson; avers following illegal voters voting for Behrensmeyer in Ursa precinct, to-wit, August Ipperson and David Hess; avers the following illegal voter voting for Behrensmeyer in Honey Creek precinct, to-wit, T. A. Melvin; avers following illegal voter voting for Behrensmeyer in Payson precinct, to-wit, Fred Dickman; answer avers following illegal voter voting for Behrensmeyer in Richfield precinct, to-wit, Albert Moore; avers following illegal voter voting for Behrensmeyer in Concord precinct, to-wit, Henry Hoeckford; avers following illegal voters voting for Behrensmeyer in Clayton precinct, to-wit, James Lovegood, John Hassett, and John Mintz. The answer then denies that contestant was in fact elected treasurer, or that such fact would appear upon a recount; and avers that contestant and contestee, by returns of the canvassing board, received an equal number of votes for treasurer at First district of Quincy; that, in the Fifth precinct, contestant, by said board's returns, had six more votes than contestee for treasurer, and in the Sixth district of Quincy 39 more votes than contestee, and in the Seventh district of Quincy contestant had 25 more votes than contestee, and in the Eighth district 9 more votes than defendant, and in the Ninth district 117 more votes, and in the Tenth district of Quincy contestant had 191 more votes than defendant, and in the Eleventh district 107 more votes, and in the Thirteenth district 11 more votes, than defendant for treasurer; that in Northeast contestant had 23 more votes, in Keene 21 more votes, in Ursa 13 more votes, in Mendon 57 more votes, in Camp Point 81 more votes, in Clayton 81 more votes, in Ellington 58 more votes, in Gilmer 3 more votes, in Beverly 26 more votes, than defendant for treasurer; and avers, besides, the inaccuracies in counting said votes, canvassing and reporting the same in this answer mentioned; that, in each of said last nine districts of Quincy and nine townships, the votes of the electors voting were, as to defendant, incorrectly, falsely, and fraudulently cast, counted, canvassed, and reported or returned; that in each of said nine townships and nine precincts last named, on the day of election, divers false and fraudulent tickets gotten up and designed by the friends, agents, and political partisans of contestant to deceive, and for the purpose of defrauding the electors of said precincts or districts and townships out of, and in the expression of, their choice for candidates for said office of treasurer, were, by such friends, agents, and political partisans of petitioner, prepared and made to resemble and counterfeit the Democratic ticket used at said election, with the exception of the substitution of petitioner's name for that of defendant thereon for treasurer, and certain other slight but unnoticeable differences, and that such tickets were, on the day of election, by the friends, agents, and political partisans of contestant, distributed, circulated, and delivered to the voters in said nine townships and nine precincts, with intent to defraud the electors, and induce them to deposit tickets at the several polling places containing contestant's instead of defendant's name for county treasurer, and that many electors in said nine townships and nine precincts or

districts were induced to vote said false and fraudulent tickets, believing, and induced to believe by fraud and contrivance, that said false and fraudulent tickets were the tickets of, and authorized and distributed by, the Democratic party, through its authorized agents, for use at said election, and that said tickets contained the names of all the candidates for the respective offices thereon named of the Democratic party; that the name of defendant was not thereon; and defendant avers that, by reason of said false and fraudulent tickets and acts, the electors of said nine townships and each of them, and said nine precincts and each of them, were defrauded, and the expression of the will of said electors by their ballots cast at said election was falsified, and that, by reason thereof and thereby, the votes of the electors of said nine precincts or districts and said nine townships, and the count made thereof, and the return and report thereof, are not the vote of said elector, and a count and return of such vote; denies petitioner entitled to the relief prayed, and says petition is not brought and filed to proper term of court, and that summons issued to a probate term instead of law term of county court. There were no exceptions to the answer, but a general replication by contestant was filed January 13th.

Before proceeding to the merits of the case, we must pass upon a question of jurisdiction and some questions of pleading and practice.

1. It is objected that the county court had no jurisdiction in the case, because the summons was returnable to a probate term, instead of to a law term. It is provided by section 5 of the county court act (Rev. St. 1874, p. 339, c. 87) that "county courts shall have jurisdiction in all matters of probate settlements of estates of deceased persons, appointment of guardians and conservators, and settlement of their accounts, all matters relating to apprentices, proceedings for the collection of taxes and assessments, and in proceedings by executors, administrators, guardians and conservators for the sale of real estate for the purposes authorized by law, and such other jurisdiction as is or may be provided by law; all of which, except as hereinafter provided, shall be considered as probate matters, and be cognizable at the probate terms hereinafter mentioned." It will be observed that the words "and such other jurisdiction as is or may be provided by law" are unrestricted, and may therefore have application to matters to be considered at the probate as well as at the law term of the court; and the last sentence of the paragraph expressly provides that all of the matters of which the court may thus have jurisdiction shall be not matters of probate, but considered as probate matters, and be cognizable at the probate terms, except as thereinafter provided. Unless, therefore, it is in the statute expressly provided that contested elections shall be considered at law terms, it must follow, under this language, that they shall be considered at probate terms. It is provided, in section 7 of the same act, that the "county courts shall have concurrent jurisdiction with the circuit court in all that class of cases wherein justices of the peace now have or may hereafter have jurisdiction, where the amount claimed or the value of the property in controversy shall not exceed one thousand dollars; concurrent jurisdiction in all cases of appeals from justices and police magistrates, * * * and in all criminal offenses and misdemeanors where the punishment is not imprisonment in the penitentiary or death; all which shall be cognizable at the law term hereinafter mentioned." The words "class of cases wherein justices of the peace now have or may hereafter have jurisdiction" clearly mean actions at law. This is clear both from the limitation of \$1,000 on the "amount claimed on the value of the property in controversy," which can have no application where no amount in money and no property is sought to be recovered, and from the specific enumeration of the cases of which justices of the peace then had and still have jurisdiction, in section 13, c. 79, p. 639, Rev. St. 1874. Besides, from the very nature of chancery powers and jurisdiction, it would be absurd to assume that it would have been contem-

plated by the general assembly that they would ever be conferred upon justices of the peace. We had decided, previous to the date of this enactment, and then held, that a proceeding to contest an election was not a suit at law. *Moore v. Mayfield*, 47 Ill. 167; *People v. Smith*, 51 Ill. 177. There is plainly nothing in this section conferring general chancery powers upon the county court, and we know of no other section in which such powers are conferred and to be exercised at the law terms. The section 113, cap. 46, Rev. St. 1874, entitled "Elections," provides that a person desiring to contest an election, etc., shall "file with the clerk of the proper court a statement in writing, * * * which statement shall be verified by affidavit in the same manner as bills in chancery may be verified." Then sections 114, 115, and 116 provide for the issuing of summons, its service and return, the taking of evidence, and the trial of the case in like manner as in cases in chancery. And there is no other provision of the statute in regard to the term to which the writ shall be returnable. The section 93 of the act simply says, "The county court shall hear and determine contests of election of all other county officers,"—and that includes this office; and says nothing about when the proceeding shall be heard. It must therefore inevitably follow that this proceeding shall be heard at the probate term, because there is no other term provided for its hearing. *East St. Louis v. Wittich*, 108 Ill. 449, is supposed by counsel for appellant to be opposed to this view. We think otherwise. That was a proceeding, under chapter 24 of the Revised Statutes 1874, to assess the cost of improvement of a certain street in East St. Louis, and the issues must be tried by a jury. See section 31, art. 9, of the chapter. And it is expressly provided that the hearing shall be conducted as in "other cases at law;" and so we thought it followed it could only be tried at a law term. It may, moreover, be observed that this objection does not question the jurisdiction of the court over the subject-matter or the person, but simply denies that the court existed at the time to which the writ was returnable for the purpose of such adjudication. If we shall admit that to be true, what follows? Simply that the orders then made were a nullity. At the February term, appellant answered. That was a law term, and undoubtedly the court then might adjudicate if the parties were before it. Had appellant failed to answer, or failed to obey any order of the trial term, and the court had then coerced him into obedience to doing that which it could not have compelled him to do but for the prior order, the validity of the order at that term would be before us for investigation. But appellant might have answered without summons, and without any previous order; and, if the previous order is a nullity, he is to be assumed, in the absence of coercion, as having voluntarily answered. If he did so, the court thereafter had jurisdiction of his person; and, having jurisdiction of the subject-matters, it lawfully proceeded.

2. It is objected that the court was not authorized by the proceedings, nor by the preliminary proof of the identity of the ballots, to decree an examination of the ballots. We are of the opinion that it is not indispensable, in such cases, that the petition shall show the names of the persons whose ballots have been improperly counted. More particularity in pleading is not required than the nature of the subject is necessarily susceptible of, and it is obvious, in the very nature of things, that in most instances the candidate defeated by a miscount cannot know whose ballots were miscounted. All he can be expected to know is that about so many ballots were deposited for him at a given poll, and that the account does not agree therewith. If he knows more, it is accidental. Nor, in such case, is it of consequence whose ballot was miscounted; for the effect is the same, and the mode of proof is precisely the same, whether it was cast by one legal voter or another. It is, moreover, evident that the information upon which the contestant acts must, to a very great extent, be hearsay. He cannot be expected to have been personally at each poll, much less to have known how each elector voted, nor can he be expected to have

personally supervised the counting at each poll, and therefore, however grossly and palpably he may have been wronged at several polls, all that he can say truthfully, in respect to most of it, is that he is informed and verily believes. We are therefore of the opinion that as to the polls, count, etc., at Melrose, Burton, Ursa, Mendon, McKee, Honey Creek, Liberty, Richfield, and the Third, Fifth, Sixth, Tenth, Twelfth, Fourteenth, Fifteenth, and Sixteenth election districts of the city of Quincy, the petition is sufficient. As to the other polls, it clearly was not, had the objection been taken by demurrer and adhered to. It is a clear and most palpable violation of the right of a secret ballot to allow a party, on mere suspicion, to have the ballots exposed, and subjected to scrutiny, to enable him to find objections upon which to make a tangible charge. But appellant answered, and made issues of fact, and gave evidence upon the general and indefinite as well as the specific allegations of the bill, and thus waived the objection. As respects the preliminary proof of the identity of the ballots, it is alleged in the petition that "said judges of said respective precincts and districts thereupon [*i. e.*, after counting the ballots at the several polls] caused the ballot-boxes containing the ballots voted in the said respective precincts and districts, with their said certificates of the numbers of votes last above named, to be forwarded to the county clerk of Adams county, Ill., who, together with two justices of said county, within four days of said election, opened the returns of said election, and canvassed the same as required by law." Appellant, in his answer, admitted that, "after the polls were closed, a count was made by the judges; * * * that said judges of said precincts, except in the case of the township of Ellington, thereupon caused the ballot-boxes containing the ballots voted at said respective precincts, with their certificate of the number of votes cast thereat, to be forwarded to the county clerk of Adams county, and that said clerk and two justices afterwards, and within four days of said election, opened the returns of said election from all said precincts, including Ellington, and canvassed the same. It is unnecessary to notice the answer as to Ellington, since appellant lost nothing by the recount of the vote at that poll, and was not, therefore, injured by it. We think, under the admissions of the answer, the preliminary proof was sufficient. It does not follow from the fact that ballots are ordered to be recounted that all question of whether they have been tampered with is concluded. If the petitioner makes a *prima facie* case that there is a necessity that they be recounted, and that they have not been tampered with, the order to that effect will be made; but an inspection of the ballots alone, upon a recount, might furnish ample evidence that they had been tampered with and changed since cast; and where one ballot is taken out, and another ballot of the same general appearance, but for a different candidate or candidates, is put in its place, it can only be learned, after an inspection of the ballots, upon a recount, by the voter declaring that it has been changed. Hence, after the recount, and consequent opportunity for inspection of ballots, it is competent for the incumbent to show that the ballots have been changed, if such is the fact, or that they are in any respect to be discredited for other cause.

3. Appellee contends that appellant was improperly allowed to introduce evidence proving that certain persons who had voted for appellee, whose names are not given in his answer, were not legal voters. Less particularity is required in the answer of the defendant than in the petition. 1 Daniell, Ch. Pr. (3d Amer. Ed.) 727. It is, among other things, alleged in the petition that appellee was actually elected to the office of treasurer; and, to sustain this allegation, it was incumbent upon him to prove that a majority of the legal votes cast at the election were cast for him. It is true that the production of ballots cast for him raised the presumption, *prima facie*, that they were legal; but the burden of proof, nevertheless, was upon him, and it was therefore incumbent upon him to introduce evidence of the ballots in the

first instance. Appellant denied that allegation, and under that denial, was entitled to rebut the presumptive case thus made by appellee, by disproving the *prima facie* case made by the ballots; and this he did by showing that they were not what they purported to be,—that they were not the ballots of legal voters. In *City of Beardstown v. City of Virginia*, 81 Ill. 544, Easem and Mains had each voted for removal, but the election judges refused to count them because they deemed them double ballots. On the trial, satisfactory evidence was introduced that they were in fact not liable to the objection, and the court then counted them for removal. It was objected that there was no allegation in the answer under which this could be done; but we said: "The bill alleges that a majority of the legal votes cast at said election were not for removal, but against it. The answer denies the allegation. Under such allegation and denial, we regard the evidence as properly admitted." Aside from this, however, there is a general allegation in the answer that, over and above the illegal votes mentioned specifically in the answer, 10 illegal votes were counted for appellee for the office of treasurer. Undoubtedly, this allegation is too indefinite; and, if the answer had been excepted to, an exception to that allegation should have been sustained; but it was not excepted to, and therefore what has been said in respect to the too general allegations of the bill in respect of a number of the polls is applicable here.

This brings us to specific rulings on the merits of the case. *First*. Appellant, after appellee had concluded evidence on his behalf as to the condition and in explanation of ballots cast at the election, introduced Joseph W. Davis, who testified that he voted at the election in Clayton township; and appellant then proposed to prove that the witness voted ballot numbered 143 at that poll, and that, when he voted it, it had the name of John B. Kreitz for county treasurer printed on the ticket, and that it did not then have a paster stuck on and placed over the name of John B. Kreitz, and that it was uncrossed, and plainly to be seen a ticket for John B. Kreitz for county treasurer; that the ticket, when recounted, had a paster, on which was printed the name of C. F. A. Behrensmeyer, pasted over the printed name of John B. Kreitz, and that the name of Behrensmeyer was not on the ticket at the time witness voted. Counsel for appellee objected to the admission of this evidence for the reason alleged "that the evidence, if it ever could be admissible, presupposes fraud or improper conduct on the part of the election officers, and there is no charge of the kind in said Kreitz's answer herein filed as to the officers of the election of Clayton township; that hence the evidence is not now admissible; that a ballot, after once in the box, cannot be contradicted or changed by parol evidence, at least not without fraud charged, which is not done in the answer in this case; and because there is nothing in said Kreitz's said answer to found the evidence offered on; and because the identity of the ballots counted by the judges of election with those counted on the recount of Clayton township, of which this ballot was one, was admitted by contestee before proceeding to such recount." The court sustained the objection, and refused to allow appellant to prove or to give evidence of the facts, or of any of them; and appellant excepted. It was at the same time proved that the witness was a legal voter at that poll. The witness was then asked for whom he voted for treasurer. This was objected to for the reason that the ballot is the best evidence of that fact; and the court sustained the objection, and appellant excepted. Following this objection in its order, it is manifestly not true that the evidence necessarily presupposes fraud in the election officers, for the paster may have been put on the ticket by a third party when their attention was absorbed by their official duties in taking in or counting other ballots, or in preparing and signing their returns; or it may have been put on the ticket, since the ballots left their hands, by stealth and artifice, and without the knowledge or gross neglect of any officer having custody of the ballots. But, even if it be admitted that it does presuppose fraud in the election officers, it

is to be kept in mind that, the proper canvassing officers having found and declared Kreitz to be elected, the presumption is that he was elected until the contrary is clearly established; that Behrensmeyer, in alleging that he was elected, and that Kreitz was not elected, by a majority of the legal votes cast at the election, assumes the affirmative, and consequently that the burden is upon him to clearly prove that a majority of the legal votes cast at the election were for him. It is immaterial that the production of a ballot received by the judges of election is *prima facie* evidence that it is cast by a legal voter; for that affects only the order of giving evidence, and does not change the issue. As we have before insisted, appellant's denial of the allegation of the petition that Behrensmeyer was elected, and that Kreitz was not elected, by a majority of the legal votes cast at the election, simply closed the issue. It then devolved upon appellee to make out by evidence at least a *prima facie* case; and when he had done so, appellant was entitled to introduce evidence to show that the evidence thus introduced and relied upon by appellee was not what appellee claimed it to be, and consequently that what he introduced as legal ballots were not in fact legal ballots. Were appellant to raise a new issue, one not presented by the petition, the burden and order of introducing evidence would, of course, be directly the reverse. But that is irrelevant to the question before us. It is undoubtedly true that a voter cannot be allowed to say that he voted for one person when he admits that he cast a ballot, which has not since been changed, showing that he voted for another person. But this is merely upon the principle that a writing cannot be contradicted by parol. It is, however, always competent to show that even the most solemn writings are forgeries; and a ticket which has been changed by a paster to read as a vote for a man for a particular office, different from the man for whom it read as a vote in the condition in which it was then cast, is a forgery; and the same is true where the ballot, after it is cast, is destroyed, and another and a different ballot is put in its place. Quite clearly, therefore, this evidence would have proved that one ballot counted for appellee was not evidence of a lawful vote cast for him; but, on the contrary, that the vote should be counted as a vote cast by appellant, and was therefore directly responsive to the allegation of the petition.

What is relied upon as an admission of the identity of the ballots cast and recounted is thus recited in the record: "And the recount of the ballots returned to the clerk of the county court next hereinafter named as cast at the said election for said office of county treasurer at the [here the poll is named,] in said Adams county, being about to proceed, the said Behrensmeyer, the said contestant, stated to said Kreitz and his attorneys that, if any question as to the identity of the ballots cast at said [naming the poll,] with those about to be produced and counted by said Haselwood, were made, the said contestant wanted a judge or clerk of said last-named district present, and would send for such judge or clerk, and have him present, before proceeding to a recount of said last-named ballots; and thereupon, the contestee making no question as to said identity, the recount of said last-mentioned ballots proceeded without the presence of such judge or clerk." Very clearly, this cannot be construed into an admission that the ballot was not changed after the recount of the poll was commenced, and before that ballot was reached, which may have been the fact. In other words, it is not an admission that no ballot of that poll would be thereafter changed before recounted. But it is also further quite evident that it could not have been intended as an admission as to matters of which appellee could then know nothing. He doubtless then knew that the election officers supposed they had and that they intended to count the ballots as they received them, and placed them in the ballot-box, and that the same ballots were intended to be put up by them, and that they believed they were, and returned to the county clerk, as provided by statute. But the election officers could not know what was on the face of a ballot until they opened

and read it; and since, in reading off the names of a ballot, and ascertaining the number of votes for the particular candidates for the respective offices, they are not required to take cognizance of the number which each ballot bears, but, on the contrary, they are, by section 87, c. 46, Rev. St. 1874, expressly forbidden, under severe penalties, from comparing the ballot with the poll-book, so as to ascertain by whom the ballot was cast, it is impossible that they could know whether a ballot bearing a particular number, as, for instance, that of this ballot, had an erasure or paster on it. And all that they could know is that the general appearance of the ballots, as a whole, is the same, or, by extreme possibility, that so many names for this office were erased and another name substituted, and so many pasters with one name upon it were pasted over another name. And waiving evidence simply waives that which is susceptible of evidence. But, aside from this, this admission was for the mere purpose of dispensing with preliminary proof. In order to recount the ballots, it was assumed, and properly so, a necessity should be shown, and the *prima facie* identity of the ballots to be recounted established. What the ballots might disclose, when re-examined, no one could know in advance; and, necessarily, the proof to be thereafter offered could not be anticipated. When the recount was gone into, the purpose of the preliminary proof, and, necessarily, this admission, was accomplished. And it violates the fundamental rule of construction that words are to be limited by their meaning as applicable to the object in view, when they are used to hold that this admission goes beyond the right to recount the ballots. It is not contended, and it cannot be reasonably, that the mere fact that ballots are recounted concludes all inquiry as to whether they are really the ballots cast, or that they have the same names upon them as when cast. The court therefore erred in excluding this evidence.

Appellant introduced Charles H. Matsenbacher, whose testimony proved that he was a lawful voter, and voted at this election, in the Ninth district of the city of Quincy; and appellant then offered to prove by him that he voted ballot numbered 330 at that poll, and that when he voted it the name of John B. Kreitz for county treasurer was upon it; that his name was not erased or scratched; that the name of Behrensmeyer was not then interlined upon the ballot under the name of John B. Kreitz; but the ballot was plainly a ballot for John B. Kreitz for county treasurer, and that the ballot was changed by erasing the name of Kreitz, and interlining the name of Behrensmeyer, after he voted it. Appellee objected to the introduction of the evidence, and the court sustained the objection, to which appellant excepted. This objection, we must assume, as the record discloses no reason, is predicated upon the same reasoning as the objection to the testimony of Davis. What we have said in respect to that objection is equally pertinent here. The court erred in excluding the evidence.

Appellant also offered to prove by J. T. Seehorn, whom he showed to have been a legal voter, and to have voted, at this election, at the Ninth election district in the city of Quincy, that he voted for John B. Kreitz for treasurer; that his ballot was numbered 28; and he offered to prove by other evidence that there was, at the time of the recount, no such ballot among the ballots of that precinct. Appellee objected generally, and because there is nothing in said Kreitz's answer herein as to any abstracting of ballots in the said Ninth precinct, or of any misconduct of election officers of such kind; that there is nothing in said answer to file such proof on. And the court sustained the objection, and refused to allow the evidence to be given, and appellant excepted. We have already shown that evidence of this kind is competent as rebutting the evidence given by appellee to make out his case in chief. Appellant could not have mentioned it in his answer, because he could not have known that the ballot was missing until the ballots were examined for recounting, which was long after the issues were made up. For aught that we

can know, the ballot may have been inadvertently lost after the ballots were opened to be recounted, but before the recount of that poll was completed. Whether the ballot was lost by inadvertence, or stolen by design, appellant was entitled to the benefit of it. It was one of the lawful votes cast for him for treasurer. The court clearly erred in this ruling.

Appellant also offered to prove by Charles Henry Matsenbacher that he was acquainted with 25 different persons, whose names were given; that each and all were voters, at this election, in the Ninth precinct in the city of Quincy; that they all voted at that election, in that precinct, for John B. Kreitz for county treasurer; that the names of each and all appear upon the poll-books of that precinct as having voted; that each name on the poll-books has a number opposite to it; and that no ballots were returned in the box corresponding to these numbers on the poll-books. Appellee objected to the introduction of the evidence "on the ground that the evidence was incompetent generally; that it related to ballots in a precinct where, at the time of the recount, the question of the identity of the ballots with those counted had been conceded; that in the order of trial, as marked out by the court, the evidence was not admissible at this time; that the evidence offered belonged to the case in chief; that the ballots and poll-books of the 9th precinct are the best evidence; that the evidence offered is secondary, and relates to ballots not declared ambiguous by the court; and because there is nothing in contestee's answer apprising contestant of any alleged change of ballots in this precinct, or any allegation therein on which to found the proof." The court sustained the objection, and refused to allow the evidence to be given, and appellant excepted. The record does not disclose whether the court sustained the objection on all of these grounds, but it is to be inferred from the rulings upon the questions we have just been considering that it was on the ground that the identity of the ballots had been conceded, and that the objection had not been specially raised in the answer. This objection, however, as the one last before considered, could not have been set up in the answer, for it could not have been known when the answer was filed. But the same reasoning is applicable here that was applicable to the objection to the matters offered to be proved by Davis, except as to the suggestion that, "in the order of trial marked out by the court, the evidence was not admissible at that time." But, unfortunately, under the rulings of the court, it would have been admissible at no other time. It appears from the abstract before us that at the January term, 1887, of the court, the court fixed the 7th day of February, 1887, for the commencement of the hearing, and then "held and announced that offers of testimony as to other ballots not held by him patently ambiguous might be made by the parties during the progress of the testimony, if they saw proper, but that he would not hear or admit any such testimony at any stage in the case." This was, at the time, excepted to by appellant. The time, then, when this evidence was offered, was unimportant, because it was thus ruled out at the opening of the trial. It was equivalent to saying: "It makes no difference when you offer it, I rule it out now." The counsel had a right to assume that the time of offering it was of no consequence; that offering it was purely formal; and the court was notified, by the exception then taken, that appellant would stand upon his legal right to introduce such testimony. If the court ever changed this determination, the record fails to show it. If it was, in fact, changed, it was due to appellant's counsel to notify him of it in time to have procured and introduced his evidence. If it be true, as the offer supposes, and the objection by implication admits, that these parties voted, and numbers were placed opposite their names, but no corresponding ballots were in the box, the poll-books and ballot-box, already before the court, proved it; and appellant was entitled to have it considered on the hearing. While we held in *Hodge v. Linn*, 100 Ill. 402, that the failure to number any of the ballots cast at a particular poll was not sufficient reason for setting aside the

return of that poll, it being proved that the omission was through a misapprehension of duty, and with no fraudulent intent, still the statute requires the ballots to be numbered; and, the presumption being that officers do their duty, it must be presumed, until the contrary is shown, that these ballots were numbered as they were cast, and that they have since been abstracted or lost from the ballot-box. It is provided by section 51, c. 46, Rev. St. 1874, each clerk of the election shall keep a poll-list, which shall contain a column headed "Number;" and another headed, "Names of voters." The name of each elector voting shall be entered upon each of the poll-books by the clerks, in regular succession, under the proper headings. And it is provided by section 55 of the same act: "The ballot shall be folded by the voter, and delivered to one of the judges of elections. * * * The clerks of the election shall enter the name of the voter, and his number, under the proper heading in the poll-books, and the judge shall indorse on the back of the ticket offered the number corresponding with the number of the voter on the books, and shall immediately put the ticket into the ballot-box." And, this being done, the ballot must always bear the same number that is on the poll-books opposite the name of the voter. It is undoubtedly susceptible of explanation that ballots are omitted to be numbered, or are inaccurately numbered through mistake; and so here, had this evidence been admitted, as it should have been, the burden would then have been upon appellee to show, if such was the fact, that the ballots as cast were actually in the box, but by mistake either bearing no number, or a different number than that opposite the name of the voter; and, in the absence of such proof, it would have been presumed that appellant was fraudulently denied, in the count, the benefit of that many votes. *Prima facie*, therefore, the effect of this offer is to prove that the number of votes indicated were cast for appellant, and not counted for him on the recount of this poll, in addition to the number that were then actually counted for him; and, in that view, the court clearly erred in excluding the evidence offered.

On the recount of the Sixteenth precinct, the court found two unnumbered ballots, both for appellant, and, by examining the poll-list returned with the ballot-box, it was determined that there was one more ballot than names on the poll-list. The court therefore destroyed one of these unnumbered ballots. The statute provides that each clerk of the election shall keep a poll-list; one of which is to be kept in the ballot-box, and the other returned to the county clerk. Sections 51-62, c. 46, Rev. St. 1874, and section 57 of the same chapter, require that the judges, after the polls are closed, shall count the ballots, and that they shall first count the whole number in the box. If the ballots shall be found to exceed the number of names entered on each of the poll-lists, they shall reject the ballots, if any be found upon which no number is marked. Now, this duty, it is to be presumed, was discharged by the judges of election; and assuming, as appellee does, that the ballots are the same, either the court made a mistake in counting, or the poll-lists did not agree. It is, however, quite as reasonable to assume that the poll-lists did not agree as that there was a mistake in any other respect; and it admits of no controversy that there was a mistake in omitting to number at least one of the ballots. The statute requires, it will be noted, before the ballot shall be destroyed, that it shall be ascertained that the number of the ballots in the box "exceeds the number of names entered on each of the poll-lists," and that was not here done. And the action of the court was therefore erroneous. It is contended by appellant that in no event was the court authorized to destroy the ballot, because, it is said, it was no fault of the voter that it was not numbered. If it be conceded that the unnumbered ballot was actually cast by a legal voter, this position will be true. But the statute contemplates that the ballots shall be correctly numbered, and hence that every ballot, as cast, will have the number of the voter indorsed upon it; and, this being

done, it must follow that the unnumbered ballot is improperly in the box, and it should therefore be destroyed.

Frederick C. Inman voted for appellant in the Third precinct of Quincy. The court held him to be an illegal voter, and rejected his vote, upon his own testimony. He testified: "I thought I was twenty-one years old when I voted, but I find I was twenty-one the 6th of last February." Being asked, "This month?" he answered, "Yes." On cross-examination, question and answer proceeded thus: "How did you come to believe that you were 21? My father had told me I was 21. Is your father living here? No, sir; he lives in Crown Point, Ind. Did he ever live here? Yes. Up to what time? The 8th of March last. And how long have you been informed by him that you were 21 years old? Since the primary election." He was afterwards asked, "What was your reputed birthday in the family?" and he answered, "1865, February 6." He further said that he had never known to the contrary until after the last election; that from the time he could remember he always counted his birthday from that date; that he celebrated his sixteenth birthday 16 years after February 6, 1865. On redirect examination he was asked: "Well, what does your family record say?" That was objected to, but the court overruled the objection, and permitted the witness to answer; and he said, "The family record says I was born February 6, 1866." This was clearly error. This family record, which he had never heard of until since the election, speaking directly contrary to his father's statements prior to the election, and to the reputation in the family before that time, should have been produced, or, if that was impossible, a proved copy should have been produced. It should have been shown when and by whom the record was made. It cannot be said this witness has any knowledge of his own confirmatory of the record, and his whole story looks extremely suspicious. For aught that appears, the record may have been made for the case. At all events, he may have misunderstood its language, and parol evidence of his conclusion of what it proves ought not to have been received.

Ballots, some claimed for one party, and some claimed for the other, were rejected by the court in a number of instances, because there were the name of both appellee and appellant, the one written and the other printed, in the same ballot for treasurer. Appellee contends, on the authority of *People v. Saxton*, 22 N. Y. 309, that such ballots should have been counted as for the person whose name was written; that writing the one name was in effect canceling the other name printed. The reasoning of *People v. Saxton* only applies to cases where it is shown that the voter, with his own hand, writes the name of the candidate. Where a ballot is furnished a voter by another party, already having upon it a printed and a written name, as may quite often be the case, there can be no reason for saying that the ballot, as to him, is anywise different from one bearing both names written or both names printed upon it, for no act of his has caused it to be as it is. But our statute seems to us imperative. It says: "If more persons are designated for any office than there are candidates to be elected. * * * such part of the ticket shall not be counted for either of the candidates." And this was held obligatory, as to this class of tickets, in *Clark v. Robinson*, 83 Ill. 500.

In several instances two ballots were folded together, the one within the other, and the outside one alone numbered. The judges of the election omitted to count them, but fastened them together, marked "Double Ballot;" and they were returned to the county clerk with the other ballots. The court refused to count either of such ballots; and this we think was right. The statute requires the names of the candidates voted for all to be written or printed on the same piece of paper. Section 54, c. 46, Rev. St. 1874. Inclosing one ballot within the other, with the names of the candidates on each, was plainly an attempt to vote twice, and therefore such a fraud upon the rights of other

electors as required that his ballot should not be counted. *Webster v. Gilmore*, 91 Ill. 324.

August Sleckman proved by his own testimony that he was a legal voter in the Eleventh precinct of the city of Quincy; that he was then and for many years past had resided in that precinct, in the house which had belonged to his mother, but which, she dying, he and his sister had jointly inherited; that he took his meals in the Ninth precinct, but his home was and had been in this house in the Eleventh precinct. He gave his ballot to one of the judges, who took it, and said "that he would see about it;" but he subsequently refused to deposit it in the ballot-box. Appellant insists that this ballot ought to have been counted for him. We think the court below properly refused to count it. The voter knew that the ballot was not accepted as a vote. He knew that it was not deposited in the ballot-box, and he should have furnished the evidence required by the statute to entitle his vote to have been received, and have insisted upon his rights. Whether the judges were culpable in not receiving his ballot is not pertinent here. It is sufficient that they did not receive it.

The question is presented, by rulings on ballots, some of which are counted for one party, and some of which are counted for the other party, to what extent is evidence admissible to explain a ballot, or show the intention of the voter in casting it. In *People v. Matteson*, 17 Ill. 167, it was held that votes designating the office voted for as "police justices" should be counted as votes for "police magistrates;" there being but one office coming within the reasonable contemplation of the words "police justices," and that designated by the statute, "police magistrates." The court said: "In election contests, as in other cases, the question to be determined depends upon facts to be ascertained; and here we are simply called upon to determine, from the evidence before us, the simple fact of the intention of the voters who cast their votes. Did they intend to vote for the relators to fill the offices for which this election was ordered?" In *Clark v. Robinson*, 88 Ill. 508, it was said: "Three votes cast, respectively, for W. E. Robso, Robertson, and W. E. Robers, were counted for appellee, to which objection is made. These votes were cast for circuit clerk. The evidence shows that there were no candidates for circuit clerk at the election except appellant and appellee. We can have no doubt, from the evidence, that these three votes were intended for the appellee. 'Robso' and 'Robers,' no doubt, were abbreviations for the name of appellee, and the cause of the abbreviations is apparent, from the ballots alone." Another ballot containing the name of "Robbin" written on the margin to the left of "for circuit clerk," and with a continuation at the end with a light mark, having the name of Clark erased, it was held should be counted for Robinson. It may not be improper to observe, with reference to the ticket for Robertson, as to which nothing was said, that the court felt bound to take judicial cognizance that Robins and Robertson, as ordinarily pronounced, especially by unlettered and careless talkers, were *idem sonans*, being in accordance with the literal spelling of neither,—"*Robeson*." In *McKinnon v. People*, 110 Ill. 305, ballots were cast for Henry Malzacher and for Joseph Malzacher for the office of town clerk. It was held competent to prove that Henry Malzacher was the Democratic candidate for that office, and Donald McKinnon the Republican candidate, and that there were no other candidates for the office; that no person resided within the town of the name of Joseph Malzacher, and that the name of Joseph Malzacher was printed on a number of Democratic tickets by mistake, supposing that Henry was named Joseph, and that such tickets got circulated, to some extent, and voted by mistake, supposing that Joseph and not Henry was the Democratic nominee for the office; and we held the votes thus cast for Joseph should be counted for Henry. An analogous case is *Carpenter v. Ely*, 4 Wis. 420, referred to and quoted from in that case. In laying down the rule in *McKinnon v. People*, we

quoted with approval from Cooley, Const. Lim. (5th Ed.) *611, that "evidence of such facts as may be called the circumstances surrounding the election, such as who were the candidates brought forward by the nominating conventions; whether other persons of the same name resided in the district from which the officer was to be chosen, and if so, whether they were eligible or had been named for the office; if a ballot was printed imperfectly, how it came to be so printed; and the like,—is admissible for the purpose of showing that an imperfect ballot was meant for a particular candidate, unless the name is so different that to thus apply it would be to contradict the ballot itself, or unless the ballot is so defective that it fails to show any intention whatever." There is less difficulty in stating the rule in general terms than in applying it to particular cases. Manifestly, it would not be competent to hear the voter say that he intended a ballot plainly for a particular name, for one having no such similarity of sound, as that one might reasonably be intended for the other. And it is quite as obvious that it is competent to prove by the elector what he understood the names of the candidate to be, and how he reads his ballot. If he has used the letters of a foreign language to express the name, it is competent to prove by the voter, or by some one else versed in that language, what word or words they make. If the characters are so complex in their formation, or so imperfectly formed, or so obscurely impressed, as to make it difficult to read them, it is competent to prove by any one understanding them what they are. What is not admissible is to show that something was intended which is plainly contradictory of what was done; as, for instance, that a ballot cast with the name of Jones for a particular office upon it was intended to be a vote for Smith for the same office. And so, upon like principle, where it is shown that there has been what appears to be an erasure of a name, it may be shown that it was not done by the voter, or that it was the result of an accident, and not of intention; but, the fact of erasure being conceded to have been the deliberate act of the voter, it cannot be explained that by it he intended a different result than that which the law implies from it.

It was in proof that John B. Kreitz was the Democratic nominee, Charles F. A. Behrensmeyer the Republican nominee, and B. L. Dickerman the Prohibition nominee for the office of treasurer of Adams county, and that there were no other candidates for that office at the election in November, 1886. It was also in proof that some tickets bore the name of John M. Kreitz for the office of county treasurer, and that John B. Kreitz had a brother of that name, who had at a former time held the office of sheriff of said county, and, perhaps, also some minor office at a still prior time; but it was, on the other hand, proved that John B. Kreitz was ordinarily known and called "John" Kreitz, and that John M. Kreitz was ordinarily known and called "Mat." Kreitz; that John M. Kreitz was not a candidate for any office at that election. Ordinarily, the middle letter is no part of the name, and, under the circumstances mentioned, the trial court properly attached no significance to it. The vote was evidently intended, as it was counted, for John B. Kreitz.

It was likewise in proof that there were other persons than appellee in Adams county of the name of Behrensmeyer; and appellant objected to many ballots counted for appellee which had merely "Behrensmeyer" upon them for treasurer, without any designation of the Christian name. It was shown that no other Behrensmeyer was a candidate at that election for the office of treasurer or any other office, and, we think, therefore, the court properly counted the ballots as cast for appellee.

Appellant also objects that parol evidence was admitted to explain what name was intended by certain obscurely and imperfectly written ballots which were counted for appellee. So far as those ballots could, by one able to read them, be given a sound which might be understood to be intended to express the name Behrensmeyer, or that name as it was pronounced by any number

of people, we think the evidence was properly admitted. There was evidence that some person pronounced the name as "Benmire," and, perhaps, that others pronounced it by a still shorter name. Any evidence, therefore, proving that the voter had intended and attempted to express appellee's name as he understood it was properly admissible. Objections of a like character were made to tickets counted for appellee, and of course the same rule was properly applied there. It is evident that imperfect spellers might spell Kreitz, "Krietz," "Kritz," "Critz," or even omitting the "z." We recall only two instances in which we think the rule, in this respect, was misapplied. In certain ballots it was claimed the name written after "treasurer" was "John B. Krietz;" and in certain other ballots it was claimed the name written for treasurer was "Dehbsnmeyer." If these letters were really employed, we think these ballots could not be aided by extraneous proof, since we discover no such similarity in sound between these names and the names of the candidates as might induce the one to be mistaken for the other, and, plainly, neither can be introduced as a contradiction of the names of the candidate. It is not improbable, however, that this results from a misapprehension of the characters employed.

In many tickets the name of the candidate for treasurer, as printed, is erased, and the name of the other candidate is written over the name of the office, as thus:

(Written.)

"Charles F. A. Behrensmeyer.

"For county treasurer,

(Printed.)

"~~John B. Kreitz.~~"

(Erased in pencil.)

The same thing also frequently occurs with reference to the office next below, which is that of county superintendent of schools, for which John Jimison was the Democratic, and Newton J. Hinton the Republican, candidate, and thereat causes what at first flush seems to be, and appellant claims is, a ballot for two votes for county treasurer, as thus:

(Print.)

"Charles F. A. Behrensmeyer.

(Written.)

"John Jimison."

"For county superintendent of schools,

(Print.)

~~Newton J. Hinton.~~"

(Erased in pencil.)

We think, in the first-named instance, it may fairly be construed as a vote for county treasurer, as thus: "Charles F. A. Behrensmeyer, for county treasurer." McCrary, Elect. (2d Ed.) § 397. And in that view, in the last instance, the vote is for "John Jimison for county superintendent of schools," and not two votes for treasurer.

A different case, however, is presented in a few other ballots, where the printed name is stricken out of the ballot, and no name is written immediately above or immediately below the designation, "For county treasurer," but the name of one of the candidates for county treasurer is written below the designation, "For county superintendent of schools," and below the name of the candidate for that office. Here is, palpably, upon the face of the ballot, no vote for county treasurer, and two votes for the county superintendent of schools. The rule seems to admit of no evidence of what was the intention. Under the circumstances, there is no ambiguity. The facts present simply the question, may the voter do one thing, and say that he meant something entirely different? The court properly held that he could not.

Two ballots were found in the box of one of the polls, each torn from top to bottom, across all the names, into two distinct fragments, with ballot numbers on one of the fragments of each ballot. The question is, should that have been treated as a cancellation, or should they have been counted? Since voting a canceled ballot is a useless and senseless act, we think cancellation should not be presumed from the mere fact that a torn ballot is found in the box; but that, on the contrary, it should be presumed that the tearing was

accidental. It may, however, be proved that the tearing was by the voter and intentional; and, upon such proof being made, the ballot will be held to be canceled. There was no such proof here, and the ballots were therefore properly counted. In one or more instances the name of the office was completely canceled, but the name of one of the candidates was written beneath the canceled name of office. On the authority of *Clark v. Robinson, supra*, such ballots were properly not counted.

In some ballots the name of the candidate was written into the title of the office, obscuring and partially obliterating the letters designating the name of the office. We think it was, at least, susceptible of explanation that this was accidental and unintentional, and hence no cancellation.

The question arises, on a number of ballots, (or some counted for each party,) what constitutes the "permanent abode" of the elector, prescribed by the statute as an indispensable requisite to the right to vote? We held in *Dale v. Irwin*, 78 Ill. 170, that it "means nothing more than a domicile,—a house which the party is at liberty to leave as interest or whim may dictate, but without any present intention to damage it;" and that ruling has been adhered to in other cases. This was sufficiently accurate as applied to the fact in those cases; but there is an obvious inaccuracy in the latter part of the quotation when considered with reference to some of the facts in the present record. And we cannot better state it, and our views thereon, than by quoting from the report made in the case of *Cessna v. Meyers*, App. McCreary, Elect. (2d Ed.) bottom page 489, and top of page 498. It is there said: "A man may acquire a domicile, if he be personally present in a place, and elect that as his home, even if he never design to remain there always, but design, at the end of some short time, to remove and acquire another. A clergyman of the Methodist Church, who is settled for two years, may surely make his home for two years with his flock, although he means at the end of that period to remove, and gain another. And, again: Suppose a man, single, with no property, to come from Ireland, and be employed all his life on railroad or other like works at different places in succession. If he does not acquire a residence, he can never become a citizen, because he never would reside in this country at all. It seems to us that to such persons the general rule above stated, [*i. e.*, in substance, the rule as quoted from *Dale v. Irwin, supra*,] does not apply. Where a man who has no interest or relatives in life which afford a presumption that his home is elsewhere comes into an election district for the purpose of working on a railroad for a definite or indefinite time, being without a family, or having his family with him, expecting that the question whether he shall remain or go elsewhere is to depend upon the chances of his obtaining work, having abandoned, both in fact and intention, all former residences, and intends to make that his home while his work lasts, that will constitute his residence, both for the purpose of such jurisdiction over him as residence confers, and for the purpose of exercising his privileges as a citizen. Of course, the intent above supposed must be in good faith, and an intent to make such district the home for all purposes. The party's intent to vote in the district where he is, he knowing all the time that his home is elsewhere, will not answer the law." It can, under our system, need no elucidation that a man cannot be entitled to votes at any one time in either of two places, as he shall elect; and it is, in one or more instances in this record, pertinent to keep in mind that it does not follow because a man must have a domicile somewhere, and that a domicile once gained remains until a new one is acquired, that a man must be entitled to vote somewhere, or that the right to vote at a particular poll, being once established, is presumed to continue until a right to vote elsewhere is shown. Permanent residence is but one of the requisites of the right to vote, and it must, in this state, always precede the election by an extended space of time,—in one respect for a year, in others for 90 and 80 days, respectively. Const.

art. 7, § 1. But abandonment of a residence is instantaneous; and if it be, by a voter, of a residence in one voting district at a date too near the election for the requisite intervening time of residence to be a voter in another voting district, to which he has removed, the voter will be entitled to vote in neither voting district. We have frequently held that when a party leaves his residence, or acquires a new one, it is the intention with which he does so that is to control. Hence the shortest absence, if, at the time, intended as a permanent abandonment, is sufficient, although the party may soon afterwards change his intention; while, on the other hand, an absence for months or even years, if all the while intended as a mere temporary absence for some temporary purpose, to be followed by a resumption of the former residence, will not be an abandonment. On the question of intention, the declaration of a party, though admissible, is not necessarily conclusive, because it may be disproved by his acts; as thus, if a party were to remove his family to a particular district, there build and furnish them a home, keep his property there, return there constantly as his leisure allowed, and remained there with his family during sickness and unemployed time, this would constitute his residence, notwithstanding he might be employed in laboring in another district, and claim that to be his residence. *People v. Holden*, 28 Cal. 124. For, on questions of domicile, less weight is given to, the party's declarations than to his acts. 3 Jac. Fish. Dig. (7th Ed.) "Domicil," p. 4225; *Lessee of Butler v. Farnsworth*, 4 Wash. C. C. 108. The controlling inquiry would seem to be, where, if at all, does the party actually make his home, and claim, for the time, to exercise rights of property or of citizenship incident to or resulting from permanent residence? And therefore, if a party having no family leave, or having a family take it with him and leave, this state, and go to another state, and there make a home, and seek to acquire rights by virtue of its being a permanent residence, such as acquiring a homestead under the acts of congress, or exercising the rights of an elector, to which permanent residence is a requisite, his subsequently testifying that he had never intended to permanently abandon his residence here, but had all the time intended at some future day to return, could not control. There must be a present, continuous citizenship, with its attendant incidents and rights, subject, of course, to certain necessary guards against fraud, somewhere; and, if it be here, it cannot be abroad; and, if it be claimed and exercised abroad, that is conclusive that it had at that time ceased to be claimed here. The question is made material by objections raised upon the trial to what extent is evidence of the declarations of the voter competent to prove that he was disqualified to vote? In *City of Beardstown v. City of Virginia*, 81 Ill. 542, we refused to follow the English rule, which permits any declaration of a voter tending to prove that he was not qualified to vote to be given in evidence in a contest, where his right to vote is drawn in question, and held that declarations of a voter subsequent to the elections were incompetent; and we have no inclination to now depart from that ruling. Since the question of the intention, as well as of the act of the party in leaving a particular abode, and adopting and retaining another, is the subject of proof, it must follow that evidence applicable to either is admissible; and that, although less weight is given to the party's declarations than to his acts, still, his declarations of his mental state, so long as that shall be the subject of inquiry, must be admissible. And so it is held that conversations and declarations, in regard to present or future domicile, although not accompanying acts, are admissible in evidence, and must be weighed with the other evidence. Although the lowest species of evidence, they are competent. 3 Jac. Fish. Dig. (7th Ed.) "Domicil," 1, p. 4225. Upon this principle, in *Thorndike v. Boston*, 1 Metc. 242, it was held that a letter written from the plaintiff to his agent in Boston, before the controversy in litigation arose, in which he expressed his intention not to return to Boston, was admissible in evidence. And, again, in *Kilburn v. Ben-*

nett, 3 Metc. 199, declarations of a party's future intentions to change his domicile were held admissible. It is obvious that a declaration that a party at a particular time was residing in one place would be negative evidence that he was not at that time residing in another, or a declaration that he was intending to change his residence would negative the idea that he was intending to remain, and so, also, the reverse.

Question was raised as to whether certain persons were citizens having been alien born, and also as to sufficiency of proof of naturalization. It was held in *Kelly v. Owen*, 7 Wall. 496, that the act of the 10th of February, 1855, which declares that, "any woman who might lawfully be naturalized under the existing laws, married, or who shall be married, to a citizen of the United States, shall be deemed and taken to be a citizen," confers the privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous acts of congress privilege.—*i. e.*, that a free white person; that the terms "married" or "who shall be married" do not refer to the time when the ceremony of marriage is celebrated, but to a state of marriage; that they mean that whenever a woman who, under previous acts, might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the time of the passage of the act or subsequently, or before or after the marriage, she becomes, by that fact, a citizen also. The citizenship of a woman thus acquired is not lost by the subsequent death of her husband, and her afterwards intermarrying with an alien, (see 15 Op. Atty. Gen. 599;) and the children of such a woman, under the age of 21 years, become citizens by virtue of her citizenship, (*Dale v. Irwin*, 78 Ill. 186; *City of Beardstown v. Virginia*, 81 Ill. 543; *U. S. v. Kellar*, 11 Biss. 314, 13 Fed. Rep. 84; *Leonard v. Grant*, 6 Sawy. 603, 5 Fed. Rep. 11; *People v. Newell*, 38 Hun, 78.) We are, however, aware of no authority holding that the effect of this naturalization will extend to members of the family who are not children. Records of naturalization are nowise different from other records. When destroyed, secondary evidence of their contents may be given, just as may secondary evidence of the contents of any other records be given.

The views expressed necessarily lead to a reversal of the judgment below; and, upon another trial, the rules herein stated will, we apprehend, enable the trial court to dispose of all the material controverted questions. The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

(115 Ind. 55)

BRITTON v. STATE *ex rel.* ROWE.

(*Supreme Court of Indiana.* May 29, 1888.)

1. GUARDIAN AND WARD—GUARDIANS' BONDS—DEFECTS.

Where the penalty in a guardian's bond is left blank, the defect is cured by Rev. St. Ind. § 2516, providing that a guardian's bond shall not be void on account of any informality, illegality, or defect, either formal or substantial, but shall have the same effect as if legally executed.

2. SAME—ACTION ON BOND—PLEA OF NON EST FACTUM—EVIDENCE.

In an action on a guardian's bond, where defendant admits his signature to the bond, and the evidence shows that it was approved and filed by the clerk more than 12 years before, it is properly admitted in evidence, although defendant on oath alleges that he never delivered it.

3. INFANCY—ACTIONS BY INFANTS—IN FORMA PAUPERIS—NEXT FRIEND.

Under Rev. St. Ind. 1881, § 255, providing that an infant having a cause of action shall be entitled to sue thereon, and the same shall not be delayed or deferred on account of such infant not being of full age, section 256, Rev. St. Ind., providing that suits by infants must be brought by next friend, who shall be liable for costs, does not apply to a suit by a minor whom the court has admitted to sue as a poor person.

4. WITNESS—CROSS-EXAMINATION.

In an action on a guardian's bond, it is not competent to show by plaintiff's witness on cross-examination that defendant did not execute the bond.

Appeal from circuit court, Montgomery county; JAMES WRIGHT, Special Judge.

Action by state *ex rel.* Mary L. Rowe against William Britton, on guardian's bond. Second appeal. On the former trial a demurrer to the complaint was sustained, and plaintiff appealed. The ruling of the court was reversed, and case sent back, with direction to overrule the demurrer. There was judgment for plaintiff, and defendant appeals.

Thompson & West, for appellant. *Clodfelter & Ballard*, for appellee.

Howk, J. This is the second appeal to this court in this case. On the former appeal herein, the opinion and judgment of the court are reported under the title of *State v. Britton*, 102 Ind. 214, 1 N. E. Rep. 617. We then held that, in the first paragraph of her complaint herein, plaintiff's relatrix, Mary L. Rowe, stated a cause of action amply sufficient to withstand defendant's demurrer thereto for the alleged insufficiency of the facts therein to constitute a cause of action. After the cause was remanded to the court below, defendant's demurrer to the first paragraph of complaint was overruled, in obedience to the mandate of this court. Defendant then answered in three paragraphs, of which the first stated a special defense; the second was a general denial of the first paragraph of complaint; and in the third paragraph of his answer he denied, under oath, his execution of the bond in suit. Relatrix replied by a general denial of the first paragraph of answer. The issues joined were tried by a jury, and a verdict was returned for plaintiff's relatrix, assessing her damages in the sum of \$200; and, over defendant's motion for a new trial, the court rendered judgment on the verdict. In this court the only error assigned by defendant, Britton, is predicated upon the overruling of his motion for a new trial.

Plaintiff's relatrix sued herein upon a guardian's bond alleged to have been executed by one Edward G. Rowe, as guardian of the persons and property of relatrix and others, minor heirs of Mary Rowe, deceased, and defendant, Britton, as his surety therein. This bond is set out at length in our opinion on the former appeal. It was imperfect, in that the obligors therein were "bound unto the state of Indiana in the sum of ——— dollars," and was conditioned that "if the above-bound Edward G. Rowe will faithfully discharge his duties as guardian of the persons and property of Henry Rowe, Mary L. Rowe, * * * minor heirs of Mary Rowe, deceased, then the above obligation is to be void, else to remain in force." In section 2516, Rev. St. 1881, in force since May 6, 1853, it is provided as follows: "Such guardian's bond shall not be void on account of any informality, illegality, or defect, either formal or substantial, in the same; nor on account of any defect, informality, or illegality in the appointment of such guardian, but shall have the same force and effect as if such appointment had been legally made, and such bond legally executed." In view of the provisions of this section of the statute "touching the relation of guardian and ward," we held, on the former appeal herein, that a guardian's bond is valid and enforceable, even as against a surety therein, although no penalty whatever is expressed in such bond. In the opinion of the court on the former appeal herein, after quoting such section of the statute, it is said: "This statute is as broad and comprehensive as it was possible for the legislature to make it, and it makes all bonds effective, no matter what omissions are found to exist. It holds sureties liable for the faithful discharge of the duties of the guardian, and make them responsible for losses arising from a breach of duty. The omission of the penalty does not invalidate the bond. Notwithstanding its omission, the bond still holds the surety responsible for the acts of the guardian. The failure to prescribe the penalty leaves the surety's liability to be ascertained by determining the duty of the guardian, and the loss resulting from the failure to perform it. The failure to name the penalty does not avoid the bond. It simply leaves

the measurement of the recovery to be ascertained by finding the loss resulting from the failure to perform the duties enjoined by law." We have quoted thus liberally from our opinion on the former appeal herein, for the purpose of showing that a guardian's bond, however defective it may be, is rendered valid and binding on both principal and surety, by force of the provisions of section 2516, above quoted, for all losses resulting from any breach of the guardian's duty.

We proceed now to the consideration of the alleged errors of law occurring at the trial, of which defendant's learned counsel complain in their exhaustive brief of this cause. It is shown by a bill of exceptions, properly in the record, that, while the relatrix was introducing her evidence in chief on the trial, she "admitted, in open court and before the jury impaneled to try said cause, that she was not twenty-one years of age." Thereupon the defendant moved the court to dismiss this cause on the ground that relatrix was a minor, and a minor could not be relatrix, which motion was overruled by the court, and defendant excepted. Defendant then asked leave of the court to file an additional paragraph of answer showing the minority of relatrix, and that the fact was unknown to him and his counsel until after the trial had begun; but such leave was refused by the court, and defendant excepted. Defendant then moved the court to require that relatrix should prosecute this suit by a responsible person appearing as her next friend, which motion was overruled by the court, and defendant excepted. These three rulings of the trial court relate to the same subject, and present the same questions, and may be properly considered together. It is manifest that each of these motions of defendant is founded upon the provisions of section 256, Rev. St. 1881, and the construction placed thereon by his counsel. In that section it is provided as follows: "Before any process shall be issued in the name of an infant who is a sole plaintiff, a competent and responsible person shall consent in writing to appear as the next friend of such infant; and such next friend shall be responsible for the costs of such action, and thereupon process shall issue as in other cases." Although this action was commenced, and properly so, in the name of the state of Indiana as plaintiff, yet the relatrix, Mary L. Rowe, was, without doubt, the real plaintiff herein; and if it were true, as claimed by defendant's counsel, that under the provisions of section 526, above quoted, an infant under the age of 21 years could not be a relator in an action on a penal bond, payable to the state, under which he or she was a beneficiary, the sole reason therefor would be that he or she could not be a sole plaintiff in such an action unless and until a competent and responsible person should consent in writing to appear as his or her next friend therein. If the section quoted contained all the provisions of our Civil Code which had any bearing upon the rulings under consideration, there would be some grounds for defendant's contention that the court below had erred in those rulings. But there are other provisions of our Civil Code which, we think, strongly support the rulings of the trial court of which defendant complains. Thus, in section 255, Rev. St. 1881, it is provided as follows: "When an infant shall have a right of action, such infant shall be entitled to bring suit thereon, and the same shall not be delayed or deferred on account of such infant not being of full age." From the facts stated in the complaint of the relatrix herein, sustained, as they were, by the evidence in the record, she had a clear right of action against the defendant, which, under the statute, was not to be "delayed or deferred" on account of her not being of full age. It may be said, however, that there is nothing in the section last quoted which would excuse or prevent the relatrix herein from complying with the requirements of section 256, *supra*, by procuring the written consent of a competent and responsible person to appear in this action as her next friend. This is true, no doubt, as a general rule, but not, we think, as applied to this case, as shown by the record thereof. It appears from the record that, long before the trial of this cause, and before the

former appeal thereof to this court, upon a proper showing made by the relatrix to the satisfaction of the court below that she was a poor person, without sufficient means to prosecute this action, it was ordered by such court that she should be admitted to prosecute her suit herein as a poor person, and the court assigned her counsel to prosecute her cause, and required the officers of the court to do their duty in the case "without taking any fee or reward therefor from such poor person." This action of the court below was had under and pursuant to, and in strict conformity with, the provisions of section 260, Rev. St. 1881. In view of this action of the court, it cannot be held that the court below erred in any of the rulings which we are now considering, or in refusing to require the relatrix to procure the written consent of a competent and responsible person to appear as her next friend herein. It would have entirely defeated the purpose of section 260, *supra*, and rendered nugatory the order of the trial court, pursuant thereto, admitting relatrix to prosecute this action as a poor person, if she had been required by the court to procure a competent and responsible person to appear as her next friend in the prosecution of this suit; for the provisions of section 256, *supra*, is mandatory, which declares that "such next friend shall be responsible for the costs of such action." In *Hood v. Pearson*, 67 Ind. 368, it was held by this court, in a carefully considered opinion, that, construing together the provisions of sections 256 and 260, *supra*, an infant plaintiff has the right, upon showing to the satisfaction of the proper court that he is a "poor person not having sufficient means to prosecute his action," to be admitted by the court to prosecute the action "as a poor person," without the procurement of a next friend to appear therein. The case cited was approved and followed, upon the points under consideration, in *Wright v. McLarinan*, 92 Ind. 103, and we still adhere to it in the case at bar.

2. Defendant's counsel next insist very earnestly that the court below erred in admitting the bond sued upon in evidence without sufficient proof first made of his execution of such bond. This point is not well taken, and cannot be sustained. Defendant admitted that his genuine signature was attached to the bond in suit, and his only contention was that he had never delivered such bond, nor authorized its delivery, to the clerk of the court below. It appeared from the bond itself that it had been taken, approved, and filed by such clerk more than 12 years before the trial of this cause. Although defendant had denied under oath his execution of the bond sued upon, yet the evidence before the court, we think, fully authorized the admission of such bond in evidence.

3. Finally, it is claimed on behalf of defendant that the court below erred in excluding evidence tending to prove that, at the time he signed the bond in suit, he ordered the clerk of such court not to accept the bond without another surety therein, and that the clerk refused to accept such bond. Manifestly, this evidence was offered by defendant in support of his plea of *non est factum*, and for no other purpose. But it is shown by the record that defendant offered such evidence on his cross-examination of a witness introduced by relatrix in support of her cause of action. The evidence offered was not competent or legitimate, strictly speaking, on cross-examination; and we may well suppose that it was on this ground such evidence was excluded by the learned judge of the trial court. *Railway Co. v. Lutes*, 112 Ind. 276, 284, 11 N. E. Rep. 784, 14 N. E. Rep. 706.

Defendant's motion for a new trial was correctly overruled. The judgment is affirmed, with costs.

v.17N.E.no.3—17

(115 Ind. 123)

STOLTE v. STATE.

(Supreme Court of Indiana. May 30, 1883.)

1. INTOXICATING LIQUORS—SUNDAY SALES—EVIDENCE.

On an indictment for selling intoxicating liquors on Sunday, the failure of the state to prove the names of those to whom the liquor was sold, is immaterial, when defendant himself proved such names.

2. APPEAL—REVIEW—CONFLICT OF EVIDENCE.

Where there is a conflict of evidence, it is the right and duty of the trial court to determine the credibility of the witnesses; and the appellate court will not reverse a judgment upon the weight of the evidence.

Appeal from criminal court, Marion county; WILLIAM IRVIN, Judge.

Indictment against Henry Stolte for the unlawful selling of intoxicating liquors on Sunday. Defendant was found guilty, fined, and he appeals.

J. N. Scott, for appellant. *L. T. Michener*, Atty. Gen., for appellee.

ZOLLARS, J. Appellant was fined below for having sold intoxicating liquor on Sunday. The only ground urged for a reversal is that the finding and judgment are not sustained by sufficient evidence. It is claimed that the state did not prove the names of the persons to whom it claimed the liquor was sold, nor in any way identify them. Without deciding what the state proved, or was bound to prove, in that regard, it is sufficient here that appellant, by himself and his witnesses, very clearly proved the names of those persons. The real dispute was as to whether appellant sold them beer, as claimed by the state, or sweet cider, as claimed by him. Upon that question there was a conflict in the testimony. It was the right and duty of the trial court to determine the credibility of the witnesses, and it had facilities for doing that which it is impossible for this court to have. Where there is such a conflict, this court, as has been many times decided, will not reverse a judgment upon the weight of the evidence. Judgment affirmed, with costs.

(115 Ind. 123)

ZIMMERMAN v. STATE.

(Supreme Court of Indiana. May 30, 1883.)

JURY—COMPETENCY OF JUROR—SPECIAL BAILIFF.

One employed by the sheriff to serve subpoenas in a prosecution for a criminal offense is incompetent as a juror in the trial of such cause, since the sheriff, not being entitled to fees for serving such subpoenas unless the accused is convicted, is pecuniarily interested in securing a conviction.

Appeal from circuit court, Sullivan county; W. M. FRANKLIN, Special Judge.

John C. Chaney and *Walter S. Maple*, for appellant. *Louis T. Michener*, for appellee.

ELLIOTT, J. One of the jurors who tried this case on his *voir dire* made this statement: "I acted as bailiff, by appointment of the sheriff, in this cause, and as such subpoenaed the witnesses for the state herein, at this term of this court, for this day, and I had been placed upon the regular panel of jurors the day before, to fill a vacancy therein." The appellant unsuccessfully challenged the juror for cause. The challenge should have been sustained. A man called as a juror cannot be permitted to act as the bailiff of the sheriff in serving subpoenas in a prosecution for a criminal offense, and retain his place on the panel. A person who acts for the sheriff in a criminal case in the capacity in which the juror challenged did act in this instance cannot be regarded as an impartial juror. We know, as matter of law, that the sheriff, in such a case as this, is not entitled to fees for serving subpoenas unless the accused is convicted, and he is therefore interested in securing a conviction. A person employed by the sheriff to serve subpoenas is the

agent, and, in a qualified sense, the deputy of that office, and it is settled law that one who is in the employ of a person having a pecuniary interest in the result of the prosecution cannot be a competent juror. Neither the sheriff nor a regularly constituted deputy would, it seems clear, be a competent juror, and we cannot perceive why the principle on which that rule rests does not apply to bailiffs employed by the sheriff to serve subpoenas in a case which he is called upon to try. It is difficult to conceive any just ground upon which it can be held that a juror in a criminal prosecution may act for the sheriff and still retain his place on the jury. If the juror accepts employment from the sheriff he destroys his competency to serve as a juror in the case wherein he acts for the sheriff. In our opinion, the case before us falls fully within the rule laid down in the carefully considered case of *Block v. State*, 100 Ind. 357. We adhere to the rule declared in the cases of *Johnson v. Holliday*, 79 Ind. 151, and *Railroad Co. v. Pitzer*, 109 Ind. 179, 6 N. E. Rep. 310, and 10 N. E. Rep. 70, but we do not think that the rule applies to this case. The statement of the juror fully discloses his incompetency, and no explanation that he could make could break the force of his statement. The statement so clearly discloses his incompetency that nothing he could say would destroy the effect of that statement. The record, therefore, affirmatively shows that an incompetent juror was accepted despite the challenge of the appellant. Judgment reversed.

(115 Ind. 124)

DEHORITY v. PAXSON *et al.*

(Supreme Court of Indiana. May 30, 1888.)

CHATTEL MORTGAGE—FORECLOSURE—RIGHTS OF JUNIOR MORTGAGEES.

Where a senior mortgage has been foreclosed, and the property bought by the mortgagor at an unimpeached sale regularly made, the price paid will, in the absence of fraud, be presumed to have conclusively fixed the value of the property; and a junior mortgagee cannot, by showing that the property did not sell for its full value, have the first mortgage satisfied to any greater extent than the price paid at such sale.

Appeal from circuit court, Madison county; D. Moss, Judge.

Action by James M. Dehority against Joseph R. Paxson and others to foreclose a mortgage. There was judgment for defendants, and plaintiff appeals.

Robinson & Lovett and *M. A. Chipman*, for appellant. *Henry & Ryan*, for appellees.

MITCHELL, J. Petition by Dehority to reinstate the record of an alleged unsatisfied judgment and decree foreclosing certain mortgages, entered at the June term, 1880, of the Madison circuit court, in favor of Frederick Tykle against Joseph R. Paxson and David Foland, for \$1,800 and upwards, which record, it is alleged, had been destroyed by fire, in a general destruction of the records of the Madison circuit court, resulting from the burning of the courthouse on the 10th day of December, 1880. It is alleged that the judgment and decree had been duly assigned by Tykle to Dehority. Simon, and others, who were parties to the original decree, and were alleged to be the holders of junior mortgages on the real estate mortgaged to Tykle, answered, admitting the facts stated in the complaint or petition; but in avoidance they averred that both the mortgages foreclosed by Tykle had been executed as a security for the same debt; that one covered certain real estate upon which the defendants held junior mortgages, to secure debts owing to them respectively by the mortgagors; and that the other, which had been duly foreclosed by the plaintiff's assignor, covered a large amount of personal property owned by the mortgagors, of the value of \$2,500, which property the plaintiff had caused to be sold by the sheriff, on a certified copy of the decree of foreclosure mentioned in the complaint. It is alleged that the plaintiff bid off, and purchased the

personal property covered by the chattel mortgage at the sale, for the nominal price of \$232, although it was reasonably worth \$2,500. As a conclusion drawn from the foregoing facts, the pleader states that the judgment and decree taken by Tykle, and by him assigned to the plaintiff, have been fully satisfied by the above-mentioned sale.

The court held the answer sufficient on demurrer, and the only question involved relates to the propriety of this ruling. Counsel for appellee assert, and seek to maintain the proposition, that whenever property of a judgment debtor of a value sufficient to satisfy the judgment has been levied on, and the title of the judgment debtor has been divested and lost, whether by an execution sale or otherwise, the judgment is to be deemed satisfied to the extent of the value of the property thus taken. At least, it is said, this must be the rule as respects the execution plaintiff, and those holding junior incumbrances. The proposition is not maintainable. It has often been broadly stated that a levy upon the judgment debtor's personal property, of sufficient value to satisfy the execution, was *per se* an extinguishment of the judgment, and hence a satisfaction of the execution. The inaccuracy of this statement has been repeatedly shown. Such a levy is not an absolute satisfaction, but is to be considered a *prima facie* payment or satisfaction *sub modo*. If it appears that the levy has been regularly exhausted by a sale duly made, and that the sale has failed to produce a sum sufficient to satisfy the judgment, the levy and sale will be regarded as satisfaction *pro tanto*, and a new execution may be had for the residue. The most that can be said is that a levy upon goods of sufficient value to pay the judgment raises a presumption that the execution is satisfied. This presumption may be overcome by a return of the officer showing that the property had been duly and lawfully sold, and that a sale regularly made had not been productive of sufficient to pay the debt. *McIntosh v. Chew*, 1 Blackf. 239; *Neff v. Hagaman*, 78 Ind. 57; *McCabe v. Goodwine*, 65 Ind. 288; *Richey v. Merritt*, 108 Ind. 347, 9 N. E. Rep. 368; *U. S. v. Dashiell*, 3 Wall. 688; *Trapnall v. Richardson*, 13 Ark. 543, 58 Amer. Dec. 338, and note; *Banta v. McClellan*, 14 N. J. Eq. 120. As will be observed, the application of the rule relating to the effect of a levy is confined almost exclusively to cases where it appeared that, after sufficient property had been seized to satisfy the execution, the property had been wasted, or the levy released, or in some other way rendered ineffectual, without the consent of a surety or other person occupying such a relation to the debt as entitled him to insist upon a sale of the property. In all such cases it is incumbent on the plaintiff to show why the property thus taken was not sold in the regular course, and the proceeds applied to the extinguishment of the debt. *Johnson v. Tuttle*, 9 N. J. Eq. 365. The purpose of issuing an execution is to obtain satisfaction of the debt. The law will not tolerate the levying upon property merely as a security, or to protect the property for the accommodation of the debtor. *Pary's Appeal*, 41 Pa. St. 273; *Landis v. Evans*, 113 Pa. St. 332, 6 Atl. Rep. 908; *Appeal of Lazlere Co.*, 13 Atl. Rep. 85. Where, however, the property has been levied upon and regularly sold, and the proceeds properly applied, we know of no authority, nor can we conceive of any sound principle, which would permit an inquiry into the actual value of the property with a view of showing that the judgment had been satisfied by the levy, without regard to the sum produced by the sale. Where property has been sold at public sale, after due and lawful notice in pursuance of the decree of a court, parties are bound by the value of the property as fixed by the highest bidder, until the sale is set aside, or in some way impeached for fraud or irregularity. "It is to be presumed that property sold at a regular sale fetches its true value," while a contrary presumption arises as to irregular sales. *Horn v. Ross*, 20 Ga. 210, 65 Amer. Dec. 621. If the price was so grossly inadequate as to shock a correct mind, this inadequacy of price might furnish a strong presumption of fraud or irregularity, and entitle

the party injured to have the sale set aside upon seasonable application. *Fletcher v. McGill*, 110 Ind. 395, 10 N. E. Rep. 651, and 11 N. E. Rep. 779. If, however, parties to the decree affirm the sale, they also affirm the price at which the property sold. They cannot, without questioning the validity and regularity of the sale, enter upon an inquiry concerning the value of the property. The answer in the present case shows that the plaintiff's assignor foreclosed his chattel mortgage by proceedings in chancery. The appellees were parties to that decree. The sheriff afterwards took possession of the mortgaged chattels, and sold them pursuant to the order of the court. This sale, as the answer affirmatively shows, produced an amount insufficient to pay the debt. Without in any manner attacking the sale or questioning its regularity, the appellees propose to satisfy the appellant's judgment by extraneous proof that the property sold and purchased by him was of sufficient value to satisfy the judgment. This cannot be done. When a chattel mortgage has been foreclosed, either by proceedings in chancery or in pursuance of a power, the price paid by the highest bidder, at an unimpeached sale regularly made, will, in the absence of fraud, be presumed to have conclusively fixed the value of the property for the purpose of being applied to the debt. *Lee v. Fox*, 118 Ind. 98, 14 N. E. Rep. 889. There could be no propriety in requiring a mortgagee to go through the ceremony of foreclosing his mortgage, and making a public sale of the property, if in the end he is to be charged with the amount that parties interested may be able to show the property was actually worth, without regard to the amount the sale produced. In contemplation of law the only purpose of making a sale of mortgaged chattels, the legal title of which is conditionally in the mortgagee, is to ascertain their value, as applicable to the mortgage debt, thus giving the mortgagor the benefit of his equity of redemption if the goods are worth more, or leaving him liable for the residue if they are worth less, than the debt. It was error to overrule the demurrer to the answer. The judgment is reversed, with costs.

(115 Ind. 62)

HEUSTON v. SIMPSON *et al.*

(Supreme Court of Indiana. May 29, 1883.)

WITNESS—COMPETENCY—PHYSICIAN.

Under Rev. St. Ind. 1881, § 497, which forbids physicians to testify as to matter communicated to them, as such, by patients in the course of their professional duties, a physician is not a competent witness to prove the mental and physical condition of his patient, whether his knowledge thereof was derived from words of the patient, his own observation, or his professional examination.

Appeal from circuit court, Lawrence county; E. D. PEARSON, Judge.

Action by Jonathan B. Heuston against William Simpson and others to set aside a will. Rev. St. Ind. 1881, § 497, declares: "The following persons shall not be competent witnesses: * * * *Fourth*, physicians, as to matter communicated to them, as such, by patients in the course of their professional duties, or advice given in such cases."

Fred. L. Prow, *George W. Friedley*, and *Joseph Giles*, for appellant. *Dunn & Dunn*, *W. H. Edwards*, and *Thad. Huston*, for appellees.

ELLIOTT, J. This action was brought by the appellant to set aside the will of his deceased brother, David Heuston. The executor and devisees were made defendants. On the trial, two of the physicians who attended the testator in his last illness were called as witnesses, and the appellant proposed to prove by them the mental and physical condition of the testator. The appellees objected, on the ground that an attending physician cannot testify as to the result of an examination made by him in a professional capacity, nor as to any facts observed or learned by him while acting in that capacity. The objection prevailed. Appellees defend the ruling of the trial court upon the au-

thority of section 497, Rev. St., and the case of *Association v. Beck*, 77 Ind. 203. In that case the court quoted with approval from the case of *Edington v. Insurance Co.*, 5 Hun, 1, this language: "The secrets of the sick-chamber cannot be revealed, because the patient was too sick to talk, or was temporarily deprived of his faculties by delirium or fever, or any other disease, or because the physician asked no questions. The statute seals the lips of the physician against divulging in a court of justice the intelligence which he acquired in the necessary discharge of his professional duty." The last sentence in the extract we have made from *Edington v. Insurance Co.*, *supra*, correctly declares the law. If the knowledge is acquired in the chamber of the patient, and in the discharge of professional duty, the physician can make no disclosure. This is true whether the knowledge is communicated by the words of the patient, or is gained by observation, or is the result of a professional examination. The law forbids the physician from disclosing what he learns in the sick-room, no matter by what method he acquires his knowledge. *Association v. Beck*, *supra*; *Association v. Riddle*, 91 Ind. 84; *Insurance Co. v. Wiler*, 100 Ind. 92; *Turnpike Co. v. Andrews*, 102 Ind. 138, 1 N. E. Rep. 364; *Williams v. Johnson*, 112 Ind. 273, 13 N. E. Rep. 872; Rap. Wit. § 272. The rule we have stated is a general one, for the statute makes no exceptions. It is a rule that may be invoked by the representatives of the deceased patient. It must, therefore, apply to this case, unless the court legislates, and by legislation creates an exception. That we cannot do. The case before us is within the rule, and must be decided as the rule requires. The question came before the court in *Renihan v. Dennin*, 103 N. Y. 573, 9 N. E. Rep. 320, as it comes before us, in an action to set aside a will, and it was held, all judges concurring, that the testimony was incompetent. The case of *Coryell v. Stone*, 62 Ind. 307, is not in point. There was no such question in that case as we have in this, for there was no attempt in that case to secure a disclosure of knowledge acquired by a physician in his professional capacity. In *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433, no question was made as to the competency of the witnesses, nor was any such question made in *Dyer v. Dyer*, 87 Ind. 13, so that neither of these cases lends any support to the appellant's position. The instructions taken, as they must be, as an entirety, correctly stated the law to the jury. Judgment affirmed.

(115 Ind. 45)

WILLIAMS v. LEWIS et al.

(Supreme Court of Indiana. May 29, 1888.)

PARTNERSHIP—ADMISSIONS OF PARTNER—ESTOPPEL.

A partner cannot, in the absence of his copartners, subject specific articles of the partnership property to the individual debts of one of them, by declarations or admissions that they are such person's individual property, nor will his knowledge, presence, or unauthorized acquiescence, at a levy and execution sale thereof to satisfy such individual debts, estop his copartners, who are absent and without notice, from asserting their partnership rights.

Appeal from circuit court, Switzerland county; JAMES Y. ALLISON, Judge. *W. R. Johnston and Works & Schroeder*, for appellant. *James B. McCrellis*, for appellees.

MITCHELL, J. Complaint by James W. Lewis, Benjamin W. Simmons, and James C. Long against John E. Williams, to set aside a constable's sale of certain personal property, and to enjoin the defendant from removing property alleged to have been wrongfully sold to and purchased by him at such sale. It is charged in the complaint that in February, 1885, the plaintiffs, as partners, under the name of Lewis, Simmons & Long, were owners of a stationary steam saw-mill, with engine, boiler, carriage-way, trucks, 11 saws, and other attachments complete,—all of which were situate in the city of Vevay, Ind., and that the partnership affairs remained unsettled, the firm being still

indebted to divers persons, whose names are set out. It is averred that a judgment had been recovered against James W. Lewis, one of the partners, for an individual debt, and that an execution had issued thereon, in virtue of which the constable had seized and sold the engine and boiler, and the saw-frame and 11 saws above mentioned, as the individual property of Lewis. It is further averred that the only interest which Lewis had in the property so levied upon and sold arose from his being a member of the firm of Lewis, Simmons & Long, and that the only interest Williams had was such as he acquired through the constable's sale above mentioned. It is averred that Williams and his employes were proceeding to tear down and remove the engine and boiler and other articles which he assumed to own in pursuance of the purchase made as above, and that to detach and remove those articles would render the residue of the partnership property practically useless. It was also charged that the defendant, Williams, was notoriously insolvent. Prayer that the sale be set aside, and the defendant enjoined from interfering with the property. Williams answered, among other defenses, that the firm of Lewis, Simmons & Long had ceased to transact business about a year before the sale under which he claimed, and that he was not aware at the time he purchased the property that it belonged to the firm of Lewis, Simmons & Long. He alleged, further, that before the execution was issued Lewis claimed to own the whole of the property, and that he was offering to sell it to Simmons. He charged, further, that before he bought the property the constable to whom the execution was issued called upon Simmons, and informed him that he had an execution against the property of Lewis, and that he was about to levy on the property now in dispute, and that Simmons informed the defendant and the constable that the property belonged to Lewis individually, with the exception of a few dollars invested therein by the other partners in the way of repairs. It is averred that Simmons was in Vevay from the time of the levy until the day of the sale; that he knew the property was advertised for sale; and that he made no objection nor gave any notice of the claim of the firm, and that he again told Williams, on the day of the sale, that the property belonged to Lewis individually. The court sustained a demurrer to the answer, and the propriety of this ruling is made the principal subject of discussion.

That the interest of one partner in the goods or property of the firm may be seized and sold upon execution for his individual debt cannot be doubted, and it is likewise settled that, as incidental to the right of sale, the officer may, without interfering with the rights of the other partners, take possession of the interest seized, and deliver it to the purchaser, who takes subject to the rights of the other partners, and to the contingency that an accounting may show that he took no beneficial interest by the purchase. The purchaser cannot acquire specific articles of property at such a sale, but, if the creditor of one partner sells his debtor's interest in the firm property, the purchaser may ultimately obtain any surplus that may remain after the firm creditors are paid and the partnership accounts fully adjusted. *Ex parte Hopkins*, 104 Ind. 157, 2 N. E. Rep. 587; *Deeter v. Sellers*, 102 Ind. 458, 1 N. E. Rep. 854; *Donellan v. Hardy*, 57 Ind. 393; 2 Lindl. Partn. 690. Specific articles of partnership property cannot be levied upon and sold to satisfy the individual debt of one partner, and when the officer, instead of selling the whole interest of the execution debtor, sells the whole of certain specific articles of property belonging to a firm, the other owners may treat him as a trespasser, and may enjoin the sale or the delivery of the articles so sold. *Stumph v. Bauer*, 76 Ind. 157; *Branch v. Wiseman*, 51 Ind. 1; *Moore v. Pennell*, 52 Me. 162, 83 Amer. Dec. 500, and note; *Spalding v. Black*, 22 Kan. 55; *Atkins v. Saxton*, 77 N. Y. 195; *Miner v. Pierce*, 38 Vt. 610; 2 Lindl. Partn. 690. Without disputing the propositions above stated, it is contended on appellant's behalf that the declarations made by Simmons, one of the partners, to the effect that the property levied upon and sold was the individual property of Lewis, estopped

the former from afterwards asserting as against the appellant, who bought on the faith of his declaration that it was the property of the firm. It is insisted, moreover, that notice to Simmons that the property was about to be sold as the property of Lewis was notice to the firm, and that his acquiescence in the sale, and his declarations in respect to the title, not only estopped him, but the firm of which he was a member as well. It appears from the pleadings that both Lewis and Long were out of the state at the time and had no knowledge of the levy and sale; that, although the firm had ceased carrying on its business, the debts had not yet been paid, nor the partnership account settled, nor the partnership property disposed of. It is undoubtedly true that each partner is, in a qualified sense, the agent of his copartners in relation to the business of the firm, and that his acts and declarations in reference to the business in which he is at the time employed, within the scope of the partnership, are the acts and declarations of the firm; but one partner cannot, by his acts or declarations, in the absence of the others, deprive them or either of them of their interest in the firm property. *Rush v. Thompson*, 112 Ind. 158, 13 N. E. Rep. 665; *Bays v. Conner*, 105 Ind. 415, 5 N. E. Rep. 18; *Hickman v. Reineking*, 6 Blackf. 387; *Bank v. Underhill*, 102 N. Y. 336, 7 N. E. Rep. 293; *Kaiser v. Fendrick*, 98 Pa. St. 528. The agency which exists between partners pertains only to the business of the firm, and the declarations of one partner which bind the others are such as pertain to, and are made while employed about, the business of the partnership. *Boor v. Lowrey*, 103 Ind. 469, 3 N. E. Rep. 151; *Winchester v. Creary*, 116 U. S. 161, 6 Sup. Ct. Rep. 369; *Avery v. Rowell*, 59 Wis. 82, 17 N. W. Rep. 875. Certainly, one partner cannot admit away the interest of his copartners in the partnership property, or transfer the interest of one partner to the individual creditors of the other in the absence of both, nor can he, by his declarations, make that a partnership transaction which does not appear to be such. *Blaker v. Sands*, 29 Kan. 551. Whatever the motive of Simmons may have been in asserting that the property belonged to Lewis individually, the declaration was not made during the progress and within the scope of the partnership business. While one partner may, under certain circumstances, in the absence of the others, dispose of the firm property or pledge it for a firm debt, he cannot, by an admission in the absence of the other partners, convert that which was the property of the firm, into the property of one of its members, and thus divert it from the payment of partnership debts. *Bond v. Nave*, 62 Ind. 505. Neither can one member of a suspended firm, by standing by, estop the other members, who are absent, from asserting their interest in the partnership property. The present case is not within the principle which ruled *Griswold v. Haven*, 25 N. Y. 595, 82 Amer. Dec. 380, and cases of that class. As stated in the head-note to that decision, one of a firm of warehousemen falsely represented to a person, who advanced money on the faith of the representation, that the one to whom the money was advanced, and to whom he had given receipts in the firm name, had on storage a certain quantity of grain. It was held that where the authority of an agent or partner depends upon some fact outside the terms of his power, and which from its nature not peculiarly within his knowledge, his principal or firm is bound by his representation, though false, as to the existence of such fact. The decision in the case cited is controlled by the fact that the representation was made in connection with an act which the partner was authorized to perform, and the fact misrepresented formed part of and was within the power of the partner whose representation was relied on. Where a party, dealing with one partner in respect to a matter which corresponds in every particular with the business of the firm, relies upon the representation of the partner, as to any fact pertinent to the transaction in hand which rests peculiarly within the knowledge of the partner, the firm is bound. Declarations made by an agent or partner in response to timely inquiries relating to matters under his charge, in respect to which it is part of

his business, in the usual course, to act or impart information, bind the principal or firm. *Bank v. Stewart*, 114 U. S. 224, 5 Sup. Ct. Rep. 845. It is, however, no part of the business of partners to enlarge, deny, or affect the respective interests of members of the firm in the partnership property, by declarations or admissions in the absence of each other. They are not constituted agents for each other for any such purpose. The agency extends merely to the conduct of the business of the firm. *Woodruff v. Scatfe*, 3 South. Rep. 311. It is not to be doubted but that partnership assets may be transferred in payment or to secure an individual debt of one partner, but this can only be done while the property is in the possession of the owners, and by the consent of all the partners. *Fisher v. Syfers*, 109 Ind. 514, 10 N. E. Rep. 306; *Machine Co. v. Bannon*, 4 S. W. Rep. 831. Of course if one, seeing his property about to be levied on as the property of another, disclaims any ownership therein, or stands by and acquiesces in the sale, he will be estopped to assert a title as against an innocent purchaser. But a disclaimer by one partner cannot estop the others, unless it is known to, and ratified by, them, nor can the acquiescence of one bind the others, who had no notice. *Caldwell v. Auger*, 4 Minn. 217, (Gil. 156,) 77 Amer. Dec. 515, is not in conflict with this conclusion. While the answer may have been good, if no other interest than that of Simmons had been involved, since it was not good as an answer to the complaint by Lewis, Simmons & Long, as partners, the demurrer was properly sustained. The complaint was sufficient. It was not necessary that the plaintiffs should have tendered the money paid to the constable by Williams. The firm received no benefit from the money. Nor does it make any difference that the plaintiffs have a remedy at law to replevy the property carried away. They have a right to invoke the aid of the court to enjoin the defendant from tearing down their engine and boiler, and carrying it away, to the disruption and detriment of their property. The judgment is affirmed, with costs.

(115 Ind. 148)

ALVEY v. REED.

(Supreme Court of Indiana. June 12, 1888.)

MECHANICS' LIENS—CONTRACTS WITH INFANTS.

A mechanic's lien cannot be obtained on an infant's land by virtue of a contract with her.

Appeal from superior court, Vigo county; J. M. ALLEN, Judge.

Action to quiet title to land by Edward Reed, as guardian of Jessie Bowser, against John P. Alvey. Judgment for complainant, and defendant appeals.

I. N. Pierce, for appellant.

ELLIOTT, J. The appellee, as the guardian of Jessie Bowser, brought this action to quiet title to land owned by his ward. It is alleged in the complaint that the appellant erected a house on the land; that, at the time the house was built, Jessie Bowser was under the age of 21 years; that she was the wife of James B. Myers, from whom she has since been divorced; and that the house was built under a written contract executed by Myers and his then wife. The appellant filed a cross-complaint, wherein he alleged that at the time the contract was executed, and the house built, Jessie Myers appeared in size and development to be of full age; that she entered into a contract with the appellant to build a house on the land owned by her; that she agreed to pay him for building the house the sum of \$1,640, and that she paid him \$500, and for the remainder executed a note and mortgage; that, when the house was completed, Jessie Myers for the first time informed appellant that she was a minor, and declared that she would not pay the note and mortgage, but would repudiate them when she arrived of age; that thereupon the appellant filed notice of intention to hold a lien on the property; that she has wrongfully and

forcibly taken possession of the house, and now has possession of it. The cross-complaint also avers that the improvement made by the appellant will increase the value of the property to the amount of \$1,640, and that the work done and materials furnished by him are of the reasonable value of \$1,640. It is further averred that at the time the contract was executed, and until after the house was completed, the appellant was ignorant that Jessie Myers was a minor, and that he believed that she was of full age. The complaint is good. A mechanic's lien cannot be acquired against the property of an infant. A lien implies a contract, and, as an infant cannot make a valid contract, no lien can be obtained against his property. *Price v. Jennings*, 62 Ind. 111; Phil. Mech. Liens, § 108. The case made by the cross-complaint is a hard one as against the appellant, but many cases, indeed almost all cases, where infants are concerned, are hard cases. We cannot, much as we are impressed by the equities of the appellant, find any principle upon which we can uphold his cross-complaint. It cannot be upheld on the ground of estoppel, because an infant cannot be estopped from asserting his true age, nor from avoiding his contract by pleading his disability. *Carpenter v. Carpenter*, 45 Ind. 142; *Price v. Jennings*, *supra*; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. Rep. 420; *Sims v. Everhardt*, 102 U. S. 300; Hock. Infants, § 17. A lien cannot be enforced without enforcing a contract, since, as we have seen, the right to a lien depends entirely upon contract; and, as the contracts of infants cannot be enforced, the appellant has no right of action. If a right existed entirely independent of a contract, and was founded solely on a tort, it might be otherwise. *Rice v. Boyer*, *supra*, and authorities cited. Persons who deal with infants do so at their peril, for the law interposes their nonage as a shield. If liens were allowed to prevail against infants, the result the law intends to prevent would follow, for they might be improved out of their property. Judgment affirmed.

(115 Ind. 134)

CARPENTER *et al.* v. COOL.

(Supreme Court of Indiana. June 12, 1888.)

1. EXEMPTIONS—FINDINGS AS TO TOTAL AMOUNT OF PROPERTY—SET-OFF OF JUDGMENTS.

In a suit to set off judgments, a finding that defendant is insolvent, and has no property subject to execution, does not imply a finding that all his other property does not amount to \$600,—the exemption in cases founded on contract under Rev. St. Ind. 1881, § 703,—and so require a denial of the relief sought.

2. SAME—PLEADING.

Under Rev. St. Ind. 1881, § 703, exempting to resident householders property to the amount of \$600, in cases founded on contract, an answer, in a suit to set off judgments, that defendant's judgment against plaintiff was rendered on contract; that at the date of that judgment and since defendant was and has been a resident householder of the state; that defendant's entire property was then and has been since of a less value than \$600; and that both judgments were rendered on contracts made since the above law took effect,—is a good plea.

Appeal from circuit court, De Kalb county; R. WES MOBRIDE, Judge.

Action by Isaac N. Cool against Herman F. Carpenter and Samuel H. Rush to have a judgment of Cool against Rush set off against a judgment of Rush against Cool, which had been assigned by Rush to Carpenter prior to the recovery of plaintiff's judgment, in payment of a pre-existing debt, and was so applied, in good faith. The defendants filed separate answers, to which plaintiff demurred. The demurrers were sustained, issues tried, and judgment rendered for plaintiff for the relief asked. Defendants then appealed.

W. H. Dills and G. B. Adams, for appellants.

Howk, J. On the 11th day of May, 1885, Isaac N. Cool, plaintiff, commenced this suit against the defendants, Herman F. Carpenter and Samuel H. Rush. Both defendants appeared, and, severing in their defense, filed

separate answers herein, to which plaintiff replied by general denials thereof. The issues joined were tried by the court, and, at defendant's request, the court made a special finding of facts herein, and thereon stated its conclusions of law in favor of the plaintiff. Over defendants' exceptions to its conclusions of law, the court rendered judgment thereon, in plaintiff's favor for the relief demanded in his complaint. Defendants have assigned error here (among others) which call in question the correctness of the trial court's conclusions of law upon its special finding of facts. The facts found by the court are substantially as follows: (1) On February 1, 1885, defendant Rush, in the court below, recovered a judgment against plaintiff, Cool, for \$107.30, and costs taxed at \$11, which judgment was on the 16th day of March, 1885, assigned by said Rush to his co-defendant, Carpenter, to be applied on a certain indebtedness of said Rush to said Carpenter, evidenced by two notes, one for \$200 and one for \$100, dated September 19, 1884. Said judgment was then in full force and unpaid, and said Carpenter received said assignment thereof in good faith, and credited the amount of such judgment on said indebtedness of Rush to him. (2) On March 13, 1885, said Cool commenced a suit against said Rush before a justice of the peace of De Kalb county, Ind., upon a note and account which had been assigned to said Cool after the rendition of said judgment in favor of said Rush, and against said Cool; which case of *Cool v. Rush* resulted in a judgment in favor of said Cool, and against said Rush, before said justice, on March 16, 1885, for \$140, and costs taxed at \$4.45, which said judgment was in full force and unpaid. (3) On said 16th day of March, 1885, but before the rendition of said last-described judgment, said Rush assigned his said judgment against said Cool to defendant Carpenter. (4) At the dates of both of said judgments said Rush was "and still is" a resident freeholder of the state of Indiana, and was at those dates "and still is" insolvent, and had not "nor has" property subject to execution. Upon the foregoing facts the trial court stated its conclusions of law as follows: "Plaintiff is entitled to the relief asked in his complaint, and to have his said judgment against defendant Rush set off against said judgment recovered by said Rush against him. [Signed.] R. WES McBRIDE, Judge."

We are of opinion that, upon the facts found as aforesaid, the trial court did not err in its conclusions of law, as above stated. It would seem from the record of this cause that defendants claimed, and attempted to show, that the judgment against the plaintiff in favor of defendant Rush was a necessary part of his exemption as a householder of this state; and that, for this reason, plaintiff could not assert any claim, legal or equitable, by way of set-off against such judgment, either as against Rush or as against his assignee and co-defendant, Carpenter. The evidence is not in the record, and therefore it does not clearly appear what showing defendants made on this point; but, as against them, it may be properly assumed, in the state of record, that the court's special finding of facts herein; the substance of which we have given, was fully sustained by the evidence on the trial without material conflict therein. We need not argue, for the purpose of showing that the facts found specially by the trial court were wholly insufficient to sustain defendant's claim, that the judgment against plaintiff in favor of said Rush was a necessary or proper part of his constitutional and statutory claim to a householder's exemption, and that such judgment was not subject to the equitable set-off which plaintiff sought to enforce against it in this suit or proceeding. Under our law, an amount of property not exceeding in value \$600, owned by any resident householder, is not liable to sale on execution, or any other final process from a court, for any debt growing out of or founded upon a contract, express or implied. Rev. St. 1881, § 703. If, under this statute, the court below had found as a fact, in the case in hand, in addition to the fact that Rush was a householder of this state, that his judgment against the plaintiff, Cool, and all his other property, real and personal, did not exceed in value the sum \$600, it might

well be held, we think, that the plaintiff could not maintain his claim herein to a set-off against such judgment, as against either of the defendants, under our previous decisions. *Puett v. Beard*, 86 Ind. 172; *Butner v. Bowser*, 104 Ind. 255, 3 N. E. Rep. 889; *Burdye v. Bolin*, 106 Ind. 175, 6 N. E. Rep. 140; *Taylor v. Duesterberg*, 109 Ind. 165, 9 N. E. Rep. 907; *Barnard v. Brown*, 112 Ind. 53, 13 N. E. Rep. 401; *Dumbould v. Rowley*, 113 Ind. 353, 15 N. E. Rep. 463. But no such facts, nor any facts equivalent thereto, were found by the trial court in the case under consideration. The very utmost that was found, bearing upon Rush's claim to an exemption, was that he was "insolvent," and had "no property subject to execution." In legal acceptation, a man is insolvent who is unable to pay his debts at maturity; and he may be insolvent, and may have no property subject to execution, although at the same time he may be the owner and in the possession of thousands of dollars in good choses in action. It is certain, we think, that the court did not err in its conclusions upon the facts found, that plaintiff was entitled, as against both defendants, to have his judgment against defendant, Rush, set off against the judgment recovered of him by Rush. In their brief of this cause, defendants' counsel ask, in the event we hold that the court did not err in its conclusions of law upon the facts specially found, that we consider also the errors assigned upon the sustaining of plaintiff's demurrers to the second paragraph of defendant Rush's separate answer, and to the third paragraph of defendant Carpenter's separate answer. In the second paragraph of his separate answer, defendant Rush alleged that his judgment against plaintiff, Cool, was rendered upon contract, to-wit, the sale of goods and personal property to said Cool by said Rush; that at the date of his recovery of such judgment against plaintiff, Cool, and of its assignment to his co-defendant, Carpenter, and since, defendant Rush was and has been a resident householder of the state of Indiana; that the entire property of defendant Rush, real and personal, within or without this state, was then and has been since of a less value than the sum \$600; that both of the judgments described in plaintiff's complaint herein were rendered upon contracts entered into since May 31, 1879. In the third paragraph of the separate answer of defendant Carpenter, substantially the same facts, among others, were alleged, as those stated in the second paragraph of the separate answer of defendant Rush, the substance of which we have given. Without discussing at length the questions presented by the errors predicated upon the sustaining of plaintiff's demurrers to these two paragraphs of defendants' separate answers herein, it must be held, we think, upon the authority of our previous decisions heretofore cited in this opinion, that these errors are well assigned, and that plaintiff's demurrers to each of such paragraphs of defendants' separate answer ought to have been overruled. For these errors the judgment below must be reversed. We note the fact that plaintiff's counsel have not favored this court with any brief or argument in support of the rulings and judgment of the court below. The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the demurrers to the second paragraph of Rush's answer, and the third paragraph of Carpenter's answer, and for further proceedings not inconsistent with this opinion.

(115 Ind. 160)

SPEAR v. WHITSETT.

(*Supreme Court of Indiana. June 13, 1888.*)

NEGOTIABLE INSTRUMENTS—ACTIONS ON—WEIGHT OF EVIDENCE.

Where the testimony of defendant in an action on a promissory note is clear and positive that the note was given without consideration, and in support of her plea of *non est factum*, a verdict in her favor is fairly sustained by the evidence.

Appeal from circuit court, Scott county; JEPHTHA D. NEW, Judge.

W. K. Marshall and *A. N. Munden*, for appellant. *C. B. Harrod*, for appellee.

Howe, J. This was a suit by appellant, Spear, as plaintiff, against appellee, Surelda C. Whitsett, and one Lemuel E. Whitsett, as defendants, on a promissory note for \$200, dated May 13, 1884, purporting to have been executed by defendants, payable 12 months after date, to the order of one Cassilda Laraway, and indorsed by her as alleged to plaintiff herein. In his complaint, plaintiff averred that said note was due and wholly unpaid, and demanded judgment, etc. Summons was returned by the sheriff that defendant Lemuel E. Whitsett was "not found," and he went out of the case. Defendant Surelda C. Whitsett appeared and answered in six paragraphs, of which the first was a general denial of the complaint. In the sixth paragraph she denied under oath her execution of the note in suit, and the other paragraphs of her answer were special or affirmative defenses. Afterwards, said defendant filed additional seventh and eighth paragraphs of her answer; and plaintiff replied by a general denial to the second, third, sixth, seventh, and eighth paragraphs of defendant's answer. The issues joined were tried by a jury, and a verdict was returned for said defendant, and thereon the court rendered judgment that plaintiff take nothing by his suit herein, and that defendant recover of him her costs, taxed, etc. Plaintiff's motion for a new trial having been overruled by the court, he has appealed from the judgment below to this court, and has here assigned as the only error of which he complains the overruling of his motion for such new trial.

In his motion, the only causes for a new trial assigned by plaintiff were (1) that the verdict of the jury was contrary to the evidence; (2) that the verdict of the jury was not supported by the evidence; and (3) that the verdict of the jury was contrary to law and the evidence. It is manifest, from these causes for a new trial, that the question, and the only question, presented for our decision, by the record of this action and the error assigned thereon, may be thus stated: Is there legal evidence, in the record now before us, which fairly sustains or tends to sustain the verdict of the jury on every material point? If this question must be answered in the affirmative, as we think it must, the judgment below, under many decisions of this court, must be affirmed. This court will not weigh the evidence, nor attempt to determine its preponderance either for or against the verdict of a jury, or the finding of a trial court. The credibility of witnesses, and the proper weight to be given to the testimony of each witness, are material for the consideration of the jury and the trial court. It may be regarded as settled by our decisions that the verdict of a jury, which has met the approval of the trial court, will not be disturbed here on the evidence merely, unless the record shows an absolute failure of evidence on some material point. *Railroad Co. v. Husselman*, 65 Ind. 78; *Cornelius v. Coughlin*, 86 Ind. 461; *Beck v. Bundy*, 92 Ind. 145; *Ketcham v. Barbour*, 102 Ind. 576; *Allyn v. Allyn*, 108 Ind. 327, 9 N. E. Rep. 279; *Campbell v. Railroad Co.*, 110 Ind. 490, 11 N. E. Rep. 482; *Kopelke v. Kopelke*, 112 Ind. 435, 13 N. E. Rep. 695. In the case under consideration, defendant was a witness on the trial in her own behalf. Her testimony was clear, positive, and unequivocal in support of two of the paragraphs of her answer, namely: (1) That the note in suit was given without any consideration whatever, and (2) her plea of *non est factum*. If the jury believed her testimony in preference to other conflicting evidence, (and this it was competent for the jury to do,) it is easy to see how and why they arrived at their verdict, and it cannot be correctly said that such verdict was not fairly sustained by the evidence. Our conclusion is therefore that the court did not err in overruling plaintiff's motion for a new trial herein. The judgment is affirmed, with costs.

(115 Ind. 131)

PEHLMAN v. STATE.

(Supreme Court of Indiana. June 12, 1888.)

CRIMINAL LAW—VERDICT—AMENDMENT.

A verdict may be corrected or amended as well in a criminal as a civil case, and its recommittal does not put defendant twice in jeopardy. So a verdict convicting under a statute which inflicts a penalty of fine, imprisonment, and disfranchisement, may be recommitted to be filled out as to the length of the term of disfranchisement, though it had been, according to stipulation, sealed and intrusted to the foreman, and the jury had afterwards separated.¹

Appeal from circuit court, Tippecanoe county; WILLIAM C. WILSON, Judge.

Louis Pehlman was prosecuted upon affidavit and information by the state of Indiana for receiving stolen goods knowing them to be stolen. Verdict of guilty, and Pehlman appeals.

John F. McHugh, for appellant. *Geo. P. Haywood* and *The Attorney General*, for appellee.

NIBLACK, C. J. This was a prosecution upon affidavit and information against Louis Pehlman, for purchasing and receiving stolen goods knowing them to have been stolen. Rev. St. 1881, § 1935. A jury was impaneled to try the cause. After the cause had been submitted to the jury, it was agreed between the prosecuting attorney and counsel for Pehlman, in the presence and with the assent of the court, that if there should be an agreement upon a verdict after 10 o'clock that night, and before 9 o'clock next morning, the jury might seal up their verdict, place it in the hands of their foreman, and then temporarily separate. The next morning, about 5 o'clock, the jury agreed upon a verdict finding Pehlman guilty as charged, fixing his punishment at a fine of one dollar, and imprisonment in the state's prison for one year, and disfranchisement for a blank term of years. This verdict was signed, sealed up, and taken charge of by the foreman, after which the jury separated. When the court met at 9 o'clock on the same morning, the jury had reassembled, and were in their appropriate places in the court-room. Upon inquiry, they responded that they had agreed upon a verdict, and delivered the verdict to which they had agreed as above to the court. After an inspection of the verdict, the court called the attention of the jury to the fact that it was defective in its failure to specify the time for which Pehlman should be disfranchised, and upon its own motion returned the verdict to the jury, directing them to again retire to their room to consider and correct their verdict. Over the objection and exception of Pehlman, the jury accordingly retired, and soon after returned into court their amended verdict, fixing the term of his disfranchisement at two years. Pehlman thereupon moved the court for his discharge, upon the ground that he had been practically twice placed in jeopardy for the same offense; and upon the further ground that, as the jury had separated after agreeing upon a verdict, they had no power either to amend their verdict or to return another verdict. His motion was, nevertheless, overruled. Other motions designed to test the legality of the proceedings of the court and jury, which resulted in the return of an amended verdict, were consecutively entered and overruled, and judgment followed upon the verdict as amended. We are unable to see that any element of a second jeopardy was involved in the proceedings complained of. The verdict which was first

¹Concerning what will support a plea of former conviction or jeopardy, see *Boswell v. State*, (Ind.) 11 N. E. Rep. 788; *State v. Blanut*, (Ark.) 2 S. W. Rep. 190; *Robinson v. State*, (Tex.) 4 S. W. Rep. 904, and note; *State v. Briggs*, (S. C.) 2 S. E. Rep. 554; *People v. Kuhn*, (Mich.) 35 N. W. Rep. 88; *State v. Graham*, (Iowa,) Id. 628, and note; *Wells v. Com.*, (Ky.) 6 S. W. Rep. 150; *Johnson v. State*, (Ala.) 2 South. Rep. 466; *State v. Roberts*, (N. C.) 3 S. E. Rep. 682; *People v. Travers*, (Cal.) 15 Pac. Rep. 293; *Willis v. State*, (Tex.) 6 S. W. Rep. 857; *People v. White*, (Mich.) 37 N. W. Rep. 84; *People v. Curtis*, (Cal.) 17 Pac. Rep. 941.

returned was simply and only a defective verdict, and such a verdict may be amended at any time before the jury are discharged. Proff. Jury, § 456; Work, Pr. § 839; 2 Bish. Crim. Proc. § 1004. This should ordinarily be done by requiring the jury to return to their room, with proper instructions as to the correction which ought to be made; but, where the correction is merely formal, it may be made by direction of the court, in the presence and with the assent of the jury. *Noble v. Epperly*, 6 Ind. 468; *Reed v. Thayer*, 9 Ind. 157; *Jones v. Julian*, 12 Ind. 274; *Crocker v. Hoffman*, 48 Ind. 207; *Hyatt v. Clements*, 65 Ind. 12; *Clayton v. State*, 100 Ind. 201. By permitting a jury to separate after they have agreed upon a verdict, and before it is returned into court, nothing is waived either as to the power or duty of the court to have the verdict amended if it shall prove to be a defective verdict, or as to the right of either party to object to the reception of an incomplete or an improper verdict. Where a jury reassemble after an authorized separation, whether before or after agreeing upon a verdict, they resume at the point at which they left off, and proceed with the business before them as if no separation had taken place. Consequently, when a jury have been allowed to separate, and return a sealed verdict, and upon reassembling the verdict is found to be defective, the jury may be required to retire to their room and make the proper amendment or correction. This was expressly held to be a correct method of procedure in the case of *Tyrrell v. Lockhart*, 3 Blackf. 136, and is a rule of practice applicable to criminal as well as to civil causes. The judgment is affirmed, with costs.

(115 Ind. 162)

COMMONS v. COMMONS.

(Supreme Court of Indiana. June 12, 1888.)

1. WILLS—CONSTRUCTION—VESTED OR CONTINGENT INTEREST.

A testator devised certain lands to his three sons, and provided that, after said sons arrived at the age of 21, the wife, if living and unmarried, should be entitled to support from the rents of the land until her remarriage or death. Another clause of the will provided that the land could be sold during the minority of the sons only with the wife's consent. *Held*, that the wife's interest did not depend upon all the sons living to the age of 21, but was for life, if she remained unmarried, and was not affected by a partition of the land among the sons.¹

2. SAME—CHARGE ON LAND—SUPPORT.

Under a will giving testator's wife support from the rents and profits of land devised to his sons, each son is not liable personally or as a trustee for a proportionate share of the mother's support, but only to the extent of the rents and profits arising from his share of the property for the six years next before commencement of the suit.²

Appeal from circuit court, Rush county; SAMUEL A. BONNER, Judge.

Petition for rehearing. The original opinion is reported in 16 N. E. Rep. 820.

W. A. Cullen, for appellant. *Julian & Julian*, for appellee.

¹ Respecting the construction of wills, and when the interests thereby created are vested, and when contingent, see *Chasy v. Gowdry*, (N. J.) 9 Atl. Rep. 230; *Parker v. Glover*, Id. 217; *Appeal of Reed*, (Pa.) 11 Atl. Rep. 787; *Wiggin v. Perkins*, (N. H.) 5 Atl. Rep. 904, and note; *Davidson v. Bates*, (Ind.) 12 N. E. Rep. 687, and note; *Lenz v. Prescott*, (Mass.) 11 N. E. Rep. 923; *Dodd v. Winship*, Id. 538; *Williams v. Williams*, (Cal.) 14 Pac. Rep. 894, and note; *Roundtree v. Roundtree*, (S. C.) 2 S. E. Rep. 474; *Wills v. Wills*, (Ky.) 8 S. W. Rep. 900, and note; *Appeal of Churchman*, (Pa.) 12 Atl. Rep. 600; *Commons v. Commons*, (Ind.) 16 N. E. Rep. 820.

² As to when a direction or condition connected with a devise of land will be held a charge upon land, see *Schmehl's Appeal*, (Pa.) 8 Atl. Rep. 874; *Appeal of Phillips*, (Pa.) 7 Atl. Rep. 918, and note; *Merritt v. Buchnam*, (Me.) Id. 883; *Le Rougetel v. Mann*, (N. H.) 5 Atl. Rep. 746; *Halsted v. Westervelt*, (N. J.) Id. 270; *Allen v. Patton*, (Va.) 2 S. E. Rep. 143; *Decker v. Decker*, (Ill.) 12 N. E. Rep. 750; *Curtis v. Fowler*, (Mich.) 83 N. W. Rep. 804; *Commons v. Commons*, (Ind.) 16 N. E. Rep. 820.

ZOLLARS, J. It will certainly not be difficult to discover the difference between a holding that appellant was not personally liable under and by force of the terms of the will for his mother's living, which, as stated in the principal opinion, would make him liable regardless of the rents and profits of the land, and a holding which makes him personally liable by reason of having occupied a portion of the land and received the rents and profits thereof. Under the will appellee was and is entitled to a living from the land. The special finding of facts shows that appellant, while occupying a portion of the land and receiving the rents and profits, recognized that right. He certainly cannot complain that she claimed nothing from him on account of the rents and profits until recently. Nor can it be of any consequence, as affecting her rights, that during many years she was able or managed to live without looking to the land. She would have been entitled to a living from the land, although she might have received a fortune from other sources subsequent to the death of the testator. The will unconditionally gave to her a right to a living from the land. That right was not made dependent upon the condition that she might be able to live without looking to the land, nor upon any other condition. Having a right to a living from the land, appellee might, each year, have demanded from appellant, who occupied one-third of it, to turn over to her an amount equal to one-third of the amount necessary for her living, provided the rental value of the land so occupied amounted to that much. That she was entitled to a living from the land he was bound to know without any notice from her. The will which lodged the fee in him was notice to him that his mother was entitled to a living from the land. The special finding, however, as we have seen, shows that he had actual knowledge of her rights, and recognized those rights in frequent conversations with her. He has occupied the land and received the rents and profits with the knowledge, both constructive and actual, of her rights. The law raised an implied promise on his part to account to her for such an amount of the rents and profits of the land so occupied as would amount to one-third of her living, if the rental value of the land amounted to that much. To that extent he became indebted to her by reason of his occupancy and use of the land. *Betts v. Quick*, 16 N. E. Rep. 172. We can think of no statute, except the six-years statute of limitations, which will bar an action for that indebtedness, and that statute we think applies. Suppose, for example, that during the six years immediately preceding the bringing of the action, appellee had gone in debt to some one for her living, or had borrowed money on which to live, could it be said that because she had not each year, or the beginning of those six years, made a demand upon appellant, she could recover nothing from him with which to pay for her living, or to repay the money upon which she lived? By failing to require appellant to account as above indicated, appellee, by reason of the statute of limitations, is limited in her right of recovery to the six years preceding the commencement of her action; but to hold that she cannot recover for those years would be to destroy, in a measure, the provisions made for her by the testator. Complaint is made that we did not, in the principal opinion, decide upon what basis the rental value of the land occupied by appellant should be estimated; as, for example, what account, if any, should be taken of the improvements which appellant may have put upon the land, by way of clearing, fertilizing, and otherwise, if any, which may have increased the rental value. We did not go into that question, and must decline to do so now, for the reason that the record does not so present it as to make a decision necessary or proper. Petition for rehearing overruled.

(115 Ind. 219)

WULSCHNER v. WARD.

(Supreme Court of Indiana. June 16, 1888.)

SALE—RESCISSION—STATUTE OF FRAUDS.

A piano was sold on credit, under an agreement that it might be fully tested, and, if unsatisfactory, exchanged for another. Afterwards this agreement was modified by an oral agreement to rescind the sale absolutely, and refund the purchase money already paid. *Held* that, since the contract of sale had never been completed, the oral agreement to rescind was not a new and independent contract, and, having been fully performed by the purchaser, was not within the statute of frauds.

Appeal from superior court, Marion county; L. C. WALKER, Judge.

A. P. Stanton and John E. Scott, for appellant. D. V. Burns, for appellee.

NIBLACK, C. J. Complaint in two paragraphs, by Albert O. Ward against Emil Wulschner, for the rescission of a contract for the sale of a piano and for damages. The first paragraph charged that the plaintiff was induced to purchase a piano from the defendant by representations that it was sound in every particular, perfect in tone, and free from blemishes and defects of every kind, upon which he relied, but that said representations were false, as the defendant well knew at the time they were made; that after discovering certain defects in the piano, which such false representations gave assurance did not exist, it was agreed between the parties that, if the plaintiff would return the piano to the defendant at his place of business, he (the defendant) would rescind the contract of sale, and would refund the purchase price paid therefor; that, in pursuance of such agreement, the plaintiff returned the piano to the defendant, who refused to receive the same. The second paragraph was substantially the same as the first, except that it contained no averment of an agreement to rescind the contract and take back the piano. The defendant answered—*First*, in general denial; *secondly*, that the piano was sold under a contract of express warranty, coupled with an agreement that, if it should not meet all the stipulated requirements, it might be exchanged for another piano which would do so, and that a tender of exchange had been made before the bringing of the suit, averring a continuing readiness to make the exchange. Reply in denial. In response to certain questions submitted to them for the information of the court at special term, a jury made a finding of some material facts. The court also made a special finding of some additional facts adjudged to have been established by the evidence. When grouped together, these facts were, briefly stated, as follows: That the piano furnished to the plaintiff did not fulfill the conditions of warranty, or of representations made in regard to it; that the piano sent to the plaintiff was inferior to the one contracted for, and not of the character it was warranted to be; that the defendant orally agreed with one Steep, the plaintiff's agent, that, if he (the plaintiff) would return the piano to him free of cost, he would surrender to the plaintiff the notes given for it; that the piano was sold to the plaintiff, on or about the 28th day of May, 1885, for the sum of \$300; that, in payment, the plaintiff executed to the defendant his six promissory notes, in the sum of \$50 each, payable at a bank of deposit and discount in the city of Indianapolis, and at the following times: September 15, 1885, December 1, 1885, March 1, 1886, June 1, 1886, September 1, 1886, and December 1, 1886; that thereafter the defendant had the two notes first falling due discounted at said bank before maturity, by reason of which the plaintiff was compelled to pay the same, which together amounted to the sum of \$101.75; that the remaining notes had been brought into court to abide its order in relation thereto; that the defendant warranted the piano to be thoroughly made, and of the best materials; that, as a part of the contract of sale, the defendant stipulated that, if the piano did not prove to be as war-

v.17N.E.no.4—18

ranted, it might be returned to him, and that he would then furnish in its place another piano of the same grade, price, and manufacture, which would respond to all the requirements which had been agreed upon; that the defendant did, before the commencement of this suit, offer to receive back the piano so sold by him, and to deliver to the plaintiff any other piano of the same grade, price, and manufacture; that the defendant, also, before this suit was commenced, offered to exchange the piano for a better one if the plaintiff would pay the sum of \$30, as a difference between them; that the plaintiff lived at Southport, seven miles from the city of Indianapolis; that in pursuance of his agreement with the defendant for the return of the piano, and the surrender of his notes as stated, the plaintiff did return that instrument to him, (the defendant,) by sending it to him to the city of Indianapolis, at an expense to himself of six dollars, and there making a full and unconditional tender of the same to him; that the defendant nevertheless refused to receive the piano as he had agreed to do; that the agreement for the return of the piano, and the rescission of the contract for its sale, was the last agreement made between the parties concerning the piano; that the parties did not enter into any written contract in regard to the sale, exchange, or return of the piano. Upon the facts as thus found, the court below at special term came to the conclusion that the plaintiff was entitled to recover from the defendant the sum of \$102.43, and to an order for the return of his notes remaining unpaid. Over exceptions properly reserved, judgment was given accordingly, and that judgment was affirmed at general term.

Wulschner, further appealing to this court, first makes the point that it was inferentially shown, by the facts as specially found, that the piano was sold upon an express warranty, and that hence, however flagrant the breach of the warranty may have been, Ward did not thereby become entitled to a rescission of the contract of sale; citing *Marsh v. Low*, 55 Ind. 271, and *Hoover v. Sidener*, 98 Ind. 290. These cases hold, and we assume correctly, that where property is unconditionally sold, with a warranty superadded, the purchaser, in the absence of fraud, does not become entitled, as of right, to a rescission of the sale on account of a breach of the warranty; that the remedy in such a case is either an action for a breach of the warranty, or by way of recoupment or a counter-claim. We do not infer, however, from the facts expressly found, that the piano was sold upon a warranty alone; but, rather, that the sale was upon a warranty, as well as certain representations concerning its quality and general conditions. But, whatever the real facts in that respect may have been, we regard the question of the validity or non-validity of the agreement for a rescission of the contract of sale as being the controlling question in the cause. On Wulschner's behalf, it is insisted that the contract for the sale of the piano became an executed contract before the agreement for the rescission of the sale was made, and that, consequently, the agreement to rescind constituted an independent contract, amounting in fact to an agreement for the sale of the piano; that, as the piano was of a value greater than \$50, the agreement was within the statute of frauds, and consequently void. The question as to when a contract of sale may, and as to when it may not, be rescinded by a parol agreement has, at various times, elicited a good deal of discussion, and is one concerning which careful discriminations ought to be observed. The following propositions are, as we believe, fairly deducible from the authorities: Where an unconditional sale has been so entirely consummated that nothing further remains to be done, a contract for its rescission stands upon the footing of a new and independent contract, and hence is not a binding contract when it falls within the statute of frauds,—that is to say, when such a contract is required to be in writing, and is not; but that where the sale has some condition or contingent agreement connected with it, or some material thing remains to be done before the transaction is complete, an oral agreement for its rescission is binding, pro-

vided the agreement is clear and distinct, and provided, further, that the party seeking a rescission promptly complies with the agreement on his part. This is upon the principle that an agreement to undo a contract which, to some extent, still remains open or incomplete, is an agreement merely incidental and subordinate to the original contract, and hence one which requires no new consideration to support it, and to which the statute of frauds does not so readily apply as to the original contract. Bish. Cont. § 1241; 2 Reed, St. Frauds, § 461; *Guthrie v. Thompson*, 1 Or. 353; *Arrington v. Porter*, 47 Ala. 714; Benj. Sales, (Bennett's Ed.) 660. The propositions thus believed to be deducible from the authorities are not in conflict with the case of *Chapman v. Searle*, 3 Pick. 38, cited on Wulschner's behalf, but are impliedly supported by it. In that case the parol agreement to rescind the sale was held to be not obligatory, because no effort was made to enforce it until after the rights of third parties had intervened, and the non-validity of the agreement was placed upon that ground alone. In the case before us, the sale was upon a condition in the first instance, and time was given within which the piano might be tested. The sale, too, was upon credit, and the purchase money had not been fully paid. The right to exchange the piano, which had been conditionally reserved to Ward, had been, by subsequent agreement, so modified as to confer upon him the absolute right to have the sale rescinded. This subsequent agreement had, on Ward's part, been fully complied with. He had, therefore, become entitled to a rescission of the sale. The statute of frauds does not apply to a case in which a parol contract has been so far complied with on the one side as to cause a non-compliance on the other side to operate as a fraud on the party complying. 7 Wait, Act. & Def. 12; *Burnett v. Blackmar*, 43 Ga. 569; *Cook v. Churchman*, 104 Ind. 141, 3 N. E. Rep. 759. The judgment is affirmed, with costs.

(115 Ind. 139)

HOLLCRAFT v. DOUGLASS.

(*Supreme Court of Indiana. June 12, 1888.*)

1. EXECUTION—MISDESCRIPTION OF PREMISES.

An execution sale cannot be declared void for misdescription of the land in the advertisement and sale, on the mere evidence of an error in some of the published notices of sale, when the first levy is not shown to be incorrect, the second levy is correct, the land was sold and conveyed by a correct description, and the execution defendant has acquiesced in the proceedings.

2. SAME—EXECUTION AGAINST SURETY—EXHAUSTING PROPERTY OF PRINCIPAL.

A judgment creditor cannot complain that, under another judgment against the debtor and a surety, property of the surety was levied upon and sold before that of the principal debtor was exhausted, contrary to the order of court.

3. SAME—VACATION OF SALE—INADEQUATE REMEDY AT LAW.

An execution sale to an innocent purchaser will not be set aside for irregularities in the notice of sale, at the suit of a judgment creditor of the defendant in execution, in the absence of a showing that plaintiff's judgment cannot be satisfied by an ordinary execution.

4. SAME—BONA FIDE PURCHASER.

One against whom judgment has been rendered as surety is not bound to take notice of the irregularities in the notices of execution sale against his principal, and, in the absence of actual notice, may become a *bona fide* purchaser.

Appeal from circuit court, Clinton county; JOSEPH C. SUIT, Judge.

Action by Jackson Douglass against Abraham Hollcraft to set aside a sheriff's sale of land, said Hollcraft being the assignee of the certificate of sale. Defendant's demurrer to the complaint was overruled, judgment was entered against him, and his motion for a new trial was denied, whereupon he appealed.

Wm. R. Moore and *J. V. Kent*, for appellee.

"Lots three, five, and six, all in Clinton county, Ind.," does not describe any land at all. It is necessary to the validity of a sheriff's sale that the realty be described. There was no levy on lots 3, 5, and 6, in Joseph Baum's

addition to the town of Frankfort, and the sale is bad. The levy is the basis of all future proceedings. If the description of the land attempted to be levied upon is so defective that it cannot be ascertained from the levy itself where the land is located, the sheriff has no power to sell any particularly described land, and it cannot be said that it was the intention to sell the lands in controversy. Where property of any kind is coerced from the owner by legal process, there must be a substantial compliance with the statute. To constitute a levy upon real estate, it must be described by metes and bounds, or by abutments, the same as giving notice to quit, or the execution of a deed. The property sold must be the property levied upon. *Streaper v. Fisher*, 18 Amer. Dec. 604; *Grubb v. Guilford*, 28 Amer. Dec. 700; 2 Work, Pr. 184, 185; *Waters v. Duvall*, 33 Amer. Dec. 693-697. The levy must describe the land with sufficient certainty to identify it without other evidence. *Huddleston v. Garrott*, 3 Humph. 633; *Pound v. Pullen*, 3 Yerg. 338. Where all the calls are properly answered, and yet the description is such that the land levied upon could not therefrom be identified, or certainly found, the levy is void for uncertainty. *Chadbourne v. Mason*, 48 Me. 389-393; *Gault v. Woodbridge*, 4 McLean, 329. The purchaser at sheriff's sale is chargeable with notice of all irregularities and defects. *Meredith v. Chancey*, 59 Ind. 466; *Raub v. Heath*, 8 Blackf. 575; *Harrison v. Doe*, 2 Blackf. 1. His assignee is equally chargeable with such notice. *Smith v. Rogers*, 14 Ind. 224; *Summers v. Sleeth*, 45 Ind. 598; *Thompson v. Allen*, 12 Ind. 539. A sheriff's deed, although in proper form, is not enough to show title. It has been held that it is necessary to show a valid judgment, a valid execution, and a valid deed. *Nichol v. McCalister*, 52 Ind. 586; *Splahn v. Gillespie*, 48 Ind. 397; *Shibley v. Shook*, 72 Ind. 511.

James N. Sims, for appellant.

Where several judgments are rendered against a person at the same term of court, under two of which plaintiff claims, while others are hostile to his interest, but it is not shown on what date the hostile judgments were rendered, the presumption is against the pleader, and that the other judgments were rendered prior to those under which he claims, and create a prior lien on the real property of the judgment debtors. *Burrows v. Yount*, 6 Blackf. 458; *Jackson v. Hart*, 12 Ind. 606, 607; 1 Chit. Pl. 272; under title of "Rules of Construction," Id. 578. The complaint is ambiguous as to which of the bank judgment defendants were the owners of the several parcels of property alleged to have been levied on and sold, except the lots in question. It does appear that all of said property belonged to some one or more of said judgment defendants; that one of these judgment defendants was the purchaser and the assignor of this appellant, and that the other two judgment debtors stood by and did not object to the sheriff's sale, and permitted the purchase money to be applied in satisfaction of the judgment against them. *Gatling v. Rodman*, 6 Ind. 289. Appellant is an innocent purchaser, and none of the owners of the property can question his rights. It is claimed that the levy and sale of the lots was illegal, because they were imperfectly described as "lots 3, 5, and 6, in Clinton county, Ind.," without specifying the town and addition to which they belonged. The levy was truthful as far as it went, and the facts show that there could have been no mistake in the minds of either the sheriff, execution defendants, or bidders, as to the identity of the lots to be sold. Besides, it is averred that, on making the sale, the sheriff executed to the purchaser a certificate of purchase for said lots 3, 5, and 6, which refers to the plaintiff's description of the lots, and is equivalent to averring that the lots were fully described in such certificate; and afterwards the sheriff executed a deed to the assignee of the certificate of purchase, containing a perfect description of the lots. Such certificate and deed cured such defective description in the levy. Ror. Jud. Sales, 577, and authorities there cited. The bank's judgment was a superior lien on the property in question to those

of the judgments Douglass sets up; and it follows that, if there had been an entire misdescription of the property, Hollcraft had an equitable title to be subrogated to the privileges of the bank judgment, which could not be brushed aside for a junior lienor. *Ray v. Detshon*, 79 Ind. 56, and authorities there cited. If the sale were fatally defective, the defect was manifest by the record, of which Douglass had notice; yet he stood by 18 months after the sale, and saw an innocent purchaser part with his money without asserting the rights he now contends for. Douglass was not a party to the judgment and execution on which the property in question was sold, and he is a collateral assailable, and has no foothold in court unless the sale is absolutely void. *Jones v. Building Ass'n*, 77 Ind. 340. No just reasoning can place the plaintiff in a more favorable position than a creditor seeking to set aside a conveyance made to defraud him; yet it has been repeatedly decided that the creditor who seeks such relief must allege facts sufficient to constitute fraud both in the vendor and vendee. *Bunuel v. Witherow*, 29 Ind. 123.

ZOLLARS, J. Hollcraft claims title to lots 3, 5, and 6, in Joseph Baum's addition to the city of Frankfort, through a sheriff's sale. Douglass claims that that sale was and is void, and asks in his complaint that it be so declared, and that the lots be subjected to execution in satisfaction of two judgments of which he is the owner. So far as material here, the substance of his complaint is that on the 13th day of October, 1875, and at the October term of the Clinton circuit court, one John Shoff recovered a judgment against him and Joseph Baum; that on the same day said Shoff also recovered a judgment against said Baum and one Isaac D. Armstrong; that he, Douglass, and Armstrong were sureties for Baum, and were respectively so adjudged; that on the 19th day of February, 1876, Shoff assigned the first above-mentioned judgment to him, (Douglass,) and on the same day assigned the other judgment to Armstrong, who assigned it to him on the 27th day of September, 1882; that, at the time those judgments were rendered, Baum was the owner of the lots above mentioned, and that the judgments became liens thereon. Hollcraft's counsel argues the case upon the theory that a judgment in favor of the First National Bank of Frankfort against Baum and others, and upon which his claim of title rests, was rendered at the October term, 1875, of the Clinton circuit court. The argument of counsel for Douglass is upon the theory that that judgment was rendered at the October term, 1876. The record shows upon its face that, in copying the complaint into the record, the date of the judgment was first written as of the October term, 1875. A figure "6" seems to have been subsequently written over the figure "5," thus changing the date to 1876. Doubtless the clerk, in making up the record, made the change by some sort of mistake. To read the date as 1876 would make the complaint contradictory and inconsistent with itself. It shows, by other averments, that an execution was issued upon the judgment in August, 1876; that the execution was levied upon real estate; and that the real estate thus levied upon was offered for sale by the sheriff in September, 1876. Such could not have been the case had the judgment not been rendered until October, 1876. Looking to the several averments, we must dispose of the case upon the theory that the bank judgment was rendered at the October term, 1875. The substance of the complaint in relation to that judgment, then, is that at the October term, 1875, of the Clinton circuit court, the First National Bank of Frankfort recovered a judgment for \$1,055 against said Joseph Baum, as principal, and Henry M. Baum and said Armstrong, as sureties, and that by the terms of the judgment the property of the principal was first to be exhausted in satisfaction of the judgment; that an execution was issued on the judgment on the 25th day of August, 1876, by which the sheriff was commanded to make the amount from the property of the judgment defendants,—first exhausting the property of the principal; that the sheriff levied the exe-

cution upon certain described real estate belonging to Armstrong, and upon three lots which belonged to the principal, Joseph Baum, and which were described in the levy as "lots 3, 5, and 6, in Clinton county, Ind.;" that the principal Baum, at the time of the levy, owned other real estate of sufficient value to satisfy the execution, and that the sheriff failed to levy upon and exhaust it before taking the property of Armstrong; that the sheriff, after advertising the real estate levied upon, "as required by law," offered the same for sale on the 23d day of September, 1876, and subsequently returned the execution, showing that for the want of bidders the property was not sold; that on the 5th day of March, 1877, a *venditioni exponas* was issued, commanding the sheriff to sell the property so levied upon, and to make the amount of the judgment and costs; that under that writ the sheriff made a "pretended levy" upon the same property, and again described the lots as lots "3, 5, and 6, in Clinton county, Ind.;" that on the 31st day of March, 1877, the sheriff made a pretended sale of the property, "as described above," to Henry M. Baum, "pretending to act under said writ," and executed to him a certificate of purchase; that on the 3d day of April, 1878, said Baum assigned the certificate to Hollcraft; that on the 22d day of November, 1878, the sheriff executed to Hollcraft a deed for said property, and described the lots as "lots 3, 5, and 6, in Joseph Baum's addition to the city of Frankfort." Taking all of the averments of the complaint together, the claim is that the sale was and is void because the lots were levied upon, advertised, and sold as "lots 3, 5, and 6, in Clinton county, Ind.," and not by the correct description of "lots 3, 5, and 6, in Joseph Baum's addition to the city of Frankfort," for the reason that the sheriff levied upon and sold real property of the surety, Armstrong,—the principal, Baum, at the time owning real estate upon which the judgment was a lien, by the sale of which the amount of the judgment might have been made; and for the reason that the sheriff sold *in solido* the land belonging to Armstrong and Baum. It is further averred that had each parcel been sold separately the amount of the judgment might have been made without the sale of said lots 3, 5, and 6. These claims, it will be seen, are not very consistent. The claim that the sale was void because property of the surety was taken before exhausting the property of the principal is not consistent with the other claim, that, had the property of the surety been separately sold, the amount of the execution might have been made without the sale of the principal's property under execution. Douglass had no right to demand that the real estate of the surety should be first sold, nor has he a right to complain that it was sold before all the property of the principal was exhausted, in satisfaction of the execution, if such was the case. Those are questions which concern the surety, and not Douglass.

The complaint, besides being contradictory in theory, as already stated, is infirm in other respects. The remedy which Douglass seeks is an extraordinary one, and there is nothing in the complaint to show that he might not have made, and may not now make, the amount of his judgments by an ordinary execution against the property of Joseph Baum, his judgment debtor. It is not shown by any averment in the complaint that he was or is insolvent, or that he has not property, real and personal, out of which the amount of the judgments held by Douglass might be made by an ordinary execution. On the contrary, it is averred that at the time of the levy of the bank execution, and the sale thereunder, he had real estate, aside from the lots in question here, upon which the bank judgment was a lien, and by the sale of which the amount of that judgment might have been made. It is not shown that the judgments held by Douglass were not or are not liens upon that real estate, nor that it was not, or is not, entirely sufficient to satisfy those judgments; nor yet that it may not be reached and applied in satisfaction of those judgments by an ordinary execution. That Joseph Baum was justly indebted to the bank is conclusively shown by the judgment in its favor against him.

That Henry M. Baum purchased the lots at sheriff's sale, and that his money was applied in satisfaction of the bank judgment, and that the certificate of purchase executed to him by the sheriff was, for a valid consideration, by him assigned to Hollcraft, is shown by other averments in the complaint. The bank debt must be assumed to have been an honest debt, and Joseph Baum is making no question as to the validity of the sale of the lots by the sheriff. The bank judgment, and those held by Douglass, were taken at the same term of the same court. The date of the former is not given in the complaint. For aught that is made to appear, it may have been prior in date, and hence superior as a lien upon the lots in question, to the judgments held by Douglass. The law will not sanction a resort to an extraordinary remedy for the collection of a judgment, when it may be collected by an ordinary execution, and especially when a resort to such extraordinary remedy will cause loss or trouble to third persons. Such is the rule with regard to proceedings supplementary to execution, with regard to the setting aside fraudulent conveyances, and with regard to a proceeding for an execution against the body. *Baker v. State*, 109 Ind. 47, 9 N. E. Rep. 711, and cases there cited. It is the rule which must be applied here, and which condemns the complaint. And that is so, whether the sheriff's sale be regarded as void or voidable merely. As already stated, the bank debt was a valid one, and, for aught that is made to appear, its judgment was the oldest and the superior lien upon the lots. Henry Baum and Hollcraft have parted with their money. It was applied in payment of the bank judgment. Joseph Baum, the owner of the lots, makes no question as to the validity of the sheriff's sale. And, for aught that is made to appear, Douglass can collect the amount of his judgment from Joseph Baum by an ordinary execution, without entailing loss upon Hollcraft. The demurrer to the complaint should have been sustained. Douglass made no better case by the proof than by his complaint. He introduced no proof showing, or tending to show, that he cannot collect the amount of his judgments by an ordinary execution against the property of Joseph Baum. The proof shows that his judgments and the bank judgment were rendered by the same court, on the same day. Neither, therefore, had priority as a lien upon the real estate of the judgment defendants. So far as shown, no execution has been issued upon Douglass' judgments, and levied upon the lots in question. The execution on the bank judgment, having been first issued and levied upon the lots, gave to the bank a lien superior to that in favor of the owner of the other judgments. *Elston v. Castor*, 101 Ind. 426, and cases there cited. It is alleged in the complaint, as we have seen, that the sheriff levied upon the lots as "lots 3, 5, and 6, in Clinton county," but the proof does not show that the levy was so made. As a part of the return to the execution of August 25, 1876, the sheriff stated as follows: "I levied on the following real estate, to-wit, (here insert;) see according to advertisement." The advertisement referred to is not set out in the record, nor is its language or substance given. We have no means, therefore, of knowing certainly what it was, in the way of describing the real estate levied upon. Presuming, as we must, in favor of the regularity of the proceedings on the part of the sheriff, we must presume that the lots in question were properly described in the levy. That presumption is strengthened here by the statements of the clerk in the second writ. In reciting, in that writ, the sheriff's return to the first execution, he gives the full and correct description of the lots. In the sheriff's return to the second writ, he states that he levied it upon the lots, giving the full and correct description, and that he advertised them for sale by that description for more than twenty days successively before the day of sale, by posting notices in three public places in the township in which they are situated, by a like notice at the door of the court-house, and by advertising the same for three weeks successively in a newspaper of general circulation, printed and published in the county. The fair interpretation of

the return also is that the lots were sold by the same description. They are correctly described in the sheriff's deed, and, for aught that is shown, they were correctly described in his certificate of sale. We need not indicate any opinion as to the authority of the sheriff to make a second levy upon the same property, under the second writ, nor as to the propriety of his so doing. It is sufficient here that it is not shown that he did not correctly describe the lots in the first levy; that he made a levy upon the lots under the second writ, in which they were correctly described; that they were sold and conveyed by a correct description; and that Joseph Baum, the owner of the lots, neither before nor since the sheriff's sale, made, or has made, any question as to the regularity of the sheriff's proceedings. See *Richey v. Merritt*, 108 Ind. 347, 9 N. E. Rep. 368. The sale clearly, so far as shown, was not void, and to concede that the proceedings on the part of the sheriff were irregular would not help Douglass' case. He was a judgment creditor only. A sheriff's sale will not be overthrown on account of irregularities in an action by such a judgment creditor. *Johnson v. Murry*, 112 Ind. 154, 13 N. E. Rep. 273; *Jones v. Carnahan*, 63 Ind. 229. The court below, over Hollcraft's objection, admitted in evidence notices of the sale, as published in a newspaper. In some of the publication the lots were described, not as lots 3, 5, and 6, in Joseph Baum's addition to the city of Frankfort, as they should have been, but as lots 3, 5, and 6, in Clinton county, Ind. If it should be conceded that that evidence was properly admitted, there was yet some notice of the sale; for there is nothing to show that it was not advertised by posting, as stated by the sheriff in his return to the second writ. And in addition, in some of the published notices, the lots were correctly described. The evidence as to the contents of some of the published notices was really in contradiction of the sheriff's return. Without entering into an examination as to its competency, we feel quite sure that it was not sufficient to overthrow the title which Hollcraft has through the sheriff's sale. Neither he nor Henry M. Baum, the purchaser at the sheriff's sale, was the execution plaintiff, and therefore bound to take notice of irregularities in the notices of the sale or in other proceedings by the sheriff. Henry M. Baum was a judgment debtor, as surety for Joseph Baum, in the bank judgment, but that was not sufficient to bind him to take notice of irregularities in the proceedings by the sheriff as an execution plaintiff is bound to take notice. So far as shown, he had no actual notice of any irregularities, and, in the absence of such knowledge, he was entitled to protection as a third party and innocent purchaser. See *White v. Cronkhite*, 35 Ind. 483; *Meredith v. Chancey*, 59 Ind. 466; *Armstrong v. Jackson*, 1 Blackf. 210; *Joyce v. Bank*, 62 Ind. 188; *Martin v. Prather*, 82 Ind. 535; *Mavity v. Eastridge*, 67 Ind. 211; *Jones v. Association*, 77 Ind. 340. It is alleged in the complaint that a part of the real estate sold by the sheriff belonged to Armstrong, and a part to Joseph Baum, and that it was sold together, and not in separate parcels; but there is nothing in the proof to support those allegations. For aught that is made to appear, all of the property sold may have belonged to Joseph Baum. Nor is it shown that the several pieces of property were sold together, without first offering each separately. Many other questions are discussed by counsel, but we think it unnecessary to extend this opinion to decide them. It results, from what we have said, that the court below not only erred in overruling the demurrer to the complaint, but also in overruling appellant's motion for a new trial. Judgment reversed, with costs, and cause remanded, with instructions to the court below to sustain the motion for a new trial and the demurrer to the complaint. As appellee has died since the submission of this cause, and his heirs at law have been substituted, the judgment is reversed, at their costs.

(115 Ind. 186)

TOWER v. HARTFORD *et al.*

(Supreme Court of Indiana. June 13, 1883.)

WILLS—CONSTRUCTION—LIFE-ESTATE WITH POWER OF DISPOSITION.

A testator bequeathed to his wife all the residue of his personal property, and further provided that whatever was left undisposed of after the death of his wife should descend to his heirs. Held that, the widow having at least an absolute power of disposition, the assignment without consideration of a note for money received by her under the will and loaned, was an effectual exercise of her power, and the testator's administrator *c. t. a.* had no right to the note.

Appeal from circuit court, Switzerland county; SCOTT CARTER, Judge.

Action on a promissory note by William S. Tower, administrator with will annexed of one Robert Stearman, against Phillip T. Hartford *et al.* Judgment for defendants. Plaintiff appeals.

Works & Schroeder and *W. R. Johnston*, for appellant. *James B. McCrelis*, for appellees.

ELLIOTT, J. The appellant, as the administrator with the will annexed of Robert Stearman, claims a promissory note executed by Phillip T. Hartford to Ealy A. Howard for money borrowed of her. Mrs. Howard was the wife of the testator at the time of his death, and subsequently became the wife of William Howard, and has since died. She received the money which she loaned to Hartford from the estate of her first husband, Robert Stearman. The note was taken by her in her individual name, and was subsequently assigned by her to Morton D. Thiebaud, but she received no consideration from him for the assignment. The right to the note is claimed by the appellant upon the theory that it became part of the assets of the decedent's estate, and that the will of the decedent gave to the widow of the testator only a life-interest in the personal property of her husband, without the absolute power of disposition. The appellees contend that the will at least vested in the widow the absolute power of disposition, if it did not give her the absolute ownership of the property. The material provisions of the will are these: "Item 3. I give and devise to my beloved wife, Ealy A. Stearman, all the residue of my property rights, credits, or choses in action, of every kind that I may own or be entitled to at the time of my decease. Item 4. I further direct that whatever property is left undisposed of at the death of my wife shall descend to my son, George Stearman, and, in case of his death, then to my grandson, William Stearman." The will at least gave to the testator's widow an absolute power of disposition, if it did no more, and the administrator has no right to the note in controversy. *Van Gorder v. Smith*, 99 Ind. 404, and cases cited; *Allen v. Craft*, 109 Ind. 476, 9 N. E. Rep. 919; *Fullenwider v. Watson*, 113 Ind. 18, 14 N. E. Rep. 571, and authorities cited. Even if the will gave the widow no more than a life-interest with a power of disposition, the power was effectually exercised without referring to the will. *South v. South*, 91 Ind. 221, 46 Amer. Rep. 591; *Downs v. Buennagel*, 94 Ind. 228; *Silvers v. Canary*, 109 Ind. 267, 9 N. E. Rep. 904. Judgment affirmed.

(115 Ind. 150)

OUTLAND *et al.* v. BOWEN *et al.*

(Supreme Court of Indiana. June 12, 1883.)

DEED—EFFECT—FEE-SIMPLE CONDITIONAL—CONTINGENT REMAINDER.

A deed on condition that, if the grantee shall die childless, the lands or their proceeds are to fall back to the lawful heirs of the grantor, and empowering the guardian of the grantee to sell the lands, appropriating the proceeds to the uses of the grantee while she lived, the balance remaining at her death, without heirs of her body, to the heirs of the grantor, creates in the grantee an estate in fee-simple conditional, and not an estate tail. Such estate, however, being only defeasible on the double contingency of the grantee's death without issue and the grantor's prior death without leaving lawful heirs, there is no reversion in the grantor to support

a remainder; further, there is no person in being capable of taking a remainder if there was one, and the unlimited power of disposition in the first grantee is fatal to a remainder. The grantee, therefore, takes a fee-simple absolute.

Appeal from circuit court, Wayne county; D. W. COMSTOCK, Judge.

Real action, by Joseph A. Bowen and others, heirs of Joseph Bowen, Sr., against Josiah Outland and others, heirs of Rebecca E. Bowen, grantee of Joseph Bowen, Sr. Defendants' demurrer to the complaint was overruled, and they appeal.

Chas. H. Burchenal, B. F. Mason, and S. C. Whitesell, for appellants. H. C. Fox and J. F. Robbins, for appellees.

MITCHELL, J. On the 25th day of February, 1855, Joseph Bowen, Sr., executed a warranty deed in the common form, by which he conveyed a tract of land, situate in Wayne county, to his granddaughter Rebecca Elizabeth Bowen, for the expressed consideration of \$800. Following the description of the premises conveyed, there was written this stipulation: "The condition of the above deed is such that if the said Rebecca E. Bowen should die, leaving no child or children, the above-described land, or its proceeds that may be realized by sale or otherwise, is to fall back to the lawful heirs of Joseph Bowen, Sr.; and also, should the guardian of the said Rebecca E. Bowen see fit to sell the above land, he can, by appropriating the proceeds of the sale to the uses of the said Rebecca E. Bowen while she may live, and then apply the balance, if she should die without heirs of her body, to the heirs of Joseph Bowen, Sr." Subsequent to the execution of the deed, the grantee was united in marriage with the appellant Josiah Outland, with whom she lived on the land conveyed until the year 1883, when she departed this life, leaving surviving her no child or children. Her husband and mother survive as her only heirs at law. The present litigation involves a controversy between those describing themselves as the lawful heirs of Joseph Bowen, deceased, grantor in the deed above mentioned, and the surviving husband and mother of Rebecca E. Bowen, concerning the title and ownership of the land conveyed by the deed of Joseph Bowen. The final determination of this controversy depends wholly upon the construction to be given to the deed; it being conceded that both parties assert title through that instrument. The inquiry is, what was the duration and quantity of the estate created in Rebecca E. Bowen, the first grantee, and was there a valid remainder, or estate of any description limited over, to those who now claim as the lawful heirs of the grantor?

It is contended, on behalf of the appellants, that the estate conveyed to the grantee named in the deed was one which, according to the rules of the common law, would have been adjudged an estate tail; and that, since estates of that description have been abolished by statute in this state, (section 2958, Rev. St. 1881, in force since May 6, 1853,) it is now to be construed a fee-simple absolute. Without pausing to consider the sometimes apparently artificial refinements, or the numerous technical and ingenious distinctions of the common law in respect to the character of estates in land, we deem it sufficient to state our general conclusion here; and that is that the estate created by the deed in question, while in many respects bearing some analogy to an estate tail, was not one having the essential characteristics of an estate of that description. Ordinarily, an estate tail is created by a conveyance or devise in fee to some particular person, with a limitation over, in the event of the death of the person named without issue, or upon an indefinite failure of issue. The doctrine of the books seems to be that whenever it appears in the instrument creating the estate that it was intended that the issue of the first taker should take by inheritance, in a direct line, and in regular order and course of descent, so long as his posterity should endure, and an estate in fee or in tail is given in remainder, upon an indefinite failure of issue, then the estate first created will be construed to be an estate tail. *Huxford v. Milligan*, 50 Ind.

542; *King v. Rea*, 56 Ind. 1; *Tipton v. La Rose*, 27 Ind. 484; *Shimer v. Mann*, 99 Ind. 190; *Eichelberger v. Barnitz*, 9 Watts, 447; *Pott's Appeal*, 30 Pa. St. 168; 1 Shars. & B. Lead. Cas. Real Prop. 98. But it is well settled, on the other hand, that if it appears from the deed that the limitation over was not postponed until an indefinite failure of issue, but on failure of children only, or on failure of issue within a given time, the estate will not belong to the class known as estate tail. *Hill v. Hill*, 74 Pa. St. 173; *Nightingale v. Burrell*, 15 Pick. 104; *Allender's Lessee v. Sussan*, 33 Md. 11. The deed under consideration created in Rebecca E. Bowen an estate in fee, which was determinable, however, upon the contingency that she should die leaving no child or children. There is nothing in the deed indicative of an intention to limit or restrain the grantee in the disposition of the estate, in the event she should leave surviving her a child or children. It left the estate to be transmitted to the child or children of the grantee, if any should survive, or to the disposal of by her in such other manner as she might determine; the only limitation or condition being that she leave surviving a child or children. In this respect the deed lacks an essential element in the creation of an estate tail. Moreover, it will be observed that, according to the conditions in the deed, if the grantee died without leaving a child or children, it is of no consequence that she may have had children, through whom she may have left grandchildren or other lineal descendants. The whole estate was granted to her in fee, but it was made to determine by a limitation over in fee upon the contingency of her death without leaving a child or children. Upon the happening of that event, whether soon or late, the land, or, in case that had meanwhile been sold or otherwise disposed of, then the proceeds realized, was to vest in such persons, if any there could be, as might at that time occupy the relation of "lawful heirs" to the grantor. The foregoing considerations confirm our conclusion that the estate created in Rebecca E. Bowen was not one which, at the common law, would have been adjudged an estate tail. Of the estate created by the deed to Rebecca E. Bowen we may say, primarily, it was a fee-simple; and, notwithstanding the condition subsequently written in the deed, the estate was liable to become absolute, and continue perpetually in the first taker, her heirs and assigns. 1 Washb. Real Prop. 61, 62. This created in her a fee-simple conditional, or a fee of a determinable or conditional character. *Smith v. Hunter*, 23 Ind. 580; *Clark v. Barton*, 51 Ind. 165; *Greer v. Wilson*, 108 Ind. 322, 9 N. E. Rep. 284; Tied. Real Prop. § 26; Gray, Perp. § 40. It was necessary that two contingencies should arise or exist concurrently, in order that the estate created might be defeated. One was that the grantee of the precedent estate should die without leaving a child or children surviving; the other was that the grantor, prior to that event, should have died leaving lawful heirs competent to take the estate limited over. *Hennessy v. Patterson*, 85 N. Y. 91. The land was conveyed in fee to the first taker, and it remained uncertain until her death whether the estate conveyed would be defeated by the condition in the deed or become absolute; and it could not be known, until the death of the grantor, who would take as his lawful heirs. Since it was doubtful whether either of these contingencies would happen, the grant created a fee in the grantee, and there remained in the grantor no future estate in reversion, but only what is called a naked possibility of reverter. Tied. Real Prop. § 385. In no event was the estate to revert to the grantor or his heirs, so as to give them a right of re-entry as for a condition broken. The estate was to be carried over to the grantor's lawful heirs by the force and effect of the deed. The first taker's estate was therefore not an estate upon condition, but it was a conditional or determinable fee, with a conditional limitation over. The essential difference between an estate upon condition and an estate in fee, which determines upon the happening of some future uncertain but possible event, with a limitation over, conditioned upon the happening of the event, is that

in the latter case, upon the happening of the event, the estate either reverts to the grantor, or is carried, by force of the deed, to the person to whom it was granted; while in the former the grantor must have either expressly or by necessary implication reserved to himself or his heirs a right of entry, upon breach of the condition,—re-entry being necessary to revert the estate. *Attorney General v. Manufacturing Co.*, 14 Gray, 586. "A conditional limitation is an estate limited to take effect after the determination of an estate which, in the absence of a limitation over, would have been an estate upon condition. Strictly speaking, a conditional limitation cannot be limited after an estate upon limitation," 2 Washb. Real Prop. 281, 562; Tied. Real Prop. § 281; *Church v. Grant*, 3 Gray, 142; *Miller v. Levi*, 44 N. Y. 489; *Chapin v. Harris*, 8 Allen, 594; 1 Shars. & B. Lead. Cas. Real Prop. 186. Concerning estates upon conditions subsequent, see *Cross v. Carson*, 8 Blackf. 138; the same case, with valuable note, 44 Amer. Dec. 742-759. Conditional limitations were not recognized by the common law as estates capable of being created by the same deed with a prior estate or limitation. They could only be created, so as to become valid and effectual, under the statutes of uses and trusts, as shifting uses or executory devises. Tied. Real Prop. §§ 281, 418.

The second conclusion at which we have arrived is that the limitation over to the "lawful heirs" of the grantor in the deed in question, whether considered as a conditional limitation or as a contingent remainder, is void. It cannot take effect for several reasons, some of which we proceed to state. Prior to the conveyance through which all the parties to this controversy claim title, the estate conveyed to Rebecca E. Bowen, as well as the remainder or contingent estate limited over, formed one united estate in Joseph Bowen, Sr. The entire estate was disposed of by the deed; there being no reversion to the grantor. As we have seen, the estate created in the first taker was not an estate upon condition, with a right of re-entry reserved to the grantor or his heirs, but a determinable or conditional fee, with a conditional limitation or remainder over. There was, therefore, no reversion to the grantor, or right of entry in his heirs. They cannot and do not claim as reversioners by inheritance from their ancestor, but through his deed, as remainder-men, or as the owners of an estate created by a conditional limitation. They claim to derive their title through the same instrument as that through which the heirs of Rebecca E. Bowen claim. *Williams*, Real Prop. 250. It must follow, therefore, if there was no estate left in the grantor after the creation of the precedent trust-estate, vested in the first taker, he could create no remainder, as a remainder can only be created out of the estate left in the grantor after the creation of the particular estate. After the conveyance of an estate in fee, whether the fee be base, determinable, or conditional, there is nothing in the nature of an estate in the grantor out of which to create a remainder. It has therefore been laid down as one of the fundamental rules in respect to the disposition of real estate that a remainder cannot be limited to take effect after a fee; or, in other words, "where there is no reversion, there can be no remainder." Tied. Real Prop. § 398, and cases cited in note; *Huxford v. Milligan*, *supra*. This rule has always been held inflexible in cases of estates created by an ordinary deed, and is applied to estates limited over, whether they be contingent remainders or conditional limitations. *Gray*, Rest. Alien. § 22, and note. Its force has been in nowise impaired or modified by section 2960, Rev. St. 1881, which has reference solely to the contingency upon which the remainder over shall take effect, and not to the quantity or duration of the precedent estate. It simply changes the common-law rule so as to allow the remainder over to abridge the precedent estate. The only modification of the rule in this state, in respect to the power to limit one fee upon another, results from the enactment of section 2962, which, among other things, declares that "a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the per-

son or persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such person or persons may be determined before they attain their full age." The estate limited over in the deed involved in the present case does not come within the provisions of the above statute. The first estate was a fee, and a limitation over was to take effect at an indefinite period, depending upon the event of the death of the first taker at an undefined age. The distinction between estates in remainder, such as might be created by deed at common law, and executory interests, such as could only be created by executory devises in wills, or by conveyances to uses, by creating shifting and springing uses in deeds, is not to be lost sight of. Estates of the latter description arise, when their time comes, of their own inherent strength, and, when properly created, do not depend for protection on any prior estates. *Church v. Grant*, *supra*; *Den v. Hance*, 11 N. J. Law, 244; 1 Shars. & B. Lead. Cas. Real Prop. 151-189; Williams, Real Prop. 265-283. Except as authorized by the statute last above referred to, within the rule against perpetuities, an estate in fee cannot be limited on an estate in fee by an ordinary deed of conveyance, whether the limitation over be in the nature of a conditional limitation or a contingent remainder or use. The creation of estates of that character requires a resort to other methods, concerning which nothing further need be said here. The rule that a remainder in fee cannot be limited to take effect after an estate in fee is especially applicable in case the grantee of the precedent estate has, as is the fact in the present case, a general power of disposition; thereby leaving the limitation over to operate only upon what is left at the death of the first taker. In such a case the limitation over cannot take effect either as a remainder or as an executory interest. Tied. Real Prop. § 398, and note.

The limitation over is void for another reason. The contingency upon which the conditional limitation was to take effect was liable to happen at any moment after the execution of the deed. The grantor having granted the whole estate in fee to the first taker, without reserving any estate to himself or to any other person, it was necessary that there should have been some certain person in being in whom the contingent or conditional estate limited over could vest immediately upon the happening of the contingency which terminated the precedent estate. Shars. Bl. Comm. bk. 2, pp. 166-169, and note. The limitation over was to the "lawful heirs" of Joseph Bowen, the grantor, who was then in life. As no one can be heir to the living, it follows that, there was no person in being competent to take the estate limited over. *Moore v. Little*, 41 N. Y. 66; *Winslow v. Winslow*, 52 Ind. 8; *Lyles v. Lescher*, 108 Ind. 382, 9 N. E. Rep. 365. Whether a limitation is valid or not is to be determined by the deed alone, and not by what might have happened, or by what actually did happen. When the existing state of things at the time of its execution is disclosed, the deed must be left to speak for itself. *Bailey v. Sanger*, 108 Ind. 264, 9 N. E. Rep. 159. It cannot be inferred that the expression "lawful heirs," as employed in the deed, was intended as the equivalent of "children." The situation of the parties and circumstances tend to rebut such an inference. The limitation over being void, the estate of the first taker continues unimpaired. *Leonard v. Burr*, 18 N. Y. 96. The rule applicable to such cases is that a conveyance in fee which, by a subsequent condition, is subject to an executory interest or limitation which is void by reason of remoteness, or on account of its being impossible or repugnant, creates an estate in the first taker which becomes vested as a fee-simple absolute. *Church v. Grant*, *supra*; *Locke v. Barbour*, 62 Ind. 577; Gray, Perp. § 250.

Another and an independent reason why the limitation over is void and of no effect is that the deed confers upon the taker of the precedent estate a general and unlimited power of disposition. This feature of the case need not

be enlarged upon. As has been remarked, the deed created primarily an estate in fee in the grantee, subject to a condition, however, that, upon the happening of a certain contingency, the land, "or its proceeds, that may be realized by sale or otherwise, is to fall back," etc. By necessary implication, this conferred the power upon and recognized the right of the grantee, on arriving at the age of 21 years, to dispose of the land. After conferring an unrestricted power of sale, the attempt to hold onto or control the proceeds realized was futile. Whatever the intention of the grantor may have been, the power of disposition was fatal to the limitation over; the rule in such cases being that an absolute power of sale in the first taker renders a subsequent limitation over repugnant and void. *Gifford v. Choate*, 100 Mass. 343; *Hale v. Marsh*, Id. 468; *Ramsdell v. Ramsdell*, 21 Me. 288; *Jones v. Bacon*, 68 Me. 34; *Van Gorder v. Smith*, 99 Ind. 404. This subject was exhaustively considered, and the authorities collected, in *Van Horne v. Campbell*, 100 N. Y. 287, 3 N. E. Rep. 316, 771. The power in the deed under consideration being general, coupled with an ill-defined and ambiguous interest in fee, the effect of the power is to raise the estate of the first taker, and define it as a fee-simple absolute. Where the estate of the first taker is certain and particularly defined, or where the power is limited and special, the power will not enlarge the estate, as against a valid limitation over. Some rules must, however, be framed by which to arrive at the uncertain and ambiguously expressed intention of parties; and as absolute power of disposition and absolute ownership must, in the nature of things, be inseparably connected, the law declares that he to whom the one is given acquires the other, by irresistible implication, unless the contrary clearly appears by the terms of the deed. *Van Gorder v. Smith*, *supra*, and cases cited. *John v. Bradbury*, 97 Ind. 263, was decided upon the facts peculiar to that case, and contains nothing opposed to the conclusion arrived at here.

It follows from the conclusions thus reached that the demurrer to the complaint should have been sustained. The judgment is therefore reversed, with costs.

(115 Ind. 188)

TORR v. STATE *ex rel.* CORCORAN.

(*Supreme Court of Indiana*. June 13, 1888.)

COUNTIES—COUNTY BOARD—SPECIAL SESSIONS.

In collateral proceedings, the presumption that a special session of the board of commissioners of a county was regularly called, is not rebutted by showing that no summons can be found, and that their record at the close of the preceding regular session recites only that the board adjourned to meet in special session at 9 o'clock the next morning, and the record for the next day showed that "the board met in special session to complete the unfinished business of the regular session."

Appeal from circuit court, Cass county; M. WINFIELD, Judge.

A proceeding by *mandamus* by the state *ex rel.* Michael Corcoran against Harry Torr, auditor of Cass county, to compel him to issue his warrant upon the county treasurer in favor of plaintiff. Judgment for plaintiff. Defendant appeals.

John W. McGreevey, for appellant. *Dykeman, Wilson & Taber*, for appellee.

MITCHELL, J. This was a proceeding by *mandamus* to compel Torr, auditor of Cass county, to issue his warrant upon the county treasurer to Michael Corcoran for \$50; the county surveyor having certified that that sum was due the latter on account of labor performed and services rendered in clearing out and repairing a public ditch, under a contract with the surveyor. The facts were agreed upon, and, having given due consideration to the agreed statement of facts, the court below gave judgment, directing the auditor to draw his warrant for the sum certified to be due the relator. Section 10 of the act

of April 6, 1885, makes it the duty of the county surveyor in each county to keep all works constructed for the purpose of drainage, under any law then or theretofore in existence, in repair, and to certify the cost thereof, including his own per diem, to the county auditor, who is required by law to draw his warrant on the county treasurer, payable to the person to whom the money is owing. It is agreed that the work was done in pursuance of the order of the county surveyor, under a contract for the repair of a drain; that it was of the value of \$50; and that the ditch cleaned out and repaired was an existing ditch in Cass county. The auditor seeks to justify his conduct in refusing to draw a warrant upon the certificate of the county surveyor by maintaining that the ditch which the relator repaired was never legally established, or, in other words, that the proceedings under which the ditch repaired was established and constructed were void. It is agreed that the board of commissioners of Cass county, assuming to be in special session, with a proper petition before it, appointed viewers to locate and report upon the public utility of the ditch in question on the 15th day of September, 1876. The appellant insists that the order appointing viewers was a nullity, because the record of the proceedings of the board does not show "the service of any summons or notice on said board, nor a majority thereof, to meet in said special session at the time aforesaid, and that no such notice or summons can, after careful, diligent search therefor, be found on file in the office of the auditor of Cass county, Ind., where all such summons are kept on file." There is no merit in the point thus made. It is agreed that the regular September session of the board expired by limitation of law on the 18th day of September. It is recited at the end of the commissioners' record of the proceedings of that day that the board adjourned to meet in special session at 9 o'clock the next morning. The record of the proceedings of the next day commences thus: "The board met in special session to complete the unfinished business of the regular session." The business not having been completed that day, the board adjourned to meet on the morning of the 15th, the day on which the viewers were appointed. The appellant assumes, because the record of the commissioners' meeting on the 14th omits to show the issuing and service of notice upon the members of the board to meet in special session, that it necessarily and conclusively follows that the board must be presumed to have met on the 14th day of September, pursuant to its own adjournment on the 18th, without any call or summons from the auditor. As a matter of course, a board of commissioners must be lawfully in session in order to do any valid official business, and it cannot lawfully convene itself in special session by an order adjourning over beyond the term, to a day in vacation. But the law makes provision for the calling of special sessions, and it authorizes proceedings to be taken at such sessions in matters pertaining to the establishment of drains. When, therefore, the record, by a recital to that effect, shows that the board met in what was assumed to be a special session, and transacted business which they were expressly authorized by law to transact at such a session, the presumption will be indulged, when their proceedings are assailed collaterally, that they were regularly called in special session. This subject has so recently been considered by this court that we do not deem it necessary to elaborate further. *Prezinger v. Harness*, 16 N. E. Rep. 495, (present term; *White v. Fleming*, Id. 487, (present term; *Davis v. Railway Co.*, Id. 639, (present term.) It may be well enough to remark that it appeared by extraneous evidence in the present case that the commissioners were regularly called into special session by the auditor. Whether a record which recited that the commissioners had been convened in special session could be collaterally impeached we do not now inquire. It was certainly not reversible error for the court to consider such evidence, if it did consider it, in support of a record that was sufficient against collateral attack without extraneous proof. The judgment is affirmed, with costs.

(115 Ind. 213)

HOPKINS v. RATLIFF.

(Supreme Court of Indiana. June 14, 1888.)

LANDLORD AND TENANT—WHAT CONSTITUTES RELATION—IMPROVEMENTS.

Plaintiff and defendant orally agreed that in consideration of the latter's deed to plaintiff of certain land, to be delivered after plaintiff's death, plaintiff would devise other land to defendant and to his wife, and build a house on this land, defendant to go into possession at once, and pay rent. Plaintiff neglected to build the house, and persuaded defendant to repair the old one. Defendant having learned that plaintiff's will failed to conform to their contract moved off the land, and repudiated the whole agreement. In an action by plaintiff on a note defendant pleaded as a set-off the value of his improvements. *Held* that, there being no valid agreement to purchase, the relation of landlord and tenant existed between the parties, and, in the absence of an express agreement, plaintiff is not liable for the improvements; neither does his failure to erect a new house render him liable.

Appeal from circuit court, Wells county; HENRY B. SAYLER, Judge.
Martin & Martin and *Duglay & Silver*, for appellant.

MITCHELL, J. This was a suit by Moses Hopkins against Daniel Ratliff, to recover the amount due on a promissory note executed by the latter as maker, and payable to the plaintiff. The note bears date the 1st day of January, 1885, and calls for the payment of \$374, with 8 per cent. interest, due one day after date. The defendant answered by way of set-off that the plaintiff was indebted to him on account in the sum of \$500 and upwards, for money paid, laid out, and expended for his use, and for work and labor and materials furnished in improving and repairing a house for the plaintiff. The indebtedness which the defendant claims the right to set off against the note is alleged to have arisen in the manner following: In February, 1878, the plaintiff, Hopkins, being the father of the defendant's wife, and desiring to make an equitable distribution of his property among his children, orally agreed with the defendant that, if the latter would convey to the plaintiff an 80-acre tract of land belonging to him, in Wells county, he (Hopkins) would execute his last will and testament, by which he would devise to the defendant 80 acres, part of his home farm, and would also devise 40 acres adjoining, with the improvements thereon, to his (defendant's) wife, as her share of his estate; and further, that he would erect a small house with four rooms on the 80 acres, to be devised to the defendant. It was agreed that the deed from the latter should be held in his own possession, without delivery, until after the plaintiff's death. In reliance upon this aforementioned agreement, the defendant signed a deed for the 80 acres, to be conveyed to his father-in-law, but kept it in his possession, according to the understanding; and the plaintiff executed a will which was supposed to be according to his agreement with the defendant. Without delivering the conveyance, the defendant surrendered the possession of the 80-acre tract owned by him to one of the plaintiff's other daughters, reserving to himself, however, a reasonable rental for the use of the land. At the same time he took possession of the 120 acres supposed to have been devised to himself and wife by his father-in-law, agreeing to yield to the latter a reasonable rental during the remainder of his life-time. His father-in-law neglected to build the house with four rooms, but persuaded the defendant to improve and enlarge the house already on the farm, which the latter did, in reliance upon the devise which he supposed had been made by the plaintiff. It was in making the improvements that the account pleaded as a set-off to the note accrued. After having thus remained in possession some four years, the defendant learned that instead of devising 80 acres to him and 40 to his wife, the plaintiff had prepared his will so as to devise 120 acres to the defendant and his wife as joint tenants. Thereupon the defendant, without requesting that the will should be changed, repudiated the whole arrangement, and moved off the plaintiff's land, and took possession of the 80 belonging to himself.

The question is whether he is entitled to recover as upon an *indebitatus assumpsit* for the improvements made on his father-in-law's land while in possession under the arrangement disclosed in the foregoing summary of the answer. It seems clear enough to us that the question must receive a negative answer. The occupancy of land under an agreement with the owner to pay rent presumably creates the relation of landlord and tenant. This relation continues as long as the land is occupied under that agreement. It is, of course, true that a person who goes into possession of real estate under a contract to purchase does not thereby become the tenant of the vendor so as to become liable for rent in case the contract is rescinded. *Newby v. Vestal*, 6 Ind. 412; *Miles v. Elkin*, 10 Ind. 329; *Nance v. Alexander*, 49 Ind. 516; *Wood, Landl. & Ten.* 8. A suit for use and occupation, or for rent, can only be maintained when there is a contract, express or implied, which creates the relation of landlord and tenant. *Tinder v. Davis*, 88 Ind. 99; *Railway Co. v. Thornburgh*, 98 Ind. 201. The defendant in the present case went into possession under an arrangement whereby he expected ultimately to become possessed of the land as purchaser by devise, which could only take effect at the plaintiff's death. Until the happening of that event, the legal title and ownership was to remain in the plaintiff, and the defendant was to pay rent. This created no other legal relation between the parties except that of landlord and tenant; and so long as the defendant occupied he did so as tenant, yielding, or under contract to yield, rent to the owner of the land. There being no valid contract of purchase, the possession and improvements can only be referred to the agreement to take possession and pay rent. The landlord agreed to erect a small house with four rooms on the land. This he neglected to do. He prevailed upon the tenant to repair the old house; but it is not alleged that he had agreed to make repairs, nor does it appear that he in any manner promised or agreed to pay for repairs made by the tenant. In respect to the repair of the old house, their duties and obligations were such as the law imposed upon landlord and tenant. There is no implied obligation on the part of the landlord to make repairs, and, in the absence of an express contract, the duty of keeping the premises in repair rests solely upon the tenant. The tenant must determine for himself the fitness of the buildings for use, or whether they are sufficiently commodious for his purposes. If he repairs or enlarges the buildings for his own convenience, even though it is by the persuasion of the landlord, he does not, in the absence of an agreement or promise, thereby acquire a right to charge the landlord with the expense of the repairs. *Estep v. Estep*, 28 Ind. 114; *Purcell v. English*, 86 Ind. 34; *Lucas v. Couller*, 104 Ind. 81, 3 N. E. Rep. 622; *Wood, Landl. & Ten.* §§ 380-382. Where a landlord covenants to repair, in case of a breach of the covenant the tenant may make the repairs, and charge the expense to the landlord, or he may recover damages for the breach. *Hexter v. Knox*, 63 N. Y. 561. The failure of the landlord to erect a house with four rooms, in compliance with the agreement, did not, in the absence of a contract to pay, authorize the tenant to charge the cost of repairing another house to the landlord. If the failure or refusal to build the house resulted in damages to the tenant by reducing the value of the leasehold, that became a matter altogether apart from the subject of repairs. *Wood, Landl. & Ten.* § 403, and note. The defendant might have built the house and recovered the cost thereof, or, if the plaintiff refused to build, after notice he might have recovered damages. A tenant who makes improvements of a permanent and fixed character, which are annexed so as to become part of the realty, can neither remove them nor recover for their cost without a special contract with the landlord. *Hedderich v. Smith*, 103 Ind. 203, 2 N. E. Rep. 315. If it should be considered that the defendant occupied the land and made the improvements, not as tenant, but in part performance of a contract of purchase, still, since after enjoying the possession for about four years, he cannot now place the plaintiff in the same

situation he was in before the contract was made. He cannot repudiate the contract in advance of the time for performance on the part of the plaintiff, and maintain *indebitatus assumpsit* to recover the cost of the improvements. The defendant has done nothing in part performance of a contract except to take possession, and make improvements. These acts, as we have seen, can be much more readily referred to his contract of tenancy than to the contract of purchase, which was not to be performed on either side until after the plaintiff's death, and which is wholly unenforceable until it shall have been so performed as to be taken out of the statute. Where possession has been taken by a purchaser, and lasting and valuable improvements have been made under and in reliance upon an oral contract of purchase, if the circumstances are such as to show that the vendor repudiated the contract with a fraudulent purpose to obtain the benefit of improvements made by the purchaser, the contract will be held so far valid as to support an action for damages for breach of the contract. In such a case, a purchaser who has made improvements on land with the knowledge of the vendor, in reliance on a contract; which improvement the latter gets the benefit of by refusing to perform on his part, may recover the value of the improvements so made, deducting the value of the rents and profits of the land. *Bender v. Bender*, 37 Pa. St. 419; *Wallace v. Long*, 105 Ind. 522, 5 N. E. Rep. 666. Where money has been paid on a contract that is wholly void, there being no part performance, the party receiving the money having repudiated the contract, a recovery may be had upon the common count. Where, however, the action is to recover for improvements made while in possession, and in part performance of the contract of purchase, the action must be for damages for breach of the contract, even though the contract may be so far invalid as not to be enforceable. *Gwynne v. Ramsey*, 92 Ind. 414; *Peters v. Gooch*, 4 Blackf. 515; *Barickman v. Kuykendall*, 6 Blackf. 21. The plaintiff, according to the averments in the complaint, is in no default. He agreed to make a will, and the will cannot speak until the testator's death. The defendant avers that he is informed or has learned that the plaintiff's will, as it is now prepared, does not conform to the agreement. This is not sufficient to authorize him to repudiate the contract and maintain an action on account for improvements made. The answer was not sufficient. The demurrer should have been sustained. Judgment reversed, with costs.

(115 Ind. 224)

WELLS COUNTY *et al.* v. GRUVER *et al.*
(*Supreme Court of Indiana. June 14, 1888.*)

1. HIGHWAYS—ASSESSMENTS—NOTICE—CORRECTION OF MISTAKE.

Under Rev. St. Ind. 1881, § 5096, which provides that, in levying an assessment for the purpose of constructing a gravel road, the board of county commissioners must give notice when they will meet to hear objections thereto, the board, after they have levied an assessment, cannot order an additional assessment without such notice, even though the latter assessment was made necessary by the fact that the first had not been paid in full, or because the auditor made a mistake in putting it on the duplicate.

2. SAME—INJUNCTION—PLEADING—CONCLUSIONS OF LAW.

In a bill to enjoin the collection of a highway assessment, an averment that there was no notice of the levy of the assessment does not state a mere conclusion of law, but a material fact.

Appeal from circuit court, Wells county; Henry B. Saylor, Judge.

Action by Mary F. Gruver *et al.* to enjoin the collection of an assessment upon her land to aid in the construction of a gravel road, on the ground that the board, having failed to give the notice required by the statute, was without jurisdiction to make the assessment. The portion of Rev. St. 1881, § 5096, applicable to the case is as follows: "The commissioners, when any such improvement shall be ordered, shall immediately appoint three disinter-

ested freeholders of the county. * * * When the report of said committee shall be returned, the county auditor shall give notice of it by publication in some newspaper published and of general circulation in said county, and shall also give notice, for at least three consecutive weeks, of the time when the commissioners will meet at the county auditor's office to hear the same. On the day named in said notice, the commissioners shall meet; and, if no exceptions have been filed to said report, they shall confirm the same."

Dailey, Mock & Stimmons, for appellant.

ELLIOTT, J. The complaint alleges, among other things, that the appellee is the owner of the tract of land described; that an assessment was levied upon it for the purpose of constructing the Bluffton and Salamonie gravel road; that on the 9th day of September, 1882, the final order levying the assessment was made by the board of commissioners; that, afterwards, on the 6th day of June, 1884, without notice to the plaintiff, and without any notice whatever, the board of commissioners entered an order levying an additional assessment. Prayer that the collection of the assessment levied on the 6th day of June, 1884, be enjoined. We regard the complaint as sufficient. There are, doubtless, in it, as the appellant's counsel contend, some conclusions of law; but, excluding all these, there are substantive facts, well pleaded, which make the complaint good. The averment that there was no notice whatever of the assessment levied in June, 1884, is not the statement of a mere conclusion of law, but the statement of a material fact. *Davis v. Railway Co.*, 16 N. E. Rep. 639, (November term.) The allegation is not that the notice was defective or insufficient, but that there was no notice. The cases of *Caskey v. Greensburgh*, 78 Ind. 233; *Booth v. Board*, 84 Ind. 428; *Krug v. Davis*, 85 Ind. 309; *Miller v. Smith*, 98 Ind. 226; *Rains v. Scott*, 13 Ohio, 107; and the other cases cited by counsel,—are not at all in point. The distinction between an averment that there was no notice whatever, and an averment conceding or implying that there was some notice, is clearly pointed out in *Harris v. Ross*, 112 Ind. 314, 13 N. E. Rep. 873. Here it appears that the final order was made on the 9th day of September, 1882, and that in June, 1884, an additional assessment was made, without any notice whatever. It is obvious that, if there was no notice, the appellee could only aver that as a fact; for it is logically inconceivable that he could do more. This disposes of the first objection urged against the complaint by the appellant.

Notice is imperative in all such cases as this. A special tax levied for the purpose of aiding in the construction of a gravel road is not valid unless some notice is given the land-owner. *Gavin v. Board*, 104 Ind. 201, 3 N. E. Rep. 846, and cases cited; *Brosemer v. Kelsey*, 106 Ind. 504, 7 N. E. Rep. 569; *Board v. Fullen*, 111 Ind. 410, 12 N. E. Rep. 298. The rule we have stated was applied to precisely such a case as the present, in *Board v. Fahlor*, 15 N. E. Rep. 830, (March 10, 1888.) The question here is not what the rule is where there is some notice, but what the rule is where there is no notice at all. If there had been some notice, we should have a very different case; but the commissioners, in June, 1884, nearly two years after levying the assessment under the only notice given, attempted to levy the assessment of which the appellee complains. Without some notice, there was an utter want of jurisdiction. The order entered in September, 1882, finally disposed of the proceedings under the notice, and, without a new notice of some character, the board of commissioners had no authority whatever to proceed against the appellee. It is clear, upon principle and authority, that the board of commissioners, having finally adjudicated the cause in 1882, could not assume jurisdiction and order an additional assessment in 1884, without acquiring, by notice, jurisdiction over the appellee. She was entitled to her day in court, and that she has not had.

The appellant's counsel are undoubtedly right in asserting that a tax-payer who seeks an injunction against the collection of a tax which is illegal only in part must pay or tender the part which he concedes to be legal. *Roseberry v. Huff*, 27 Ind. 12; *Muncoy v. Joest*, 74 Ind. 409, and cases cited; *Cauldwell v. Curry*, 93 Ind. 363; *Russell v. Cleary*, 105 Ind. 502, 5 N. E. Rep. 414; *Morrison v. Jacoby*, 113 Ind. —, 14 N. E. Rep. 546, and 15 N. E. Rep. 806. But, while we assert the rule, we deny its application to this case. Here the plaintiff denies that any part of the assessment levied in June, 1884, is valid. She affirms, and the facts she pleads sustain her affirmation, that all of that assessment is void. She concedes nothing as to that assessment. On the contrary, her assault is directed against it as an entirety. Nor does the attack rest upon the theory that there was merely some irregularity in the proceedings of the officers. The theory of the attack is that the assessment of 1884 was utterly void because there was an entire absence of jurisdiction. The appellee strikes successfully at the foundation, and proves the invalidity of the entire assessment. She overthrows the proceeding from beginning to end. The case, be it remembered, is not that of errors occurring after the acquisition of jurisdiction, but of an attempt to proceed where, in law, there was no authority to move a single step. Counsel are right in stating that the officers are presumed to have done their duty; but this general principle is of no avail to them, for the reason that it is made to appear that the officers did not do their duty. It does affirmatively appear that, so far from having done their duty, they attempted to proceed in a matter without jurisdiction.

We copy from the brief of counsel a summary of the only paragraph of the answer to which our attention is directed. They say: "The averments of the third paragraph of answer are, in substance, as follows: That the gravel road is constructed on and across the appellee's land; that it is a valuable and lasting improvement to his land, and benefits the same \$200; that the viewers estimated the expense of the improvement at \$47,630.17; that the apportionment committee apportioned against the appellee's land \$89.00, its fair proportion of said estimated expense according to the benefits; that the actual expense of grading and graveling the road was \$43,786.90, and that all of the incidental expense was \$922.96, aggregating \$44,709.86; that if the bonds of the county had been issued for said amount, in the manner and for the time as those that were issued, with the interest thereon, they would aggregate \$57,295; that, to meet the payment of such bonds, had they been so issued, it would have been necessary to have placed upon the special tax duplicate, to be paid in the years from 1883 to 1888, inclusive, the sum of \$9,549; that the board of commissioners, instead of issuing bonds for the full amount of \$44,709.86, and to save interest to the parties assessed, issued bonds only to the amount of \$38,000.00; that the difference between the said actual expense, \$44,709.86, and said bonds, \$38,000, to-wit, \$6,709.86, was paid out from the money collected upon the assessments directly upon the expenses of said work, which saved to the parties assessed \$1,335 in interest, that would have accrued on the bonds if bonds had been issued for the \$6,709.86; that the auditor, instead of placing said \$9,549 upon the duplicate, to be collected in each of the years 1883 to 1888, inclusive, by mistake placed upon the duplicate to be collected in each of said years only the sum of \$7,977.41; that the appellee had full knowledge of these several acts at the time they severally occurred; that the appellee's portion of said assessment for each of said years should have been \$19.09, and for the six years, \$114.58; that, by the mistake and miscalculations of the auditor, the sum of only \$14.83 was placed upon the duplicate for said years; that the appellee had only paid the sum of \$44.49 on account of said assessment or improvement, on said bonds, or the interest thereon; that it was necessary, in order to meet the payment of the bonds that had been issued, with the interest thereon that matured in the year 1885, to cause the auditor to make a division of said assessment; that the commis-

sioners made such order requiring the auditor to place upon the duplicate against the appellee's land, to be paid in the year 1885, the sum of \$21.95, and a like proportion against the other lands benefited; that the appellee refused to pay any part of said installment of said assessment in excess of said \$14.83, which is the assessment of which complaint is made; that it was necessary to place upon the duplicate, to be paid in the year 1886, \$9,892.21, and against the appellee's land for said year, \$18.39; that the appellee will have to pay in 1887, \$16.61, and in 1888, \$15.72; that the taxes for 1885, 1886, 1887, and 1888 were wholly unpaid; that the total amount the appellee has paid and will have to pay on account of said improvement, and including all expenses, exclusive of the interest on the bonds, will not aggregate \$79.83, which is \$9.17 less than the original apportionment against his land, and, including the interest, it will be \$102.33; that all the officers acted in good faith; that no additional assessment was made, but only a division of the assessment into installments, in order to meet the payment of the bonds and interest; that no assessment has been made against the appellee's land in excess of the actual cost of the improvement, with the interest on the bonds, and that no installment in excess of the sum necessary to pay the bonds, as they became due, has been made; and that the appellee 'has failed and refused to pay the assessment against her land which became due and owing from her in the years 1885 and 1886, and that the same is due and unpaid;' and the court is asked to 'order said tax assessment to remain on the duplicate for collection, or order the same to be again levied, and for other relief.'" This answer, in our opinion, confesses, but does not avoid, the material allegations of the complaint. The complaint explicitly avers that the assessment made in June, 1884, was an additional assessment, and the order of the board of commissioners, set forth in that pleading, contains this clause: "And the said auditor is further ordered to make an additional levy of eight per cent. on the whole of each assessment on said gravel road." The complaint also shows, as we have seen, that the board assumed to make this additional levy without giving notice. These material allegations are admitted because not denied, and their admission establishes the legal conclusion that the second assessment was void. We cannot perceive any reason upon which it can be held that because the first assessment was not paid in full, or because the auditor made a mistake in putting it on the duplicate, the board had authority to make a second assessment. *Board v. Fahlor, supra*. Conceding all that is claimed by counsel, the most that the answer shows is that a greater amount, under the first order, should have been placed on the duplicate. Grant all this to be true, still it does not follow that a second assessment might be made without notice. We do not, by any means, decide that a greater amount should have been placed on the duplicate under the order of September, 1882; but, if we should so decide, it would not lead us further than to hold that the mistake might be corrected. But that would not support the answer; for, to be good, the answer must avoid the fact that the second assessment was made without jurisdiction. It is not the first assessment that is involved here; it is only the second. And the question is not whether the auditor made a mistake in putting the first assessment on the duplicate, but whether there was any jurisdiction to make the second. It may be true that there is authority to correct the first assessment,—a question we do not decide; but, if there is, still that does not sustain the action taken by the board of commissioners. We do not deem it necessary to inquire whether the county can justly claim that as it used the amount collected from the land-owners, instead of using bonds at once, and thereby saved some interest to the tax-payers, it can rightfully collect the assessment; for the question which controls the case, and the only question, indeed, which it is proper for us to decide, is whether there was any jurisdiction in the matter of the assessment of June 6, 1884.

It is urged that the answer shows that the bill has no equity, and that for

this reason the demurrer to the answer should have been overruled, and we are referred to the cases of *Williams v. Hitzie*, 83 Ind. 303; *Woods v. Brown*, 93 Ind. 168; *Stokes v. Knarr*, 11 Wis. 389; *Woodward v. Dromgoole*, 71 Ga. 523; *Sharp v. Schmidt*, 62 Tex. 263. But these cases do not rule such a case as this. Unless the concession is made that the second assessment creates a debt, the cases cited are entirely irrelevant to the point in dispute. That no such concession can be justly made, is very clear. Where a tax is levied in a case where there is no jurisdiction, no debt or charge is created against the tax-payer. *Board v. Fahlor*, *supra*. Where there is an entire want of authority to levy the tax sought to be collected, the tax-payer neither owes a debt nor is subject to a charge. The case before us is not at all like the ordinary case where the land-owner stands by, and receives a benefit without objection; for here the work was done, and a full assessment made, and that assessment the land-owner has paid, or is ready to pay when it becomes due. That assessment he concedes to be just, and only challenges the second assessment. Here the attempt is to add an additional burden long after the final order was made, and to do it without jurisdiction. The benefit assessed is undisputed, and the contention is that a new assessment cannot be made without notice.

The appellant's counsel insist that because, as they assume, the demurrer was defective in form, it was error to sustain it, even though the answer is bad. The law is otherwise. *Hildebrand v. McCrum*, 101 Ind. 61. If the answer is bad, then the appellant has no defense; and, in sustaining the demurrer, conceding it to be defective in form, there was, at most, no more than a harmless error. Judgment affirmed.

(115 Ind. 587, 598, 599, 600)

WELLS COUNTY *et al.* v. J. P. MOUNSEY. SAME v. BOLTEN. SAME v. J. JAMISON. SAME v. W. A. POPEJOY. SAME v. HUFFMAN. SAME v. M. M. LATIMORE. SAME v. T. JAMISON *et al.* SAME v. VAN CAMP. SAME v. E. POPEJOY. SAME v. M. A. JAMISON. SAME v. W. JAMISON. SAME v. EATON. SAME v. G. B. LATIMORE. SAME v. G. R. MOUNSEY.

(Supreme Court of Indiana. June 14, 1888.)

ELLIOTT, J. Affirmed, on the authority of *Wells Co. v. Gruver*, *ante*, 290.

(117 Ind. 40)

POLLARD v. BARKLEY *et al.*¹

(Supreme Court of Indiana. June 15, 1888.)

EXECUTORS AND ADMINISTRATORS — SETTLEMENT AND ACCOUNTING — ATTORNEY'S FEES. Under Rev. St. Ind. § 2403, providing that the settlement of an estate may be set aside for fraud, illegality, or mistake, the allowance to an administrator of attorney's fees for his personal services in the administration of the estate, which is prohibited by sections 2396-2398, is an illegality for which a final settlement may be set aside.

Appeal from circuit court, Carroll county; E. P. HAMMOND, Special Judge.

Action by Margaret Barkley and others to set aside the final settlement of Charles R. Pollard as administrator of Robert Barkley. Judgment for plaintiffs, and defendant appeals.

J. Applegate and D. Turpie, for appellant. W. E. Uhl, for appellees.

ZOLLARS, J. Appellant's final settlement as administrator of the estate of Robert Barkley, deceased, was approved by the court, and he was discharged, on the 7th day of February, 1881. Appellees, as the heirs at law of said Barkley, commenced this action on the 6th day of February, 1884, and, for the reasons stated in their complaint, asked that the settlement be set aside. When the courts of common pleas were in existence, and had jurisdiction in probate matters, the law provided that, on appeal from that court to the circuit court,

¹ Rehearing denied.

a final settlement of an administrator might be set aside if, upon such appeal, it was made to appear that such settlement had been illegally made. It also provided that a person interested in the estate might, by a direct proceeding, have such a settlement set aside for fraud or mistake. 2 Rev. St. 1876, p. 537. The courts of common pleas were abolished in 1873, and their jurisdiction in all cases was transferred to the circuit courts. The above-mentioned statute was not changed, but it was held that, by the act abolishing the courts of common pleas, and transferring their jurisdiction to the circuit courts, those courts had jurisdiction to set aside such final settlements for fraud, mistake, and illegality. *Heaton v. Knowlton*, 65 Ind. 255, (261.) With some restrictions and enlargements not material to be considered here, the statute of 1881, upon the same subject, is substantially the same as the former statute. Rev. St. 1881, § 2408. Under this latter statute, such final settlements may be set aside upon the petition of a person interested in the estate, "particularly setting forth the illegality, fraud, or mistake in such settlement, or in the prior proceeding in the administration of the estate, affecting him adversely." So far as concerns the case in hearing, it is not material whether the proceeding be regarded as under the statute of 1881, or under the former statute, in force when the final settlement was approved. In our judgment, however, the former statute was, and the latter is, remedial, and hence this proceeding must be regarded as under that of 1881.

The only reason set forth in the complaint, and shown by the evidence, for setting aside the final settlement, which we need notice, is that of "illegality." The statute in force at the time the final report was approved, provided, as does that in force now, that no allowance of attorney's fees should be made to an administrator for his personal services as an attorney in the settlement of the estate. 2 Rev. St. 1876, p. 546, § 149; Rev. St. 1881, §§ 2396-2398. The enforcement of that statute in this case, it is apparent, will work a hardship and injustice to appellant; but the courts must enforce the laws as they find them, leaving the policy of their enactment to the legislature. The allowance of attorney's fees to an administrator for his personal services as an attorney in the settlement of the estate is a violation of the positive terms of the statute, and hence an illegality for which a final settlement will be set aside, just as there is illegality in a final settlement of an estate made when an unallowed claim is pending against it. 2 Rev. St. 1876, p. 535, § 112; Rev. St. 1881, § 2401; *Dillman v. Barber*, 16 N. E. Rep. 825; *Roberts v. Spencer*, 112 Ind. 85, 18 N. E. Rep. 129; *Reed v. Reed*, 44 Ind. 429; *Heaton v. Knowlton*, *supra*. See, also, *Camper v. Hayeth*, 10 Ind. 528; *Miller v. Steele*, 64 Ind. 79; *Zeek v. Reed*, 69 Ind. 319; *Taylor v. Wright*, 93 Ind. 121. In support of the charge of illegality in the allowance to, and the retention by, appellant of attorney's fees for personal services as an attorney in the settlement of the estate, appellees introduced in evidence his final report, which had been approved, as already stated. That report and its approval show that such fees were allowed. The court heard evidence for the purpose of showing how much appellant's services as administrator were worth, as a means of ascertaining, as near as might be, how much of the sum allowed to him was for services as an attorney. For that purpose, the evidence, we think, was competent. As appellant did not testify upon that subject, the evidence is somewhat meager, and not very satisfactory; and for that reason, it may be, the court, in its final judgment setting aside the settlement, ruled that the finding and conclusion upon that subject shall not be conclusive, nor in any way binding upon appellant or the court in settling the amount to be allowed to him hereafter for his services as administrator. While we are constrained to hold that, by reason of the statute, nothing can be allowed to him for personal services as attorney, it is apparent from the record that he is entitled to a liberal allowance for his services in the settlement of the estate. All that he received as assets of the estate, he recovered upon a disputed and contested claim. In the pros-

ecution of that claim, it was necessary to take depositions in a distant state. The cause was tried three times in three different counties, and was twice in this court on appeal. When the claim was finally recovered, the interest amounted to about as much as the original claim. It seems, also, that, in addition to his other services, appellant advanced the money to carry on the litigation. The expenses of the litigation, extending over a period of near 10 years, were necessarily large; but that is no sufficient reason why appellant should not receive a just and ample compensation for his services. In the making of such allowance, the court is not bound by any unbending rule, but will consider the nature of the estate, the difficulties attending the recovery of the assets and the settlement of the estate, the peculiar qualifications of the administrator, the advantage to the estate from such qualifications, and all other facts and circumstances which will the better enable it to do justice as between the estate and the administrator.

It is contended, in a brief filed by one of appellant's counsel, that the evidence shows that Barkley in his life-time, despairing of ever recovering the claim, declined to advance money to carry on the litigation, and made an equitable assignment of the claim to appellant, and that, therefore, the amount recovered upon the claim equitably belonged to appellant, and not to the estate. It is not necessary for us to here express any opinion as to the weight or effect of the testimony upon that subject. This action is to set aside the final settlement simply, and that settlement was upon the theory that the money which came into appellant's hands belonged to the estate. It is altogether probable that, when appellant again files his final settlement report, his rights in the premises, and the question as to the proper amount to be allowed to him, will be more fully presented than they are by the record before us. Judgment affirmed, with costs.

(15 Ind. 232)

RICHEY v. BLY.

(*Supreme Court of Indiana*. June 15, 1888.)

SET-OFF AND COUNTER-CLAIM—TORT AND CONTRACT—WAIVER OF TORT.

Under Rev. St. Ind. 1881, § 948, which provide that "a set-off shall be allowed only in actions for money demands upon contracts, and must consist of matter arising out of debt, duty, or contract," the waiver of tort by defendant does not make his claim against plaintiff "matter arising out of debt, duty, or contract," and such claim cannot be pleaded as set-off.

Appeal from circuit court, Wells county; HENRY B. SAYLER, Judge.
A. N. Martin, for appellant. Dailey, Mock & Simmons, for appellees.

Howk, J. In this case the only error assigned here by appellant (defendant below) is thus assigned: "The court erred in sustaining appellee's motion to strike out the second paragraph of appellant's answer to appellee's complaint." In her complaint, appellee, Susan Bly, plaintiff below, alleged that defendant was indebted to her in the sum of \$73.40, for balance due her from him on settlement, and for work and labor performed by plaintiff for defendant at his instance and request, and for goods sold and delivered by plaintiff to defendant, etc. Defendant answered in two paragraphs, of which the first was a general denial of the complaint, and the second paragraph was pleaded as a set-off. Plaintiff's motion to reject or strike out the second paragraph of answer was sustained by the court, and to this ruling defendant excepted, and filed his bill of exceptions. This is the ruling which the defendant has assigned here as error. The second paragraph of defendant's answer reads as follows: "And for a second and further paragraph of answer, by way of set-off to plaintiff's complaint, defendant says that, before the beginning of this suit, plaintiff was and still is indebted to defendant in the sum of \$100: for the value of 150 bushels of apples, of the value of \$50, by plaintiff unlawfully

taken from the orchard of defendant without leave; for the value of 10 apple trees belonging to defendant, unlawfully destroyed by plaintiff in wantonness, of the value of \$25.00; and for the value of 50 pounds of feathers belonging to defendant, and of the value of \$25.00, by plaintiff unlawfully taken and converted to her own use or destroyed. That said sum is now due and wholly unpaid; and that defendant herewith submits to plaintiff certain interrogatories, and asks that she be ordered to answer the same. Wherefore, defendant, waiving all right of action for the torts, and asking relief simply for the value of the property, asks that said sum of \$100 be set off against a like sum of plaintiff's demand, and for judgment for the residue, for costs, and other proper relief." Plaintiff's motion to strike out this paragraph of answer was in writing, and the following reason therefor was assigned therein, namely: "Because the matters pleaded in such paragraph as a set-off to plaintiff's action on account were a series of alleged torts, and sound in tort, and were not legal and proper matters of set-off to plaintiff's cause of action."

We are of opinion that the court below did not err in sustaining plaintiff's motion, or in striking out the second paragraph of defendant's answer herein. It is settled by our decisions that a claim arising out of tort, for trespass, or the wrongful conversion of property, cannot be pleaded by way of set-off against a cause of action founded upon or arising out of a contract. *Railroad Co. v. Ballard*, 22 Ind. 448; *Shelly v. Vanarsdoll*, 23 Ind. 543; *Roback v. Powell*, 36 Ind. 515; *Harris v. Rivers*, 53 Ind. 216; *Boil v. Simms*, 60 Ind. 162; *Zeigelmüller v. Seamer*, 68 Ind. 488. Defendant's counsel concede in argument that this court has uniformly held as we have stated. But counsel claim that it is also settled by our decisions that, where a tort has been committed, it is competent for the injured party, at his election, to waive the tort, and to sue for and recover, in *indebitatus assumpsit*, the value of the property wrongfully destroyed or converted. It is, no doubt, true that such have been the decisions of the court on this point. *Jones v. Gregg*, 17 Ind. 84; *Morford v. White*, 53 Ind. 547. Under these decisions, it might have been competent for defendant to have waived the tort, and brought his action to recover the value of the property wrongfully destroyed or converted; but it does not follow that defendant could, by his waiver of the tort, make his claim against the plaintiff, described in the second paragraph of answer, "matter arising out of debt, duty, or contract." It is of such "matter" our Code imperatively requires that the set-off "must consist." Section 348, Rev. St. 1881. The set-off attempted to be pleaded in the second paragraph of defendant's answer did not consist of matter arising out of debt, duty, or contract, and plaintiff's motion to strike out or reject it was correctly sustained. The judgment is affirmed, with costs.

(115 Ind. 443)

OHIO & M. RY. CO. v. HECHT. 1

(Supreme Court of Indiana. June 16, 1883.)

1. DAMAGES—PERSONAL INJURIES—PLEADING AND PROOF.

Evidence of Bright's disease at the time of the trial, superinduced by the injury, is admissible, under a complaint alleging bruises and hurts, "so that the plaintiff suffered great pain and anguish, and became sick, sore, and lame, and was confined to his bed and room from thence hitherto, and was wholly incapacitated from attending to his usual vocation, * * * and received a permanent injury, which will lame him for life."

2. SAME—INSTRUCTIONS.

The jury are properly instructed that they may consider the occupation of the plaintiff, and give him such a sum as will fully compensate him for the injuries sustained.

3. NEGLIGENCE—CONTRIBUTORY—INSTRUCTIONS.

A charge that, although plaintiff may not have exercised due care, his want of care must have been such as contributed to the injury, to be a bar to recovery, is

1 Rehearing denied.

not erroneous, especially when accompanied by another instruction that the plaintiff must prove by a preponderance of evidence that the injury was received without his fault.

Appeal from circuit court, Jefferson county; W. T. FRIEDLEY, Judge.

Action by Abraham Hecht against the Ohio & Mississippi Railway Company to recover damages for personal injuries. Judgment was entered for plaintiff, assessing his damages at \$2,500, from which defendant appeals. One ground of appeal is that evidence was admitted, against defendant's objection, that plaintiff, at the time of the trial, was afflicted with Bright's disease, cause by the injuries complained of.

H. D. McMullen and John McGregor, for appellant. *Korbly & Ford*, for appellee.

ELLIOTT, J. The appellee bought a ticket, entitling him to passage on the trains of the appellant, and while at the appellant's station at North Vernon, for the purpose of entering one of its trains, as he was entitled to do under the ticket he had purchased, he was injured, without any fault on his part, by stepping into a hole in the platform, which the appellant, in disregard of its duty, had negligently permitted to remain unprotected. The complaint thus describes the injury sustained by the appellee, and states the damages occasioned by the wrong of the carrier: "The plaintiff was violently thrown down, and upon his valise, which he was carrying in his hand, and his foot and ankle were sprained, strained, and otherwise greatly injured and bruised, and the ligaments and tendons of plaintiff's foot were strained and drawn and permanently injured, so that the plaintiff suffered great pain and anguish, and became sick, sore, and lame, and was confined to his bed and room from thence hitherto, and was wholly incapacitated from attending to his usual vocation, and he laid out and expended a large sum of money, to-wit, \$——, for doctor's fees and medicines and nursing, in attempting to be cured of said hurt, and received a permanent injury, which will lame him for life, and always impede his successful prosecution of his business; whereby he has sustained damages in the sum of five thousand dollars." The complaint makes a case entitling the appellee to full compensation for the injury which proximately resulted from the appellant's wrong. Where a disease caused by the injury supervenes, as well as where the disease exists at the time of the injury, and is aggravated by it, the plaintiff is entitled to full compensatory damages. The decisions upon this point are numerous and harmonious. *Railroad Co. v. Wood*, 113 Ind. 542, and cases cited, 567, 14 N. E. Rep. 572; *Railroad Co. v. Jones*, 108 Ind. 551, 9 N. E. Rep. 476; *Railroad Co. v. Pitzer*, 109 Ind. 179, and cases cited, 188, 6 N. E. Rep. 310, and 10 N. E. Rep. 70; *Railway Co. v. Falvey*, 104 Ind. 409, 3 N. E. Rep. 389, and 4 N. E. Rep. 908; *Railroad Co. v. Buck*, 96 Ind. 346; *Railroad Co. v. Riley*, 39 Ind. 568; *Keyser v. Railway Co.*, 33 N. W. Rep. 867; *Quackenbush v. Railway Co.*, 35 N. W. Rep. 523. The complaint is sufficiently comprehensive to entitle the plaintiff to give evidence of the nature and consequences of his injury. In *Ehrgott v. Mayor*, 96 N. Y. 264, it was said by the court: "Upon the trial, plaintiff gave evidence tending to show that he had a disease of the spine, of a permanent nature, as the result of his injuries. This evidence was objected to by the counsel for the city, on the ground that the plaintiff had not alleged such a result from the injury in his complaint. We think the complaint is sufficient. It alleges that he suffered great bodily injury; that he became, and still continues to be, sick, sore, and disabled; that he was obliged to spend large sums in attempting to cure himself, and was prevented for a long time from attending to his business, and that he was otherwise injured, to his damage \$25,000. These allegations are sufficient to authorize proof of any bodily injury resulting from the accident; and, if the defendant desired that they should be more definite, it could have moved to have them made more specific."

or for a bill of particulars." Chief Justice CAMPBELL said in *Johnson v. McKee*, 27 Mich. 472: "Where the defendant was informed that damages were sought for sickness and disorder, and their attendant expenses, as well as for wounds and bruises, he was bound to expect evidence of any sickness, the origin or aggravation of which could be traced to the act complained of." In the case of *Delie v. Railway Co.*, 51 Wis. 400, 8 N. W. Rep. 265, the question before us was carefully examined and well discussed; the court saying, among other things, "that it is not claimed on the part of the appellant that the complaint does not state a cause of action. If the allegations of the injury are sufficient to entitle the plaintiff to recover anything more than nominal damages, then it seems to us very clear that he is entitled to recover such damages as he actually sustained by reason of all injuries to his person resulting from the accident, and that, in order to enable the jury to estimate his damages, he must be permitted to show what those injuries in fact were. We think that in cases of this kind, if the defendant does not desire to have the plaintiff make his allegations, as to the nature of his injuries, more definite and certain, and does not ask to have it done by a proper motion for that purpose, he must come prepared to meet any proof which the plaintiff may offer, which shows, or tends to show, the real nature of the injuries which were the direct result of the accident. This, we think, was the rule held, even under the old practice, by this court in *Richard v. Booth*, 4 Wis. 74-92. In that case the court held that, under allegations as general as in this case, the plaintiff might show, as one of the results of the battery, that his shoulder-blade was broken. The present chief justice, in his opinion, says: 'It was contended on the argument that the fracture of the shoulder-blade should have been specially and circumstantially set forth, in order to apprise the defendant of the facts to be proved, and that it was a surprise upon him to admit proof of it under the general language of wounding, beating, bruising, etc.; and, although we think such a special statement of the injury might have been very proper, yet we cannot say it was essentially necessary. As already stated, we can but view that injury as the natural and necessary result or consequence of the battery. That wrongful act was the efficient producing cause of the fracture and loss of health, and we think it is sufficient to allege it in this general manner.' See, also, *Schmidt v. Pfeil*, 24 Wis. 452-455. If, under the old rules of pleading, under general allegations of wounding, bruising, and beating, the plaintiff could be permitted to show all of the injuries to the person which resulted from the battery, there is much greater reason for allowing such evidence under the code practice, which gives the defendant the clear right to have the general allegations made more specific and certain if he desires so." At another place it was said: "But counsel for the appellant urges that, as the hernia did not make its appearance until nine months after the accident, it cannot be said that it was the result of the accident, and certainly not the direct and immediate result thereof, and therefore evidence concerning it should not have been admitted under the allegations of the complaint. If the hernia had appeared immediately after the accident, under the rules above stated, there would be no doubt as to the right of the plaintiff to prove the facts as one of the results of the injury; and we think the mere fact that it did not become apparent to the plaintiff until some time after can make no difference as to the right of the plaintiff to show that it was in fact caused by the accident." Our own decisions declare the rule substantially as the cases we have cited. In *Railway Co. v. Selby*, 47 Ind. 471, it was said: "The complaint charged that the plaintiff was generally bruised, hurt, and injured. Under these general allegations, the plaintiff was entitled to prove any and all injuries which he received, and which were the natural consequence of the wrongful act of the defendant." It was said by the court, in the case of *Railway Co. v. Savage*, 110 Ind. 156, 9 N. E. Rep. 85, that "after Doctor Young had, as a witness, explained the nature of the injury which the plaintiff had

received, and the remedy resorted to for his relief, he was, over objection of the defendant, permitted to say the effect of the injury would be very deleterious to the plaintiff's nervous as well as to his general system, and that the injury would thereafter have an injurious effect upon his strength and power of physical endurance. It is insisted that there was nothing in any of the averments of the complaint which justified the admission of such evidence, and for that reason its admission was erroneous. As will be seen by a recurrence to the complaint, it concluded with the averment that the plaintiff had 'thereby become wholly crippled and maimed, and prevented from actively pursuing his business, for life.' Under our decided cases, that averment was quite sufficient to let in the evidence complained of." This is the doctrine declared in the cases of *Town of Elkhart v. Ritter*, 66 Ind. 136; *Car Co. v. Parker*, 100 Ind. 181; *Turnpike Co. v. Andrews*, 102 Ind. 138, 1 N. E. Rep. 364; *Railway Co. v. Falvey*, *supra*. The case of *Brown v. Byroads*, 47 Ind. 435, cited by the appellant, decides nothing upon the point here in dispute. The case of *Teagarden v. Hetfield*, 11 Ind. 522, simply decides that a complaint praying damages for unlawfully killing a mare does not entitle the plaintiff to recover, in addition to the value of the mare, compensation for taking care of two colts which were suckling the mare at the time she was killed. The pervading fallacy in the argument of appellant's counsel is that of undue assumption. He unduly assumes that the illness and permanent injury resulting from the tort are to be deemed special damages. On this point it is said, in a very late edition of an excellent text-book, that "there is a substantial uniformity of doctrine that every such subsequently developed disease which would naturally ensue from the injury, and which cannot be shown to have resulted from a sufficient independent cause, must be imputed to the author of the original injury. Though the plaintiff be afflicted with a disease or weakness which has a tendency to aggravate the injury, defendant's negligence will still be held to be the proximate cause; and the defense that the sufferer died from an independent disease is not made out, unless it is clearly shown that death must have ensued independent of the injury. Aggravation of an existing disease may be allowed for in the damages awarded." 2 Shear. & R. Neg. (4th Ed.) § 742. This is substantially the doctrine of the cases already referred to, and to them may be added the cases of *Jucker v. Railway Co.*, 52 Wis. 150, 8 N. W. Rep. 862; *Railway Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. Rep. 1286; *Railway Co. v. Rosenzweig*, 113 Pa. St. 519, 6 Atl. Rep. 545; *Railway Co. v. Leslie*, 57 Tex. 83.

The court gave to the jury this instruction: "It is not enough that plaintiff may not have used ordinary care while on the defendant's platform, and while he was about to enter the defendant's cars, (if such want of care is proved;) but such want of care must have contributed to the injury, to bar the plaintiff from recovery, if his right to recover is otherwise shown by the evidence." If this instruction stood alone, it would not, we incline to think, warrant a reversal; for it is well settled that a plaintiff's negligence does not preclude a recovery unless it contributed to his injury. It is not mere negligence that bars a recovery, for the negligence must also be contributory. *Nave v. Flack*, 90 Ind. 205; *Railway Co. v. Richardson*, 66 Ind. 43-48; 1 Shear. & R. Neg. (4th Ed.) § 94; Whart. Neg. § 703; Cooley, Torts, 679; Beach, Contrib. Neg. § 3. But the instruction must be considered with others upon the same point, and, when thus considered, it is quite clear that the appellant has no just cause of complaint; for the other instructions clearly and explicitly directed the jury that the plaintiff could not recover unless he proved that he was not guilty of contributory negligence. In one of the instructions given, the court told the jury, among other things, that the plaintiff was bound to prove, by a preponderance of the evidence, "that he was not guilty of any contributory negligence; that the injury complained of was received without his fault." The court did not err in instructing the jury that they might con-

sider the occupation of the plaintiff, and that they might give him such a sum as would fully compensate him for the injuries he received. *Railway Co. v. Falvey, supra*; *Turnpike Co. v. Andrews, supra*; *Car Co. v. Parker*, 100 Ind. 181-195; *City v. Gaston*, 58 Ind. 224.

What we have said in disposing of the questions made upon the complaint, and the competency of evidence under it, disposes of the other questions made upon the instructions. Judgment affirmed.

(147 Mass. 201)

STONE v. WAINWRIGHT *et al.*

(*Supreme Judicial Court of Massachusetts. Suffolk. June 19, 1888.*)

FOREIGN JUDGMENT—WHEN A BAR—SERVICE OF PROCESS OUTSIDE OF STATE.

In a suit in New York against the joint makers of a promissory note, one of the defendants, who was a citizen of Massachusetts, was not served with process in New York, and did not appear; but pursuant to statute judgment was entered against all. *Held*, that this judgment was no bar to a suit against him in Massachusetts on that note.

Exceptions from superior court, Suffolk county; MASON, Judge.

Action by Leander Stone against W. L. Wainwright and one Noble, to recover upon four promissory notes. Trial in the superior court, where the court, who heard the case without a jury, found for the defendant Noble and against the defendant Wainwright, and the latter excepted. The facts are fully stated in the opinion.

W. C. Cogswell, for defendant Wainwright.

The defendant contends that, upon consideration of all the evidence, the first request should have been granted; and, second, that by the common law Wainwright was entitled to judgment; that the evidence offered of the law of New York failed to change the common law in this respect, and therefore the second request should have been granted. Service at common law was required to be made personally upon defendant, who was taken into custody, etc. The liability of members of a partnership is a joint liability, as distinguished from a several or joint and several liability. In an action against joint debtors, the judgment must go against all the joint debtors, or the plaintiff will be defeated. A judgment recovered against one of several joint debtors is a good bar to an action against another of the joint debtors. The law of another state or country must be proved as fact, and, in the absence of evidence, the common law is presumed to control. There is no presumption that the statutory law of another state corresponds with a statute of Massachusetts. Statutes which alter common-law remedies, or affect common-law rights, must be strictly complied with. A transaction must be both within the letter and spirit of the statute which derogates from the common law, in order to be governed by it. *Ward v. Johnson*, 13 Mass. 148; *King v. Hoare*, 13 Mees. & W. 494; *Murphy v. Collins*, 121 Mass. 6; *Dewey v. Goodenough*, 56 Barb. 54. If the plaintiff Stone might originally have brought his action and taken judgment against four, and then sued Wainwright upon the original cause of action, it is sufficient to say that he did not elect so to do, but chose a different course of proceedings, and adopted all the consequences that might fall therefrom. *Gay v. Raymond*, 140 Mass. 69, 2 N. E. Rep. 782. The court erred in omitting to give any effect to the judgment, which, on the evidence, was a good bar. If this action can be sustained, defendant is in the position of having two judgments against him rendered upon the same cause of action in two different states, each of which regards its own judgment as valid. The law does not place any man in such a position. Could the plaintiff maintain another suit in New York on this same cause of action? Not while the judgment he has deliberately taken remains unreversed.

McCormick v. Fiske, 188 Mass. 379, sustains this position. The action was upon a domestic judgment, which defendant was not allowed to impeach for want of jurisdiction. The remedy was error, which lies at common law for want of jurisdiction. *Bodurtha v. Goodrich*, 3 Gray, 508. The record was just as binding upon plaintiff, and defendant could have successfully pleaded it in bar to an action on the original demand. *Hendrick v. Whittemore*, 105 Mass. 24, 29.

Fred'k A. P. Fiske and W. C. Wait, for plaintiff.

The refusal of the court below to allow the defendant Wainwright's request "that, upon all the evidence in the case, the defendant Wainwright was entitled to judgment," is not a ground for exception. *Curry v. Porter*, 125 Mass. 94; *Dwyer v. Fuller*, 144 Mass. 420, 11 N. E. Rep. 686. According to the rule of common law as expressed in numerous decisions, (*Rangely v. Webster*, 11 N. H. 299; *Knapp v. Abell*, 10 Allen, 485; *Legg v. Legg*, 8 Mass. 101; *Hall v. Williams*, 6 Pick. 232; *Wright v. Andrews*, 130 Mass. 149,) a judgment against several joint obligors, being in its nature entire and unqualified if rendered by a court that has no jurisdiction over one of the defendants, is not only void as to the defendant, over whom the court had no jurisdiction, but as to all the defendants. Whatever right the defendant may have to make use of a New York statute, the plaintiff denies that the defendant has any right to ignore, as he asks leave to do, the very existence and effect of the statutes of this commonwealth. See *Odom v. Denny*, 16 Gray, 114; *Shirley v. Shattuck*, 13 Metc. 256. The decision of the court below is founded upon, and can be upheld by, a long line of decisions of the supreme court of the United States and of the supreme court of this commonwealth; said decisions clearly and unmistakably holding that a personal judgment is without any validity if it be rendered by a state court in an action upon a money demand against a non-resident, upon whom no personal service was made, and who did not appear in person or by an authorized attorney to defend such action. *Pennoyer v. Neff*, 95 U. S. 714; *D'Arcy v. Ketchum*, 11 How. 165; *Bissell v. Briggs*, 9 Mass. 462; *Odom v. Denny*, 16 Gray, 114; *Ewer v. Coffin*, 1 Cush. 23; *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. Rep. 165. And such a judgment is of no value, even within the jurisdiction of the court rendering it, other than to subject the property actually attached to the payment of the demand which the court may find to be due to the plaintiff. *Pennoyer v. Neff*, 95 U. S. 714, 724; *Eliot v. McCormick*, 144 Mass. 10, 10 N. E. Rep. 705; *Cooper v. Reynolds*, 10 Wall. 309. The judgment rendered in New York against defendant Wainwright is therefore totally invalid in this commonwealth, and, being thus invalid, the plaintiff in his suit against said defendant in this commonwealth very properly declared upon the note instead of the judgment.

HOLMES, J. This is an action of contract upon four promissory notes, brought by the payee against the five makers, who were copartners under the name of the "Olympian Roller Skating Club." Two only of the defendants, Noble and Wainwright, were within the jurisdiction, or were served. These defendants set up a judgment recovered in New York as a bar. The New York judgment was rendered against all five, but the defendant Wainwright lived in Massachusetts, and was never served with process in New York. The New York summons and complaint were served upon him in Boston, in pursuance of an order of one of the justices of the New York court. In the present action the court found for the defendant Noble, but declined to rule that Wainwright was entitled to judgment, or that his liability was to be determined by the common law, and found against him. The case comes up on Wainwright's exceptions to the refusal to rule as stated.

In the absence of any evidence of the New York statutes, the New York

judgment would be no bar to the present suit against Wainwright, because it would be void as against him for want of jurisdiction, and, being a joint judgment, it would be void altogether. *Knapp v. Abell*, 10 Allen, 485, 490; *Wright v. Andrews*, 130 Mass. 149, 151. In our opinion, the sections of the New York Code put in evidence do not change the result. Sections 438-445, 1932-1938, 1946. By section 1932 the plaintiff in an action against defendants jointly indebted upon contract may proceed against the defendants served with process, and, if he recovers, may take judgment against all the defendants. By section 1933, when such a judgment is taken against a defendant upon whom the summons was served without the state pursuant to an order for that purpose, it has the effect specified in section 445, by which the defendant, upon good cause shown, and upon just terms, may be allowed to defend after final judgment within certain times limited. And section 1933 further provides that, as against such defendant who is allowed to defend after judgment, the judgment is evidence only of the extent of the plaintiff's demand, after the liability of that defendant has been established by other evidence. We see no reason to doubt, and we assume this case was one in which sections 438 *et seq.* purported to authorize service without the state by order, that section 1932 purported to authorize the judgment against all the defendants, including Wainwright, and that the judgment had the effect above stated, so far as the statute could give it that effect. At the same time it is very plain that the judgment against Wainwright would not be recognized outside of New York if a suit was brought upon it, and it can have no greater effect as a bar than it would have as a cause of action. It would be a singular conclusion that, because a record established Wainwright's liability in New York, he was not liable anywhere else, in any form of action. If all the defendants in an ordinary action at law live out of the state, and none of them are served with process, or voluntarily appear, it is settled that a judgment against them is only valid so far as to warrant the application of property attached to its satisfaction, and will have no general operation *in personam*, even in the state where it is rendered. Statutes cannot confer jurisdiction over persons not subject to the legislative power. *Elliott v. McCormick*, 144 Mass. 10, 10 N. E. Rep. 705; *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. Rep. 165; *Machine Co. v. Radcliffe*, 66 Md. 511, 8 Atl. Rep. 265. It is only by very subtle reasoning that the fact that the New York court had power to enter judgment against the other defendants could be held to enlarge their power against Wainwright, even so as to give the judgment against him a local validity. Clearly the judgment can have no force against him outside of the state. The result is the same whether the judgment be pronounced void as against Wainwright, and therefore void as against all, notwithstanding the statute, or whether, since it is in statutory form, it be held valid as against those with whom the statute had power to deal. In either view it cannot bar a suit against Wainwright on the notes; for if the judgment be held valid against the defendants who were within the jurisdiction, the judgment is in effect (at least outside the state of New York) a judgment against those defendants only, although in form it also embraces Wainwright. By immemorial practice, founded on necessity, and embodied in a declaratory statute in this commonwealth, if an action of contract is brought against several defendants, some of whom cannot be served by reason of their absence from the state, the action may proceed against those who are duly served. But when a judgment is taken for this reason against less than the whole number of joint contractors, an action on the same contract may be maintained afterwards against any of those not served. Pub. St. c. 164, §§ 14, 15; Rev. St. c. 92, §§ 12, 13, Commissioners' note; *Tappan v. Bruen*, 5 Mass. 193, 196; *Olcott v. Little*, 9 N. H. 259; *Rand v. Nutter*, 56 Me. 339. It follows from the same necessity, and has been settled by repeated decisions, without the aid of statute, that similar judgments in other states

can have no greater effect in barring an action here. *Shirley v. Shattuck*, 13 Metc. 256, 260; *Odom v. Denny*, 16 Gray, 114; *Knapp v. Abell*, 10 Allen, 485, 490; *Dennett v. Chick*, 2 Greenl. 191. Exceptions overruled.

(147 Mass. 206)

RUSSIA CEMENT CO. v. LE PAGE.

(Supreme Judicial Court of Massachusetts. Essex. June 19, 1888.)

TRADE-MARKS—INFRINGEMENT—USE OF ONE'S OWN NAME—INJUNCTION.

Defendant, Le Page, and his partner had been manufacturing and selling liquid glue under the name of "Le Page's Liquid Glue," and sold out their business and trade-marks to a corporation. Held, that the corporation was entitled to an injunction restraining Le Page from selling glue as "Le Page's Liquid [or Improved Liquid] Glue," but not from selling liquid glue, and indicating that he was the maker of it. Held, also, that defendant would be restrained from describing the company under whose name he conducted his business, as "Le Page's Liquid Glue Company."

Reported case from supreme judicial court, Essex county; GARDNER, Judge.

Bill in equity by the Russia Cement Company against William N. Le Page for an injunction restraining the defendant from announcing or advertising himself as a manufacturer of glue, called "Le Page's Liquid Glue," or by any other name, substantially the same, or from announcing or advertising himself as a manufacturer of glue by the name of "Le Page's Liquid Glue and Cement Company, Gloucester," or any other name substantially the same. Hearing in the supreme judicial court before GARDNER, J., who refused the injunction and reported the case to the full court.

E. R. Hoar and Causten Browne, for plaintiffs.

It was contended for the defendant that a man cannot make a trade-mark of his own name, so as either to control its use himself or to give others the right to control its use; also that a man has always the right to use his own name to designate his own goods. That a man's name may be his trade-mark or that of his associates in business, has never, we believe, been doubted except by an American text writer. A reading of his discussion will not, we think, tend to inspire the court with the same doubt. *Browne, Trade-Marks*, §§ 195-206. See *Ainsworth v. Walmsley*, L. R. 1 Eq. 525; *Chaney v. Hozie*, 143 Mass. 592, 10 N. E. Rep. 713; *Bowman v. Floyd*, 3 Allen, 76; *Frese v. Bachof*, 13 Blatchf. 234; *Moet v. Couston*, 33 Beav. 578; *Tonye v. Ward*, 21 L. T. (N. S.) 480. At the same time it is well settled that a defendant cannot, because his name is his own, use his own name, being that of the plaintiff, in connection with his own goods, in any way that he pleases. He must not use it in such a way as will confound the business done by him under his name with the business done by the plaintiff under his like name. *Holloway v. Holloway*, 18 Beav. 209; *Burgess v. Burgess*, 3 De Gex, M. & G. 896; *McLean v. Fleming*, 96 U. S. 245; *Meneely v. Meneely*, 62 N. Y. 427; *Manufacturing Co. v. Manufacturing Co.*, 11 Fed. Rep. 495. See, also, *Sebast. Trade-Marks*, 18, 19. But the question of the right of the defendant to use his own name as a trade-mark, although it happen to be the same name as the plaintiff's, is wholly different from the question in the case at bar, viz., of the right of the same man, having appropriated his own name as the trade-mark of a business concern with which he was connected, to use it afterwards as his own personal trade-mark or trade name, in a like business, to the injury of that concern; that he has no such right, and may be enjoined from so doing, is clear. *Holmes v. Manufacturing Co.*, 37 Conn. 278; *Gilman v. Hunnewell*, 122 Mass. 152; *Manufacturing Co. v. Manufacturing Co.*, 18 Fed. Rep. 816. The recent case of *Chaney v. Hozie*, 143 Mass. 592, 10 N. E. Rep. 713, is exactly in point for the complainant, and is of itself decisive of the present case. See *Shaver v. Shaver*, 6 N. W. Rep. 188; *Probasco v. Bouyon*, 1 Mo. App. 241; *Oakes v. Tonsmierre*, 4 Woods, 555; *McLean v.*

Fleming, 96 U. S. 245; *Frazer v. Lubricator Co.*, 18 Bradw. 462; *Stonebraker v. Stonebraker*, 33 Md. 252; *Gillis v. Hall*, 2 Brewst. 342; *Ainsworth v. Walmsley*, *ubi supra*; *Manufacturing Co. v. Manufacturing Co.*, 32 Fed. Rep. 94. The plaintiff acquired the trade-mark by assignment from Brooks & Le Page. From the nature of a trade-mark, the right to use it is an exclusive right. *Kidd v. Johnson*, 100 U. S. 619. If the validity of the trade-mark or trade name is established, and its ownership by the plaintiff as assignee is established, there can be no question of the invasion of the plaintiff's right by the defendants. *Manufactures v. Wilson*, 3 App. Cas. 389; *Evans v. Von Laer*, 32 Fed. Rep. 153; *Frazer v. Lubricator Co.*, and *Gillis v. Hall*, *ubi supra*. The decree, if for the plaintiffs, should save its right to proceed for damages or profits since the filing of the bill.

W. Gaston, Francis Forbes, and F. L. Washburn, for defendant.

The principle is too well settled to be controverted that a man can use his own name in any common form of speech to indicate goods of his own manufacture. *Burgess v. Burgess*, 8 De Gex. M. & G. 896; *Holloway v. Holloway*, 13 Beav. 209; *Gilman v. Hunnewell*, 122 Mass. 139; *Meneely v. Meneely*, 62 N. Y. 427; *Carmichael v. Latimer*, 11 R. I. 395; *McLean v. Fleming*, 96 U. S. 245; *Marshall v. Pinkham*, 52 Wis. 572, 9 N. W. Rep. 615; *Rogers v. Rogers*, 53 Conn. 121, 1 Atl. Rep. 807, and 5 Atl. Rep. 675; *Chemical Co. v. Meyer*, 31 Fed. Rep. 453; *Bassett v. Percival*, 5 Allen, 345; *Montgomery v. Pickering*, 116 Mass. 227; *Reed v. Reed*, 114 Mass. 372; *Musio Hall v. Cory*, 129 Mass. 435; *Pearson v. Pearson*, 27 Ch. Div. 145; *Hoxie v. Chaney*, 143 Mass. 592, 10 N. E. Rep. 713; *Sebast. Trade-Marks*, (2d Ed.) 236; *Cottrell v. Manufacturing Co.*, 54 Conn. 122, 6 Atl. Rep. 791; *Gilman v. Hunnewell*, 122 Mass. 139; *Wolfe v. Burke*, 7 Lans. 151.

DEVENS, J. The plaintiff and defendant are manufacturers of liquid glue, and the defendant, whose name is Le Page, uses the same name as that used by plaintiff to describe his glue, and by which to advertise it, except that he introduces therein the word "improved." The introduction of this word into the name of the article manufactured by him does not justify its use, if in other respects the plaintiff has just ground to object to it. *Sebast. Trade-Marks*, 52; *Frazer v. Lubricator Co.*, 18 Bradw. 462, 13 N. E. Rep. 639; *Gillis v. Hall*, 2 Brewst. 342. A person cannot make a trade-mark of his own name, and thus debar another having the same name from using it in his business, if he does so honestly, and without any intention to appropriate wrongfully the good-will of a business already established by others of the name. Every one has the absolute right to use his own name honestly in his own business for the purpose of advertising it. Even though he may thereby incidentally interfere with and injure the business of another having the same name. In such case the inconvenience or loss to which those having a common right to it are subjected is *damnum absque injuria*. But although he may thus use his name, he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment or article produced by them, and thus produce injury to the other beyond that which results from the similarity of name. *Holloway v. Holloway*, 13 Beav. 209; *Meneely v. Meneely*, 62 N. Y. 427; *Gilman v. Hunnewell*, 122 Mass. 139; *Rogers v. Rogers*, 53 Conn., 121, 1 Atl. Rep. 807, and 5 Atl. Rep. 675. While this is the general rule, it is also true that one may so sell or part with the right to use his own name as a description or designation of a manufactured article as to deprive himself of the right to use it as such, and confer this right upon another. A name used as an adjective of description is not necessarily understood by the public as any assertion that the person whose name is used is the maker of the article. One who has carried on a business under a trade name, and sold a particular article in such a

manner by the use of his name as a trade-mark or a trade name as to cause the business or the article to become known or established in favor under such name, may sell or assign such trade name or trade-mark when he sells the business or manufacture, and by such sale or assignment to conclude himself from the further use of it in a similar way. *Manufacturing Co. v. Manufacturing Co.*, 18 Fed. Rep. 816; *McLean v. Fleming*, 96 U. S. 245; *Crucible Co. v. Guggenheim*, 2 Brewst. 321; *Probasco v. Bouyon*, 1 Mo. App. 241; *Oakes v. Tonsmierre*, 4 Woods, 555; *Manufacturing Co. v. Manufacturing Co.*, 32 Fed. Rep. 94; *Ainsworth v. Walmsley*, L. R. 1 Eq. 524; *Shaver v. Shacer*, 6 N. W. Rep. 188; *Frazer v. Lubricator Co.*, *ubi supra*. A person may be enjoined, therefore, from using his own name as a description of an article of his own manufacture, and from selling the article under that particular name when he has parted with the right thus to apply it. *Gillis v. Hall*, 2 Brewst. 342; *Kidd v. Johnson*, 100 U. S. 619. It is not upon the ground of the invasion of the trade name adopted by another, but by reason of the contract he has made, that he is deprived of the right himself to use his name as all others of the same name may use theirs. The recent case *Hoxie v. Chaney*, 143 Mass. 592, 10 N. E. Rep. 713, which has been decided since the decree originally made in the case at bar was rendered, is quite conclusive in regard to it. It was there held that "A. N. Hoxie's Mineral Soap," and "A. N. Hoxie's Pumice Soap" were trade-marks, and assignable as such, and that they did not necessarily mean that the soaps were made by A. N. Hoxie. Where one who had adopted these trade-marks, or, more properly, trade names, for his manufacture, entered into a partnership with another under articles by which he contributed the good-will of the business he was carrying on, with the tools, implements, and fixtures, and on the dissolution of this partnership conveyed to his partner "all my right, title, and interest in and to all and singular the partnership property belonging to the firm, meaning hereby to sell and convey all my interest in the entire assets of the firm," it was further held that these trade names became, by the articles of copartnership, a part of the property of the firm, and that the right to use them as such passed by the bill of sale, and that the partner so conveying had parted with his own right so to do. Upon the evidence in the case at bar, it appears that "Le Page's Liquid Glue" was the name adopted by Brooks and Le Page for the light glues manufactured by them, a special word such as "straw," "carriage," etc., indicating for what especial use the particular light glue was designed, being inserted before the word "glue;" that they manufactured glues under this name; and that at a subsequent period, in 1882, formed the plaintiff corporation, to which they sold their business, and which continued the manufacture of these glues under the same name. The defendant was a member of the corporation, and a director thereof until February, 1886, when he left it, and shortly after engaged in the manufacture and sale of glue at Gloucester, where the plaintiff's business has always been carried on, using the name "Le Page's Improved Liquid Glue," to advertise the article produced by him. When Brooks & Le Page sold their business to the plaintiff they in express terms sold "the right to use the trade-marks belonging to or in use by said copartnership." When Le Page (with Brooks) sold to the corporation and when he left the corporation, it must be held that the name "Le Page's Liquid Glue" was a trade name or trade-mark, and it is not important which term is used, indicating the liquid glue which the plaintiff was manufacturing. The right to use it as such was necessarily an exclusive use, as it was intended thus to distinguish the plaintiff's goods from those of others. As a trade-mark belonging to the corporation, the defendant, while an officer thereof, had himself sought to obtain registration for it at the United States patent-office. We are of opinion, therefore, that the defendant should be enjoined from using the words "Le Page's Improved Liquid Glue," or "Le Page's Liquid Glue," to describe the article manufactured by

him, and from describing the company under whose name he conducts his business as "Le Page's Liquid Glue Company," whether with or without any addition thereto. While the plaintiff has not sought to prevent the defendant from manufacturing glue, in order to avoid misunderstanding, we add that while the defendant cannot use the words adopted as a trade name for the article manufactured by him, we do not decide that he may not use the words "Liquid Glue," or other appropriate words to describe his product, or to state in that connection that he is himself the manufacturer of it. Decree for plaintiff.

(147 Mass. 212)

SHERRY v. PERKINS *et al.*

(Supreme Judicial Court of Massachusetts. Essex. June 19, 1888.)

CONSPIRACY—BOYCOTTING—INJUNCTION.

Defendants entered into a scheme, by threats and intimidation, to prevent persons in plaintiff's employ from continuing in such employ, and in like manner to prevent other persons from entering plaintiff's employ; and, in pursuance of such scheme, caused a threatening banner to be carried in front of plaintiff's shop, the effect of which was to deter persons from continuing to work for or engaging with plaintiff, and the latter's business was thereby injured. *Held*, that plaintiff was entitled to an injunction restraining the carrying or displaying of the banner.

Reported case from supreme judicial court, Essex county; C. ALLEN, Judge.

Bill in equity, by Patrick P. Sherry against Charles E. Perkins and Charles H. Leach, for an injunction to restrain the defendants, respectively president and secretary of the Lasters' Protective Union, from causing to be carried in front of the plaintiff's shoe factory a banner on which was the following inscription: "Lasters are requested to keep away from P. P. Sherry's. Per order L. P. U.;" and also a banner on which was the following: "Lasters on a strike; all lasters are requested to keep away from P. P. Sherry's until the present trouble is settled. Per order L. P. U." The court, at the trial, found as facts that members of the Lasters' Protective Union entered into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiff, as lasters, from continuing in such employment, and in like manner to prevent other persons from entering into such employment as lasters; that the defendants participated in the scheme; that the use of the banner was a part of the scheme, and its use an injury to the plaintiff in his business and property. The court, after finding the facts, reported the case to the full court.

H. F. Hurlburt, R. Lund, and T. M. Osborne, for plaintiff.

The principal question in this case is whether this court, as a court of equity, has jurisdiction to enjoin the acts complained of, upon the findings of facts reported by the justice who heard the case. The carrying of a banner or placard before a person's place of business, which injures such person in his business and property, is a private nuisance. An authority directly in point is *Gilbert v. Mickle*, 4 Sandf. Ch. 357, in which it was held that a placard paraded or posted in a public street, before the door of an auctioneer, cautioning strangers to beware of mock auctions, constituted a private nuisance remediable by injunction. The injunction in that case was refused upon grounds not affecting the jurisdiction of the court. If the highway is obstructed by crowds of people in consequence of the banner's being carried as described in the bill, such carrying of the banner is a public nuisance. *Rex v. Cross*, 3 Camp. 224; *Rex v. Carille*, 6 Car. & P. 636; *Reg. v. Grey*, 4 Fost. & F. 73. But as the damage to the business and property of the plaintiffs, found in the report, is special to the plaintiffs, they are entitled to an injunction. *Walker v. Brewster*, L. R. 5 Eq. 25; *Stetson v. Faxon*, 19 Pick. 147; *Soltau v. De Held*, 2 Sim. (N. S.) 133. The entire scheme, "by threats and intimidation, to prevent persons in the employment of the plaintiffs, as lasters, from continuing in such employment, and in like manner to prevent other persons from en-

tering into such employment as lasters," is a private nuisance to the plaintiffs. Wood, Nuis. § 141, and cases cited. Among the things which have been held to be private nuisances are a market illegally conducted within the limits of an established market, (*Yard v. Ford*, 2 Saund. 172;) a ferry carried on, without right, near a duly-licensed ferry, (*Stark v. McGowen*, 1 Nott. & McC. 387;) the use of a toll-bridge inside the limits of a lawfully established toll-bridge, (*Bridge Co. v. Lewis*, 63 Barb. 111.) See 1 Com. Dig. "Action on the Case for Nuisance," C. The scheme in which the defendants are found to have participated, has the same elements of injury as these cases of nuisance. It is illegal, injurious to property, and continuous in character. See *Railroad Co. v. Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719. This court has full power to restrain a private nuisance by injunction, both under the special provision of the statute, (Pub. St. c. 151, § 2, cl. 9,) and by virtue of its general equity powers conferred by the statute of 1877, c. 178, which is embodied in Pub. St. c. 151, § 4. The jurisdiction in equity now possessed by this court is not limited by any restriction contained in the last clause of Gen. St. c. 113, § 2, but is in all respects as full as that of the English court of chancery. 1 Pom. Eq. Jur. §§ 311, 312. In respect to private nuisances, the English court of chancery has from early times exercised the right to restrain by injunction. This is not limited to cases in which there is no redress at law. Indeed, the ability to recover substantial damages at law has been declared to give the right to ask for an injunction against the continuance of the nuisance. Lord ROMILLY, M. R., in *Crump v. Lambert*, L. R. 8 Eq. 409, 412; 2 Story, Eq. Jur. § 925 *et seq.*; 1 Pom. Eq. Jur. § 252; 3 Pom. Eq. Jur. § 1350; *Emperor v. Day*, 3 De Gex, F. & J. 240, 241, (Lord CAMPBELL.) The scheme in which the defendants participated was plainly illegal and criminal, both under the statute and by common law. Pub. St. c. 74, § 2; *Reg. v. Druitt*, 10 Cox, Crim. Cas. 592; *Com. v. Hunt*, 4 Metc. 111; *Com. v. Dyer*, 128 Mass. 70. But the illegality of the nuisance, or its criminal character, does not prevent the court from enjoining it. *Gilbert v. Mickle*, 4 Sandf. Ch. 358, Lord CAIRNS in *Assurance Co. v. Knott*, L. R. 10 Ch. 144. The jurisdiction of courts of chancery over private nuisances is concurrent with that of courts of law. *Fisk v. Wilber*, 7 Barb. 395. This court has repeatedly exercised its jurisdiction to restrain private nuisances. *Cadigan v. Brown*, 120 Mass. 493; *Mills v. Mason*, Id. 244; *Woodward v. Worcester*, 121 Mass. 245; *Tucker v. Howard*, 122 Mass. 529; *Davis v. Sawyer*, 133 Mass. 289. But, whatever the injury complained of may be called, there is abundant authority for the intervention of a court of equity to prevent injury to property by unlawful or forcible acts, when the injury is continuous. *Macaulay v. Shackell*, 1 Bligh, (N. S.) 96, 127; Lord ELDON in *Gee v. Pritchard*, 2 Swanst. 402, 413; *Emperor v. Day*, 3 De Gex, F. & J. 217, 240, 241, 253; *Spinning Co. v. Riley*, L. R. 6 Eq. 551, 37 L. J. Ch. 889, and 19 Law T. (N. S.) 64. The various cases in which the unauthorized use of the plaintiff's name has been restrained, go upon the principle of the injury to property involved. *Routh v. Webster*, 10 Beav. 561; *James v. James*, L. R. 13 Eq. 421; *Hookham v. Pottage*, L. R. 8 Ch. 91; 3 Pom. Eq. Jur. § 1358. The case of *Spinning Co. v. Riley*, *supra*, is almost precisely parallel to the present case, except that in the present case the placards are paraded in a manner which makes them more distinctly a nuisance than if they were merely posted up. See, also, *Dixon v. Holden*, L. R. 7 Eq. 488; *Assurance Co. v. Knott*, L. R. 10 Ch. 142; *Mulkern v. Ward*, L. R. 13 Eq. 619; *Food Co. v. Massam*, 6 Ch. Div. 582. In November, 1874, the judicature act went into effect, and in a decision under the act, in the case of *Saxby v. Easterbrook*, 3 C. P. Div. 339, it was held that, after the jury had found the fact of libel, an injunction would issue against the continuance of the libel. *Thomas v. Williams*, 14 Ch. Div. 864, (1880,) FRY, J.; *Loog v. Bean*, 26 Ch. Div. 306. In this court the case of *Spinning Co. v. Riley*, was referred to in the case of *Diatite Co. v. Manufacturing Co.*, 114 Mass. 69, and

the dissent there expressed to the views of MALINS, V. C., must be understood as applicable only so far as the language of the former case applies to the question of libel, since the question of libel did not arise in that case. The same is true of the reference to the same case in *Partridge v. Hood*, 120 Mass. 403, 406. See 3 Pom. Eq. Jur. § 1358. As to private nuisance, *Bridge v. Bridge*, 6 Pick. 376; 2 Story, Eq. Jur. §§ 925-928. As to the criminal character of the acts complained of: The fact that the nuisance is indictable as a nuisance does not prevent the court from enjoining its continuance. 1 High, Inj. §§ 745, 752, and cases cited; *Attorney General v. Hunter*, 1 Dev. Eq. 12; *People v. St. Louis*, 5 Gilman, 351. The English judicature act did not enlarge the jurisdiction of courts of equity. *Day v. Brownrigg*, 10 Ch. Div. 294; *Gaskin v. Balls*, 13 Ch. Div. 324. As to differences between this court, as a court of equity, and the English chancery court before 1874, see remarks of WELLS, J., in *Milkman v. Ordway*, 106 Mass. 232, 255. The acts are not libelous, but calculated to injure trade by direct interference. See *Bridge v. Bridge*, 6 Pick. 398; *Carew v. Rutherford*, 106 Mass. 1, 15. As to the parties against whom the injunction should issue, inasmuch as the Lasters' Protective Union is a voluntary association, and all its members cannot be ascertained by the plaintiff, the same rule applies which makes it proper for a few individuals to sue in behalf of such an organization represented by and associated with the defendants named in the bill. See *Birmingham v. Gallagher*, 112 Mass. 190; *Snow v. Wheeler*, 113 Mass. 179; 1 Daniell, Ch. Pr. (4th Ed.) 272, note 5.

John R. Baldwin, for defendants.

The carrying of the banner named in the report, in the manner as stated in the bill of complaint, is not a nuisance. If the words printed on the banner are libelous, the complainants have an adequate remedy at law. Equity will not restrain a libel. The manner of the publication of the words on the banner cannot be restrained. The case of *Spinning Co. v. Riley*, L. R. 6 Eq. 551, is not a precedent that establishes the injunctive jurisdiction. That case has been expressly overruled by *Assurance Co. v. Knott*, L. R. 10 Ch. 145, and unfavorably noticed in *Diatite Co. v. Manufacturing Co.*, 114 Mass. 69. The prayer of the bill is so broad that no decree comporting with the terms thereof would be equitable.

W. ALLEN, J. The case finds that the defendants entered, with others, into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiff from continuing in such employment, and to prevent others from entering into such employment; that the banners, with their inscriptions, were used by the defendants as part of the scheme, and that the plaintiff was thereby injured in his business and property. The act of displaying banners with devices, as a means of threats and intimidation, to prevent persons from entering into or continuing in the employment of the plaintiff, was injurious to the plaintiff, and illegal at common law and by statute. Pub. St. c. 74, § 2; *Walker v. Cronin*, 107 Mass. 555. We think that the plaintiff is not restricted to his remedy by action at law, but is entitled to relief by injunction. The acts and the injury were continuous. The banners were used more than three months before the filing of the plaintiff's bill, and continued to be used at the time of the hearing. The injury was to the plaintiff's business, and adequate remedy could not be given by damages in a suit at law. The wrong is not, as argued by the defendants' counsel, a libel upon the plaintiff's business. It is not found that the inscriptions upon the banners were false, nor do they appear to have been in disparagement of the plaintiff's business. The scheme, in pursuance of which the banners were displayed and maintained, was to injure the plaintiff's business, not by defaming it to the public, but by intimidating workmen, so as to deter them from keeping or making

engagements with the plaintiff. The banner was a standing menace to all who were or wished to be in the employment of the plaintiff, to deter them from entering the plaintiff's premises. Maintaining it was a continuous, unlawful act, injurious to the plaintiff's business and property, and was a nuisance, such as a court of equity will grant relief against. *Gilbert v. Mickle*, 4 Sandf. Ch. 357; *Spinning Co. v. Riley*, L. R. 6 Eq. 551. *Diatite Co. v. Manufacturing Co.*, 114 Mass. 69, was a case of defamation only. Some of the language in *Spinning Co. v. Riley* has been criticised, but the decision has not been overruled. See *Diatite Co. v. Manufacturing Co.*, *ubi supra*; *Assurance Co. v. Knott*, L. R. 10 Ch. 142; *Saxby v. Easterbrook*, 3 C. P. Div. 339; *Loog v. Bean*, 26 Ch. Div. 306; *Food Co. v. Massam*, 14 Ch. Div. 763; *Thomas v. Williams*, Id. 864; *Hill v. Davies*, 21 Ch. Div. 778; *Day v. Brownrigg*, 10 Ch. Div. 294; *Gaskin v. Balls*, 13 Ch. Div. 324. Decree for plaintiff.

(147 Mass. 204)

MARTIN v. GAGE.

(Supreme Judicial Court of Massachusetts. Essex. June 19, 1888.)

1. EXECUTORS AND ADMINISTRATORS—FOREIGN AND ANCILLARY ADMINISTRATION—APPEAL.

A domiciliary administrator appointed in Maine is a party interested, and entitled to appeal from a decree appointing another person ancillary administrator of the estate of the deceased in Massachusetts.

2. SAME—RIGHT TO POSSESSION OF ESTATE.

After the death of a citizen of Maine, property in Maine belonging to her was removed to Massachusetts. *Held*, that the administrator afterwards appointed in Maine was entitled to the possession of the property, and that, there being no other property of the deceased in Massachusetts, no administrator should be appointed there.

Exceptions from supreme judicial court, Essex county; GARDNER, Judge.

Appeal by Hanno W. Gage from the appointment by the probate court of Essex county, April 19, 1885, of William H. Martin, the appellee, as administrator of the estate of his wife, Isabella H. Martin, who died in Portland, Me., July 18, 1885. After hearing in the supreme judicial court the presiding judge refused to dismiss the appeal, and to this ruling, and to others, the nature of which appears in the opinion, the appellee excepted.

Moulton, Loring & Loring, for appellee.

Motion to dismiss should have been allowed. Appellant is not aggrieved, according to his own statement in his own reasons for appeal, to-wit: "That there were no goods, estate, effects, or debts to or by this said Isabella H., in said commonwealth," etc. Pub. St. c. 156, and cases cited. Appellant is not aggrieved, as he has no interest in this estate, except as administrator in a foreign state, and, having taken out no ancillary administration in this state, has no standing in this court. *Hutchins v. Bank*, 12 Metc. 423; *Merrill v. Insurance Co.*, 103 Mass. 248. There was no legal completed sale prior to the appointment of W. H. Martin, because Gage has no license from the probate court of Essex county to sell said yacht, as required by Pub. St. c. 142, § 3. And such sale could not be made without said license, except with the consent of W. H. Martin, bailee of the yacht, for said intestate, which consent the foreign administrator did not have. *Hutchins v. Bank*, 12 Metc. 421. It appears that the bill of sale was not delivered to said McGrady, nor the consideration paid, until after the appointment of said Martin. As we understand the law, where property at the time of the decease of a person is in the hands of a bailee in another state, the foreign administrator cannot sell it until he gets possession of it, and he cannot obtain possession of it without the consent of the bailee. In this case the administrator did not obtain possession with consent of bailee, and therefore he cannot sell, unless he

first took out ancillary letters of administration here. *Goodwin v. Jones*, 3 Mass. 514; *Rand v. Hubbard*, 4 Metc. 255.

J. G. Abbott, S. A. B. Abbott, and C. G. Saunders, for appellant.

The motion to dismiss because the appellant, Gage, is not a person aggrieved, and so cannot appeal, was rightfully overruled. Besides, the question is no longer an open one in this state, it having been expressly settled that the administrator is a proper person to appeal. *Smith v. Sherman*, 4 Cush. 408. Asking the court to rule that, as matter of law, no notice of the appellee's application was required to be given to the appellant, the Maine administrator was rightly refused, because upon the findings it was clearly immaterial, and had no bearing on the case; in fact no ruling was made upon that point, because, upon the facts found, the decree of the probate court was reversed, and that without regard to the question of such notice. The request for a ruling that the sale of the yacht in this commonwealth by the Maine administrator is not legal unless he has taken ancillary letters here, was rightly refused. *Hutchins v. Bank*, 12 Metc. 421; *Luce v. Railroad*, 3 Atl. Rep. 618; *Marcy v. Marcy*, 32 Conn. 308, 323; *Selleck v. Rusco*, 46 Conn. 370; *Petersen v. Bank*, 32 N. Y. 28, 43; *Bank v. Sharp*, 53 Md. 521; *Trecothick v. Austin*, 4 Mason, 16. But upon the facts found the reversal of the decree was right, without reference to the question whether the appellee could sell the yacht here or not. Taking out letters here is only necessary in cases of debts owed the intestate by debtors living here, or where property of the intestate was in this commonwealth at the time of the death of the intestate, that is, where the intestate at his death leaves in this jurisdiction property to be administered upon, but not in cases where there is no property here to be administered upon at the death of the intestate, but property is brought here after her death. But the finding that the appellee took legal possession of the yacht, and sold it and gave possession to the buyer before the appellant's appointment, if he had power to sell, which, upon the authorities, as we have seen, he had, is conclusive, for then clearly there was no property of the intestate in this commonwealth, and the court had no jurisdiction. *Crosby v. Leavitt*, 4 Allen, 410.

W. ALLEN, J. The appellant is the administrator appointed by the courts of the state of Maine of the estate of Mrs. Martin, who was a resident of that state, and who died there. He appeals from the decree of the probate court of Essex county in this commonwealth appointing the appellee administrator of the estate of Mrs. Martin. The principal administration is in the state of Maine, and administration granted in this state must be ancillary to that. The domiciliary administrator representing the general estate has an interest in ancillary administrations, and can appeal from the appointment of an administrator in this state. *Smith v. Sherman*, 4 Cush. 408. The appellee's motion that the appeal should be dismissed for the reason that the appellant was not a party aggrieved by the decree, was properly overruled. The only reason of appeal which there is occasion to consider is that there were no assets of the intestate in this commonwealth. The intestate owned a yacht, which was in the state of Maine at the time of her decease, but was brought into this state by the appellee before the appointment of the appellant as administrator. After the appointment of the appellant, he came into this state, took possession of the yacht, and sold it before the appellee was appointed administrator by the decree which is appealed from. Except the yacht, there never were any assets of the estate in this commonwealth. We think that there was no estate of the decedent to be administered upon in this commonwealth. The yacht was in Maine at the time of her decease, and the appointment of the appellant related back and gave him a title and right of possession to it from that time, which will be recognized and enforced in other ju-

risdictions. *Administrator of Bullock v. Rogers*, 16 Vt. 294; *Valentine v. Jackson*, 9 Wend. 302; *Holcomb v. Phelps*, 16 Conn. 127. Even if the property had never been in the state of Maine, it seems that the taking possession and sale of it here by the appellant would have been valid, there being no creditors of the intestate here. *Hutchins v. Bank*, 12 Metc. 421; *Luce v. Railroad*, 68 N. H. 588, 3 Atl. Rep. 618; *Petersen v. Bank*, 32 N. Y. 21; *Trecothick v. Austin*, 4 Mason, 16; *Doolittle v. Lewis*, 7 Johns. Ch. 45. It is contended in behalf of the appellee that where chattels of a person are at his decease in the hands of his bailee, in another state from that of his domicile, the administrator of the place of domicile cannot sell them in the other place without taking possession, and cannot take possession without the consent of the bailee. We need not consider this proposition, because it does not apply to the case at bar. It appears that the property was in the place of the intestate's domicile at the time of her decease, and it does not appear that it was in the hands of her bailee. Exceptions overruled.

(147 Mass. 192)

McKEOWN v. GURNEY.

(Supreme Judicial Court of Massachusetts. Suffolk. June 19, 1883.)

INSOLVENCY—ALLOWANCE OF CLAIMS—COSTS IN ATTACHMENT DISSOLVED BY PROCEEDINGS.

After an insolvent had been discharged, one Harry B. McKeown, whose name was omitted from the schedule of creditors, was permitted to prove his claim under the name of "Harry McKeown," which appeared therein, and to recover the dividends credited, but the court refused to pass on his claim for costs in a suit where an attachment had been dissolved by the insolvency, under Pub. St. Mass. c. 157, § 139, providing that, when an attachment is so dissolved, the creditor may prove his claim and costs accrued as a privileged debt. Held, that his only remedy was by appeal, and that he could not recover against the insolvent, under St. 1884, c. 236, providing that a creditor omitted by mistake might recover the amount of the dividends to which he would have been entitled; costs being incidental, and recoverable only in connection with the principal claim.

Exceptions from superior court, Suffolk county; PITMAN, Judge.

Contract, by Harry B. McKeown against J. Theodore Gurney, to recover \$21.22, being the amount to which the plaintiff would have been entitled as a dividend in the composition proceedings of the defendant in insolvency, provided it had been proved and allowed by the court. The superior court, hearing the case without a jury, found for the defendant, and the plaintiff excepted. The facts are stated in the opinion.

Thomas Curley, for plaintiff. Salem D. Charles, for defendant.

DEVENS, J. Although the plaintiff's name was omitted from the schedule of defendant's creditors in insolvency, and although a discharge had been granted to the debtor, and the time had expired within which claims could be proved against the estate of the defendant in insolvency, except those held by creditors whose names appeared on defendant's schedule, the plaintiff was permitted to prove his original claim in the name of "Harry McKeown," and to receive the dividend which stood to the credit of "Harry McKeown" on defendant's schedule. The plaintiff had brought suit in the municipal court of Boston on his claim, and the attachment of property made therein was dissolved by the insolvency of the defendant. At the time of proving his debt in insolvency, he offered to prove the claim for costs and expenses which had accrued in his action in the municipal court, but the court of insolvency declined to pass thereon. Upon this claim he now brings suit. Pub. St. c. 157, § 139, provide that when an attachment on mesne process has been made, and is not dissolved before commencement of proceedings in insolvency, "if the claim upon which the suit was commenced is proved against the estate of the debtor, the plaintiff may also prove the legal fees, costs, and expenses of the suit and of the custody of the property, and the amount thereof shall be a priv-

ileged debt." This is a debt created by the statute, and its existence depends upon the predicament stated in the statute, viz., that it shall have been proved as the statute prescribes. The statute creates no personal contract on the part of the insolvent to pay the costs, etc., nor does it place him under any personal liability, and the liability of his estate depends on this proof solely. If the court of insolvency erroneously refused to pass upon or to permit the plaintiff to prove his claim for costs, etc., his remedy was by appeal. Pub. St. c. 157, §§ 36-38. The proceedings of the debtor were under St. 1884, c. 236, which provide for a discharge by means of a composition in insolvency. The ninth section of this statute, after authorizing the court of insolvency, under certain circumstances, to confirm the composition, and to grant a discharge, provides that the composition "shall not bar the debt of any creditor whose name was fraudulently and willfully omitted from the debtor's schedule of creditors. But the debt of any creditor, omitted only through mistake or want of knowledge, shall be barred, and he shall be entitled to and may recover against the debtor the amount of the dividend to which he would have been entitled in the composition proceedings." The contention of the plaintiff is that, whether the debt due him was omitted fraudulently or by mistake from the schedule, which latter is the most favorable view, this omission enables him to recover the full amount of his claim for costs, etc., as a privileged debt. The original debt due to the plaintiff, however, which was for labor and services, has ceased to exist. It was proved in the name of "Harry McKeown," and has been paid in full. The claim for costs, etc., was only supplementary thereto. Whether, if the plaintiff were now able to bring suit on his original debt, either because the same was fraudulently or by mistake omitted by the defendant from his schedule, it would be possible, in view of the language of the statute, to hold that he might maintain his claim for legal costs, etc., as supplementary thereto, upon the ground that the negligence or fraud of the debtor had deprived him of his right to prove the costs, etc., as well as the original debt, or whether a more literal construction of the statute should be followed, need not now be discussed. The debt referred to in St. 1884, c. 236, § 9, is the original debt, and, when this cannot be enforced by suit, that which is purely incidental, or which may be made incidental thereto by a decree of the court, cannot be. Exceptions overruled.

(147 Mass. 215)

BLANCHARD v. COOKE *et al.*

(Supreme Judicial Court of Massachusetts. Worcester. June 19, 1888.)

1. EQUITY—PRACTICE—APPLICATION FOR ISSUES FOR JURY.

After a hearing and a decree, which was reversed on appeal, and after the case was again set down for a hearing, an application by a defendant for issues for a jury, the juries at that time having been dismissed for the term, was properly refused.

2. APPEAL—REVIEW—OBJECTION NOT RAISED BELOW.

After the admission, without objection, of evidence showing a misappropriation of a certain fund, the defendant at the hearing in the supreme court objected that the bill did not sufficiently allege a misappropriation of that particular fund. *Held*, that the objection came too late.

3. SAME—PRACTICE—RECEPTION OF FURTHER EVIDENCE—ACCIDENT OR MISTAKE.

Under Pub. St. Mass. c. 151, § 26, authorizing the supreme court to receive further evidence, in special cases of accident or mistake, in equitable causes, the court will not allow the introduction of the testimony of a witness who testified at a former hearing, was always accessible, and was referred to in the testimony at the final hearing; there being enough to put the parties on inquiry as to what the witness knew.

4. SALE—CONDITIONAL—BREACH OF CONDITIONS.

An agreement for the sale of a stock of goods provided that the seller should retain title to the goods sold, and all added thereto, until paid, the purchaser taking possession, and acquiring a fractional interest proportionate to his payments; and also provided that the seller should be paid the proceeds of the sale of another stock of goods belonging to the purchaser. *Held* that, upon a breach of the last provision, the seller was entitled to resume possession.

Reported case from superior court, Worcester county; ALDRICH, Judge.

This was a bill in equity, by Thomas Blanchard against William O. Cooke, alleging that the defendant had agreed to purchase of the plaintiff a stock of goods; the agreement providing that the plaintiff should retain title to the goods sold, and all added thereto, until paid; the defendant taking possession and acquiring a fractional interest proportional to his payments; the agreement also providing that the plaintiff should be paid the proceeds of the sale of another stock of goods belonging to the defendant. The defendant sold the last-named stock, and converted the money to his own use; whereupon the plaintiff took possession, and by his bill prayed for the appointment of a receiver, an accounting and sale of the property, and a distribution of the proceeds. After a final decree against said Cooke, George P. Staples, the assignee in insolvency of said Cooke, was allowed to come in and be made a party to the suit, and to file his answer. After the case had been heard and determined in the superior court, it was reported to the supreme judicial court; the decision of the latter court being reported in 144 Mass. 207, 11 N. E. Rep. 83. The case now comes before the court in a supplemental report, on appeal by the defendant Staples. The facts material to the points decided sufficiently appear in the opinion.

F. P. Goulding and *A. J. Bartholomew*, for plaintiff. *J. J. Myers*, for defendant Staples.

C. ALLEN, J. The motion of the assignee, that issues be framed for a jury, was properly overruled, as coming too late. The assignee became a party to the cause, and filed his answer, in February, 1886, and proceeded to a hearing before the court, and a final decree was entered June 2, 1886, from which an appeal was taken to this court, and the decree was reversed on March 23, 1887. The case was again set down for a hearing before the court, and on May 4, 1887, the day appointed for the hearing, he for the first time made application for issues for a jury. The presiding judge certifies that the juries had at that time been dismissed for the term, and that there had been ample time, while the juries were still in court, to make such request for a trial by jury. The proper time to present such request was before the hearing in 1886. By going into that hearing without presenting a request for a trial by jury, the assignee waived his right to such trial, if he had any such right; and we think it a proper exercise of the discretionary power of the judge, in respect to granting a jury trial, to refuse it at the time when the request was made. *Dole v. Wooldredge*, 142 Mass. 179, 7 N. E. Rep. 832.

The assignee contends that the plaintiff did not in his bill allege any misappropriation by Cooke of the money received on the sale of the stock of goods at Sandwich. But we are of the opinion that it is too late to object to the admission of the evidence of such misappropriation; no special objection having been made at the hearing that the averments were not broad enough to cover it. The general charge in the bill was that Cooke had failed and neglected to pay over the balance of the proceeds of sales, though often requested to do so by the plaintiff; but, in violation of his said agreement, had taken said proceeds, and appropriated a large sum thereof, to-wit, in all about \$3,500 of such proceeds belonging to the plaintiff, to his own use. If an objection had been made that, taken literally, this only charged a misappropriation of the proceeds of sales in Southbridge, and did not include the proceeds of the sale in Sandwich, it would have been competent for the court to allow an amendment. But the hearing proceeded without objection, on the assumption that no amendment was necessary, and a full investigation was had of the sale of the Sandwich goods, and the disposition of the proceeds. The presiding judge certifies, what, indeed, is apparent from a perusal of the testimony, that it had been from the beginning the main contention between the parties whether Cooke had or had not paid to the plaintiff all that he was

required to pay by the terms of the contract, or whether, in other words, he had not overdrawn his account; and that the plaintiff has claimed, in all the hearings, that the entire sum for which Cooke sold his Sandwich stock of goods was, by the terms of the written contract, to be paid to the plaintiff upon the indebtedness of Cooke to him under said contract. If it is doubtful whether the bill contains a sufficiently explicit averment in respect to the Sandwich goods, certainly, at this stage of the case, no objection having been raised at the hearing, it is too late to found any substantial argument upon this ground. The plaintiff might even now amend by making this averment more specific.

The assignee further contends that a breach of the agreement by Cooke to pay over to the plaintiff the proceeds of the sale of the Sandwich stock of goods as soon as received by him would not authorize the plaintiff to enter and take possession of the goods in Southbridge. In respect to this, the agreement was as follows: "For the security of said Blanchard, the legal title in said goods shall be and remain in said Blanchard until said sum of \$14,214.94, with interest at the rate of seven per cent. per annum, shall have been fully paid; it being agreed, however, that said title may vest in said Cooke in the proportion to the amount which at any time he shall have paid on account of said \$14,214.94 and interest, said Cooke hereby covenanting and agreeing said Blanchard shall be the legal owner of a fractional part of the stock of goods in said store, whether it be these goods, or goods subsequently purchased by said Cooke, which fractional part shall at all times bear the same proportion," etc. This was followed by later provisions giving further effect to Blanchard's right in respect to said goods. The proceeds of the sale of the Sandwich goods were to be applied on account of said sum of \$14,214.94. It thus appears that Cooke distinctly agreed that Blanchard should be the legal owner of a fractional part of all the goods in Southbridge, whether then or thereafter purchased, until full payment of the \$14,214.94. The former decision of this court was that, if there had been a substantial breach of the contract by Cooke, then the plaintiff had the right to take possession while the default continued. 144 Mass. 207, 228, 11 N. E. Rep. 83. The objection now taken appears to be fully covered by the former decision.

This disposes, we believe, of all the questions of law presented upon the present appeal. The assignee, however, strenuously contends that there was a mistake of fact, which was material and vital, and which ought to be corrected. This supposed mistake is as follows: The written agreement contained the following clause: "It is further agreed if said Cooke shall sell the stock of goods now owned by him, and contained in the store in Burgess' block, Sandwich, Mass., that he shall pay the proceeds thereof, as soon as received by him, over to said Blanchard, on account of said sum of \$14,214.94." Now, it was proved at the hearing, and is conceded, that Cooke did sell that stock of goods, and received \$3,600 therefor, and that he did not pay over the proceeds thereof to Blanchard in full, but appropriated a portion thereof, amounting at the least to \$1,900, to paying his own debts, incurred either wholly or partly in the purchase of said goods. The assignee in the present argument admits this, but contends that Blanchard had waived this provision of the contract. The presiding judge found otherwise, and a perusal of the whole evidence, aided by the elaborate presentation by counsel in his argument, leaves the impression that his finding was right. It would be of little use to go into a recapitulation and discussion of the evidence in detail. But, in a general way, the situation appears to have been as follows: Soon after entering into the contract with Blanchard, Cooke received \$3,600 from the sale of the Sandwich goods, and immediately began to pay out the money in payment for his debts, and used in this manner \$2,470.59 of the amount, unknown to Blanchard. In September or October, upon Blanchard's pressing for money Cooke paid to him \$2,000. There is nothing to show, and there

is no pretense, that Blanchard ever in explicit terms consented that the above-cited clause in the contract might be treated as unimportant; but the contention is that there was an indirect waiver to be inferred from his conduct. The conduct relied on is that he consented to the payment, from the proceeds of the Sandwich goods, of \$1,000, and again of \$600, to Bradford, Thomas & Co. But we are not satisfied, on the evidence, that he ever gave such consent. Shortly after the bill was brought, on December 18, 1884, the plaintiff and Cooke were both examined as witnesses, and their testimony was taken down; and there was no suggestion at that time that Blanchard had consented in advance, or forborne to object afterwards, to such a use of that money. Cooke in no manner intimated at that time that Blanchard knew that the Sandwich goods brought as much as \$3,600, or of the misappropriation of a part of the money, or in any way consented to it. On the other hand, Blanchard had just taken possession because Cooke had overdrawn his account, and the fact that Cooke had overdrawn was hardly in dispute, and was in no way justified. Mr. Bartholomew afterwards testified to what took place when Blanchard took possession, and, according to his testimony, there was at that time no pretense but that Cooke had withdrawn money which ought to have been paid to Blanchard, and no pretense of any waiver by Blanchard, but, on the other hand, the talk by Cooke was of endeavoring to pay back the money he had thus taken out. Cooke, in his later testimony, in some particulars, contradicts Blanchard, but the whole effect of the testimony leaves the impression upon the mind that he did appropriate the money, in violation of his contract, and concealed the fact from Blanchard. At the least, we cannot say that the finding of the presiding judge to that effect appears to us wrong. The evidence that Blanchard had access to the books is a circumstance; but there was no proof that he ascertained, from such examination as he made, that Cooke had thus used the money. And on the whole, without going into a minute criticism of the testimony, or undertaking to comment upon it in detail, we do not find it to be proved that the plaintiff waived Cooke's failure to fulfill the clause of the agreement in relation to the proceeds of the Sandwich goods.

The assignee also makes an application to this court for leave to exhibit further evidence, under Pub. St. c. 151, § 26, which authorizes the full court to grant leave to parties, in special cases of accident or mistake, to exhibit further evidence. The affidavit of Soule is what is chiefly relied on in support of this application. Soule had been a witness at the hearing of December 18, 1884. He was always accessible. Blanchard, on that same day, had been questioned in respect to a conversation with him. Soule was also referred to in later portions of the testimony. There was enough to put both Cooke and the assignee's counsel upon inquiry as to all that he knew, as well as all that was known by Mr. Thomas. Under such circumstances, to open the hearing at this time, and in view of all the opportunities which have existed during this protracted litigation, would be unreasonable. The maxim, *interest reipublice ut sit finis litium*, finds a proper application in this case. Decree affirmed.

(147 Mass. 224)

SALTMARSH et al. v. SPAULDING et al.

(Supreme Judicial Court of Massachusetts. Essex. June 19, 1888.)

1. CORPORATIONS—CONVEYANCES—VOTE OF STOCKHOLDERS—FOREIGN CORPORATION.
Pub. St. Mass. c. 106, § 23, requiring a vote of the stockholders of a corporation to authorize a conveyance of its real estate, does not apply to a conveyance of Massachusetts real estate by a foreign corporation.
2. SAME—MORTGAGE EXECUTION.
The directors of a New Hampshire corporation, by vote passed in Massachusetts, authorized the execution of a certain mortgage on land in Massachusetts, the directors having by by-law the management and control of the business of the corpora-

tion, and authority to appoint all necessary agents, and the mortgage, pursuant to the vote, was executed in the name of the corporation as was usual in Massachusetts. *Held*, that the mortgage was valid, notwithstanding Gen. Laws N. H. c. 185, § 2, provides that corporations authorized to hold real estate may convey the same by an agent appointed for that purpose, there being no express prohibition of other modes of conveyance.

3. **SAME—PLACE OF DIRECTORS' MEETING.**

Where a corporation is organized for the purpose of doing business outside the state, and its contracts are made and business conducted in another state, and its by-laws, while they provide for an annual meeting and election of officers in the former state, provide also for directors' meetings for business in the latter state, the appointment of agents and the filling of vacancies in the board of directors there, a vote authorizing certain officers to mortgage land in the latter state may properly be taken by the directors in said state.

4. **SAME—MORTGAGES—FORECLOSURE—PURCHASE BY DIRECTOR.**

A director of a corporation purchased at a foreclosure sale property of the corporation mortgaged by vote of the directors. *Held* that, good faith being shown, the sale could not be avoided; and, in the absence of good faith, the sale could be avoided only upon repayment of the purchase price, and then by the corporation or its stockholders, and not by the purchaser of the land at a sale on execution in a suit against the corporation.

5. **SAME—LOANS BY DIRECTOR.**

A director of a corporation is not prohibited from lending it money needed for its benefit, and purchasing its property at a public sale under a mortgage to a trustee given to secure the loan.

Appeal from superior court, Essex county; BRIGHAM, Judge.

Writ of entry by Aaron H. Saltmarsh and others against Leonard V. Spaulding and others to recover a parcel of land in Haverhill. The superior court ordered judgment for the tenants, and the demandants appealed. The facts are stated in the opinion.

H. N. Merrill, J. Otis Wardwell, and J. C. Caverly, for demandants. E. T. Burley and C. U. Bell, for tenants.

DEVENS, J. The demandants rely for their title upon a special attachment of the land demanded, by a creditor of the American Iron Glass-Pipe & Plate Company, and a sale thereof on execution issuing upon the judgment subsequently obtained. The title of the tenants rests upon a mortgage lawfully made, as it is contended, by the corporation to the City Savings Bank of Haverhill, and a foreclosure sale by authority of a power therein contained, both the mortgage and the foreclosure sale being made previously to the attachment relied on by the demandants. The tenants also rely upon a purchase made by them of the premises upon a sale under an order of court issued on a process to enforce a mechanic's lien. In the view we take of the case, the validity of the title thus acquired it will not be necessary to consider. It is the contention of the demandant that the mortgage made to the savings bank was without lawful authority, and void by virtue of Pub. St. c. 106, § 23, which prescribes that no conveyance or mortgage of the real estate of a corporation, or "lease thereof for more than one year, shall be made unless authorized by a vote of the stockholders at a meeting called for the purpose," no such vote having been passed, authorizing the mortgage in question. An examination of the section shows that it refers only to corporations subject to the provisions of the chapter, where it is found, and that it does not refer to foreign corporations. While the general principle undoubtedly is that the law of the place where real property is situate, exclusively governs as to the title of parties therein, the disposition and mode of transfer thereof and the solemnities attending such transfer, and while we do not doubt that it would be possible to provide by legislation that foreign corporations permitted to own real property situate in this state should only transfer the same by authority of the stockholders, no such provision has been made. *Attorney General v. Mining Co.*, 99 Mass. 148. While they must comply in their forms of conveyance with those here required, they derive their authority to make them from the

rules imposed upon them by the states where they are created. The demandant further urges that even if the statute of Massachusetts does not apply to foreign corporations, there was no power vested in the board of directors by the laws of New Hampshire which authorized them to make a deed of real estate. The by-laws of the corporation vested the management and control of its business, and the authority to appoint all necessary agents or attorneys therefor, in the board. The mortgage deed was made in the name of the corporation, and under its seal, by the president and treasurer of the corporation, by virtue of an express vote of the directors giving them authority. Gen. Laws N. H. c. 147, § 4, cl. 3, which are made a part of the case, empowered the corporation to adopt by-laws, "to regulate the number of officers, their powers and duties, the mode of choosing them, and their tenure of office, and any others necessary and suitable to promote the objects of the corporation, and to alter and amend the same." The corporation was one authorized to make contracts necessary and proper for its business, and to purchase, hold, and convey real and personal estate necessary for the transaction of its business. Gen. Laws N. H. c. 147, §§ 5, 6. The directors, by virtue of the powers implied from their position, had the general control and management of the business, which of necessity involved the raising of money to carry it on. It is found that the money raised by means of the mortgage was expended on the real estate mortgaged. In the absence of any prohibitory statute, a sufficient authority is shown on the part of the directors to mortgage the property, and in doing so they could adopt the form ordinarily in use where the real estate was situated. *Burrill v. Bank*, 2 Metc. 166; *Sargent v. Webster*, 13 Metc. 497; *Hendee v. Pinkerton*, 14 Allen, 387; *Despatch Line v. Manufacturing Co.*, 12 N. H. 205. The provision that a corporation authorized to hold real estate may convey the same by an agent duly appointed for that purpose (Gen. Laws N. H. c. 135, § 2) does not exclude other modes of conveyance; as for instance, in the name and under the seal of the corporation itself, and by the president and treasurer. Especially would this be so where the latter form was that used where the real estate was situated. *Morris v. Keil*, 20 Minn. 53, (Gil. 474;) *Bason v. Mining Co.*, 90 N. C. 417. It is said, however, that, even if the directors might make the mortgage, they had no power to delegate this authority, but must exercise it themselves. The directors delegated no discretionary power; they determined upon the mortgage, and made the president and treasurer simply the agents to execute formally that which they themselves had voted to do. In *Burrill v. Bank*, *ubi supra*, it was accordingly held that not only might the directors mortgage its real estate to secure a debt due from the bank, but might delegate such authority to a committee of their own number. The demandant further contends that a vote of the directors, passed without the state to which their corporation owes its existence was void. The corporation was organized for the purposes of doing business without the limits of New Hampshire. Its works were within this state, and here its contracts were made and its business conducted. Its by-laws, passed at a meeting of the corporation in New Hampshire, while they provide, for the annual meeting of the corporation in that state, and for the choice of officers there, provide also for meetings of the directors for business in this state for the control of the business, and the appointment of the necessary agents here, and for the filling here by the directors temporarily of any vacancies that may have occurred. We do not doubt that this may be done by the corporation. It would certainly be an extraordinary anomaly if, while by the comity prevailing between the states, the corporation was allowed to conduct its business, it could disavow the acts of those whom it has appointed to direct its business here, on the ground that the votes by which they were done, were passed here. The case cited of *Miller v. Ever*, 27 Me. 509, to sustain the statement in *Ang. & A. Corp.* § 274, on which the demandant relies, only holds that a corporation established under a charter of the state of Maine could

not organize in another state, and that the attempt so to do was void, but recognizes fully that a corporation duly organized, and acting within the limits of the state granting the charter, may, by agents duly constituted, act and contract without the limits of the state. The demandant further contends that, as the directors are trustees for the stockholders, even if the mortgage was valid, a purchase by one of the directors of the property belonging to the corporation (the *cestui que trust*) is *prima facie* a purchase for the trust. If this proposition is correct, we cannot see that it would aid the demandant in maintaining this action. The title clearly passed to the purchaser, even if a director, and if the foreclosure sale could be avoided, or the purchaser declared to hold the property subject to a trust, this could only be done by the corporation or its stockholders. *Wildes v. Vanvoorhis*, 15 Gray, 145; *Cahill v. Bigelow*, 18 Pick. 369. The demandant, resting his title upon an execution recovered by one of the creditors of the corporation, cannot for this reason maintain a writ of entry. In an action to recover land, alleging a legal title in the demandant, such a title must be established. *Packard v. Marshall*, 138 Mass. 301. Nor, if it were possible in favor of the demandant to hold that he was entitled to avoid the sale, could he be in a more favorable position than the mortgagor, who could not be allowed to do so except upon paying the sums which it has received from the tenants (five of whom were not directors of the corporation) by the payment of its mortgage debt. We do not, however, intend to suggest that as between the corporation and Spaulding, the director who purchased the land, the facts as they now appear show any reason why it should be permitted to avoid the sale. The sale was not the act of the directors, but of the mortgagees. It was his duty to obtain the highest price possible. While other directors were responsible on one of the mortgage notes, Spaulding was not. A director of a corporation is not prohibited from lending it moneys when they are needed for its benefit, and the transaction is open and otherwise free from blame; nor is his subsequent purchase of its property at a fair public sale, by a trustee under a deed of trust, executed to secure a payment of them, invalid. *Oil Co. v. Marbury*, 91 U. S. 587; *Holt v. Bennett*, 146 Mass. —, 16 N. E. Rep. 5. It is proved as a fact that the sale was made in good faith, to the highest bidder, and that in making the purchase the tenants were in fact acting in good faith. The law does not require that from their relation to the company the contrary necessarily is to be implied. Judgment for tenants.

(124 Ill. 602)

BOURLAND v. GIBSON *et al.*

(Supreme Court of Illinois. May 9, 1888.)

1. VENDOR AND VENDEE—PURCHASE-PRICE NOTE—CONVEYANCE AS CONDITION PRECEDENT.

In an action on a note, after plea that the note was given for lands to be conveyed by plaintiff one year before the note was payable, but that plaintiff had failed to convey, a reply that plaintiff had not refused to convey, is bad, no demand being needed where the note could not be operative till the conveyance was given or waived.

2. EVIDENCE—RES INTER ALIOS ACTA—HARMLESS ERROR.

In an action on a note, testimony that the surety had been informed of the nature of the consideration, that he might be induced to become surety, cannot prejudice plaintiff, a surety being entitled to such information.

Appeal from appellate court, Third district.

Action by Benjamin Bourland against George L. Gibson, Snell, and others on a promissory note. Judgment for defendants, which was sustained on former appeals, and plaintiff again appeals.

Moore & Warner, for appellant. *James S. Ewing*, for appellees.

SCHOLFIELD, J. This case was before this court in 1870, and is reported in 91 Ill. 471. Since then it has been four times in the appellate court of the

Third district, (7 Bradw. 227, 13 Bradw. 352, and 21 Bradw. 43;) and we need only refer to the printed volumes for statements of the case as presented on these several occasions. The case as now presented is this: *Assumpsit* is brought to recover the amount alleged to be due on a promissory note given by appellees to appellant. The following plea was pleaded: "That after the last pleading in this cause on July 1, 1878, said Patterson, by deed duly executed and delivered to one Farrell, sold and conveyed to said Farrell said homestead, and that said causes of action in said declaration mentioned are one and the same, to-wit, the supposed promissory note in the first count mentioned; and the defendants aver that the consideration of said note has wholly failed, in this: that before the execution of said note the plaintiff, as agent of Patterson, had purchased, at trustee's sale, said homestead of said Gibson, for \$6,000, and had, as such agent, received a deed conveying the same to said Patterson; and said Gibson, being desirous to repurchase the same, on February 22, 1875, at Peoria, proposed to the plaintiff, as such agent, to repurchase said homestead, and to give the plaintiff for the same his note for \$2,100, due in one year, with interest at 10 per cent. per annum; said note to be executed by Gibson as principal, and Snell as surety, and also to give said plaintiff, as agent of Patterson, his promissory note for \$4,000, secured by mortgage on said homestead; and that plaintiff in consideration thereof should then and there execute and deliver, or cause to be executed and delivered, a deed to Gibson conveying to Gibson said homestead in fee-simple; and that thereupon the plaintiff accepted said proposition, and undertook and promised to make, or cause to be made, said conveyance to Gibson, and defendants then and there in consideration thereof executed and delivered to the plaintiff the note in suit, and Gibson also executed the note and mortgage aforesaid, and delivered the same to plaintiff, which agreement aforesaid was and is the sole consideration for said note. Yet the plaintiff has wholly neglected and refused, and still neglects and refuses, to execute and deliver, or cause to be executed and delivered, said deed to Gibson, although often requested so to do; but, on the contrary, by the conveyance by Patterson of said homestead to said Farrell, said Patterson and the plaintiff have placed it beyond their power to comply with their contract with the defendant Gibson; by means whereof the consideration of said note has wholly failed. And defendants aver that they are not informed and did not know that plaintiff and Patterson had wholly disregarded the trust-deed last given by said Gibson, and had conveyed said homestead by said Patterson to said Farrell, until on or about the 1st day of May, 1882. And defendants further aver that they have pleaded in substance the foregoing facts at the August term of this court, but, the same not being in due form, a demurrer was sustained to said plea, and leave was then and there obtained to amend said plea, and to file additional pleas. And the defendants now come and file this amended plea, and this the defendants are ready to verify," etc. The circuit court held this was a plea *puis darrein continuance*, and, as such, sustained a demurrer to it; but this ruling was reversed in 13 Bradw., *supra*, the appellate court there holding that it was not a plea *puis darrein continuance*, but a simple plea of failure of consideration, and, as such, sufficient. The first replication filed to this plea is: "Plaintiff says *precludi non*, because he says that the said note was not given and delivered to the plaintiff in consideration that plaintiff would deliver to defendant Gibson the deed in said plea mentioned, on the delivery to him of said note;" and to this the *similiter* was added. Subsequently plaintiff, by leave, filed an additional replication, thus: "The plaintiff, by leave of the court first had and obtained, for further replication to the plea of the defendants filed herein on November 24, 1882, says *precludi non*, because he says that he did not and has not refused to execute and deliver, or to cause to be executed and delivered, to said Gibson, the deed in said plea mentioned, as in said plea alleged," etc. The court sustained a demurrer to this replication; but plaintiff elected to stand

by the replication, and refused to plead over. The jury, on the trial, returned a verdict for the defendant, upon which the court gave judgment; and that judgment, on appeal, was affirmed by the appellate court.

The principal question arising upon this record is whether the trial court erred in sustaining a demurrer to the second replication. The substance of the plea is that the sole consideration of this note, and of another note executed by Gibson at the same time for \$4,000, is that plaintiff would, when the notes were delivered to him, execute and deliver a deed conveying the described property in fee to Gibson; and that the deed was not executed and delivered. Assuming the contract to be as pleaded, plaintiff undertook to execute and deliver the deed to Gibson on the 22d day of February, 1875; and, to pay him therefor, Gibson and Snell agreed to pay him \$2,100 on the 22d day of February, 1876, and Gibson agreed to pay him the further sum of \$4,000 on the 22d of February, 1879. In other words, the \$2,100 was to be paid for the execution and delivery of a deed, which was to be executed and delivered one year before the payment was to be made. The undertaking to pay was dependent upon the undertaking to convey, but its performance was to be subsequent. It is true, the burden is upon the defendants to prove their plea; but if the agreement as alleged be proved, there is no obligation upon them to prove a demand for the execution or delivery of the deed, for, as has been seen, under that alleged agreement the duty was upon the plaintiff to execute and deliver the deed one year before he was entitled to demand payment of the note. This, therefore, is not like the cases cited, where the deed is executed, but the title fails. Here Gibson has nothing, and he is sought to be coerced to make a payment which he was not to make until one year after the delivery of a deed which has not been executed and delivered, and which was the sole cause or action for his undertaking to make a payment. The agreement, in fact, may have been different; but for the present question we must accept it as alleged. Plainly, then, it was immaterial that plaintiff had not refused to execute the deed. That did not meet the plea. If the agreement was as alleged, then it only remained to show performance; that is, that he had executed and delivered the deed on some excuse for non-performance, as a waiver, etc., neither of which was alleged. Bish. Cont. § 1434.

The first instruction asked by the plaintiff and refused by the court embodied the idea of the second replication, and was therefore properly refused. The instructions relating to a waiver were properly refused, because no issue in that respect was presented by the pleadings. It is objected that the court improperly admitted evidence of what was said to Snell, in the absence of the plaintiff, to induce him to sign the note. But the court excluded all of the answers of the witness in this respect except that he told Snell what the contract was with the plaintiff. Snell was entitled, certainly, to know that; and it could not prejudice plaintiff, therefore, that it was communicated to him. The instructions, as given, presented the law upon the issues raised by the pleadings with sufficient fullness and accuracy. The great contest in the lower courts was one of fact. We cannot say that there was no evidence tending to support the conclusion reached, and we must, therefore, in the view of the law we have expressed, affirm the judgment, which we accordingly do.

(45 Ohio St. 678)

CLEVELAND, C. C. & I. RY. CO. v. SCHNEIDER.

(*Supreme Court of Ohio. May 1, 1888.*)

1. RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—DUTY OF COMPANY.

Where a railroad company uses the tracks of its road across a generally traveled public street in a populous town or city, for its convenience in the switching of trains, cars, and locomotives, and the crossing is thereby rendered exceptionally dangerous, it is bound to exercise care proportioned to the increased danger arising from such use of its tracks, to avoid injury to persons using the crossing, and should,

v.17N.E.no.4—21

in the exercise of such care, as a reasonable precaution for their safety, and means of preserving the legitimate uses of the street, maintain flag-men, or gates and gate-men, at such crossing, or adopt other equally adequate measures for that purpose.¹

2. SAME—GATE-MEN.

A railroad company which, in operating the road with the company owning the same, under an agreement to pay the latter a specified sum yearly, in excess of the amount to which it is entitled out of the joint earnings, for the use of its tracks and the cost of switching, uses the tracks at such crossing, where gates and gate-men are maintained, is bound to the same care in the use thereof as the company owning the road, and should anticipate the reasonable effect of the gates, and the gate-men's conduct in their management, on persons approaching the crossing, or about to cross, and operate the road at that place having due regard to such probable effect, and exercise care proportioned to the probable danger to persons using such crossing under these circumstances. And if, while so using the tracks of the road, it accepts the services of the gate-men employed by the company owning the road, instead of employing gate-men of its own, they become, for the time being, its servants, for whose negligence it is responsible; and, if it does not accept their services, its duty is to place competent gate-men at such crossing, and is responsible for its omission to do so.¹

3. SAME—CONTRIBUTORY NEGLIGENCE.

When gate-men are maintained at such crossings, it is their duty to observe the tracks, and know when, on account of trains or engines thereon, it becomes dangerous for persons to cross, and, when it is so, to close the gates, and keep them closed, to prevent persons from going upon the tracks, so long as the danger continues; and when the tracks are clear, or persons may cross without danger from passing cars and locomotives, then to open the gates, and keep them open, to enable persons to cross, so long as it is safe for them to do so, but no longer. Persons approaching the crossing, or about to cross, have the right to presume, in the absence of knowledge to the contrary, that the gate-men are properly discharging their duties; and it is not negligence on their part to act on the presumption that they are not exposed to dangers which can arise only from a disregard by the gate-men of their duties. Hence an open gate, with the gate-man in charge, is notice of a clear track and safe crossing; and, in the absence of other circumstances, when the gates are open, and the gate-men present, it is not negligence in persons approaching the crossing with teams to drive at a trot, or pass onto the tracks through the open gates without stopping to listen, though the view of the tracks on either side of the crossing is obstructed; nor, in such case, is their failure, when at a distance of 25 feet from the track, to look for locomotives 150 feet or more from the crossing, negligence, though they could have been seen.²

(*Syllabus by the Court.*)

Error to circuit court, Hamilton county.

On the 10th of September, 1881, Henry Schneider, while driving his team over the railroad tracks across Freeman street, in the city of Cincinnati, was killed by a locomotive run, managed, and operated by the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company. His widow, Mary Schneider, was appointed administratrix of his estate, and brought her action in the superior court of Cincinnati against the railway company, under the statute, for damages, averring that his death was caused by the negligence and wrongful conduct of the company's servants, and that he was without fault. The answer controverted all the allegations of the petition except that the defendant is a corporation under the laws of Ohio. The plaintiff obtained a verdict for \$6,000, but, upon the hearing of a motion for a new trial filed by the defendant, consented to remit \$2,000, and accept judgment for \$4,000. The motion was thereupon overruled, and judgment entered accordingly. A bill of exceptions was duly taken, purporting to set out all the evidence, the charge of the court to the jury, certain instructions requested by the defendant which were re-

¹ Respecting the duty of railroad companies at crossings, see *Railroad Co. v. Schuster*, (Ky.) 7 S. W. Rep. 874, and note; *Railroad Co. v. Lee*, (Tex.) *Id.* 857.

² Respecting the duty of travelers at railroad crossings, see *Durbin v. Navigation Co.*, (Or.) 17 Pac. Rep. 5, and note; *Powell v. Railroad Co.*, (N. Y.) 15 N. E. Rep. 891, and note; *Schilling v. Railroad Co.*, (Wis.) 37 N. W. Rep. 414, and note; *Allerton v. Railroad Co.*, (Mass.) 15 N. E. Rep. 621; *Matti v. Railway Co.*, (Mich.) 37 N. W. Rep. 54; *Hamilton v. Railroad Co.*, (N. J.) 13 Atl. Rep. 29; *Reed v. Railway Co.*, (Iowa) 37 N. W. Rep. 149; *Railroad Co. v. Lee*, (Tex.) 7 S. W. Rep. 357; *Railroad Co. v. Townsend*, (Kan.) 17 Pac. Rep. 804.

fused, and certain other instructions requested by the defendant which were given. One of the grounds of the motion for a new trial was misconduct on the part of the plaintiff in the action, upon which affidavits were read by both parties, which affidavits are by reference made part of a separate bill of exceptions taken on the overruling of the motion. The railway company prosecuted error to the district court, and at the April term, 1885, the circuit court affirmed the judgment of the superior court, and the reversal of these judgments is now sought in this court. The errors relied on relate to the charge of the court, its refusal to give in charge the instructions requested, and misconduct of the plaintiff in the progress of the trial. Such further statement with reference to them as is deemed material will appear in the opinion.

Matthews, Holding & Grieve, and E. H. Pendleton, for plaintiff in error.
Campbell & Bettman, for defendant in error.

WILLIAMS, J., (*after stating the facts as above.*) The refusal of the court to give in charge to the jury the first instruction requested by the railway company is made the basis of an extended argument to show that it was denied the benefit of the proper rule of law on the subject of contributory negligence. Whether this is so depends, not only upon the accuracy of the instruction requested, but also upon the effect of the charge given. The charge requested is as follows: "(1) It was the duty of the decedent to approach the crossing at such a rate of speed as would enable him to stop promptly, to avoid danger; and if the decedent approached the crossing on a trot, or at such rate of speed as prevented him from discovering the danger in time to avoid it, or prevented him from stopping promptly, or from turning his horses, or as induced him to hurry across, upon discovering the danger, rather than attempt to stop, then he was guilty of contributory negligence, and the plaintiff cannot recover even though defendant's negligence also contributed to the injury." The court, in its general charge on the subject, said to the jury: "The deceased was bound to use the same care, in protecting himself, that the defendant company was bound to use in seeing that no person came to injury by the management of its cars and engines; that is, he was bound to use such care and prudence as a reasonable and prudent man would use in protecting himself against any injury. It was his duty to use his senses, in approaching the railway track, to discover whether or not there was any train or locomotive approaching which might injure him; to make such reasonable use of his eyes and other senses as a reasonable and prudent man would make; and if, by the use of them, he could have avoided the injury, then he cannot recover from the company. But if he exercised such care as a reasonable, prudent man would exercise; and if the defendant were guilty of neglect in the running of this engine, and the deceased was killed by reason of that, then the company is responsible." And, at the request of the company, the court further instructed the jury "that it was the duty of the deceased, in approaching the railroad crossing, to look for the railroad locomotive before attempting to cross; and, if his failure contributed to the accident, he cannot recover, even though the defendant's negligence also contributed to the injury. Even though the fireman and engineer were guilty of neglect contributing to the injury, yet that did not absolve the deceased from exercising the precaution of looking and listening for the approach of trains at such point on Freeman street as would enable him to discover the approaching train or locomotive, or from approaching the crossing at such gait as would enable him to control his horses promptly." The instructions given to the jury omitted nothing of substance contained in the one refused, unless it be that, "if the deceased approached the crossing on a trot," he was guilty of contributory negligence. Indeed, the effect of the charge requested is that it is negligence in law for a person driving a team to approach at a trot a railroad

crossing under any circumstances. It is undoubtedly true that persons approaching railroad crossings are bound to the reasonable and prudent exercise of their faculties to discover danger, and to the use of proper care to avoid injury; and, if the omission of either contributes to their injury, they are generally without remedy. But whether they have so exercised their faculties, and used such care, must depend upon the particular circumstance. For instance, it has been held that the absence of the usual sign-board of warning is a circumstance which may properly go to a jury to enable them to determine whether the person attempting to cross the railroad track has been guilty of such negligence as would defeat his recovery. The reason assigned is "that, if the traveler is a stranger to the crossing, the want of such warning would be calculated to mislead him into danger; and, if he was familiar with the crossing, it might operate as a reminder of danger which he might otherwise forget." And, generally, "when the question of contributory negligence depends upon a variety of circumstances, from which different minds may arrive at different conclusions as to whether the plaintiff exercised proper care and caution, the question should be submitted to the jury under proper instructions." *Railroad v. Whitacre*, 35 Ohio St. 627. Approaching a railroad crossing by one driving a team at the speed of a trot may not necessarily either interfere with the prudent use of his faculties, or prevent due care on his part in crossing. There may be crossings much used both by the railroad company and the traveling public where it would be highly important that persons should cross over promptly and quickly. At the intersection of railroads and highways where trains are run at long intervals, and few persons travel the road, persons approaching ordinarily can tell whether it is dangerous to cross, and easily govern their own conduct in crossing. But where several tracks, over which trains and engines are run many times every hour, cross a constantly traveled public street in a populous city, thronged with people and vehicles, unless some expeditious mode of crossing were devised, a confused and hopeless obstruction of the street would result. Hence at such crossings gates are put up and gate-men maintained by railroad companies, as was the case at the crossing in question, as a means of safety to the people using the street, and for the protection of the railroad companies. It is the business of the gate-men to watch the track, and, when clear, to open the gates for persons using the street to cross; and, upon the approach of locomotives or trains, to close the gates, and prevent persons and vehicles from crossing until the tracks are again clear. To persons in the street who are approaching the railroad tracks with a view to crossing, an open gate is notice that the track is clear, and that it is safe to cross; but, as the gates were liable to be closed at any time, persons crossing would naturally understand they should not linger on the track, but pass over promptly and speedily. Therefore, for a person to drive on a trot onto the railroad tracks while the gates are open, instead of being negligence, might be a high degree of care. The evidence in this case very clearly shows that Freeman street, at the point it was crossed by the railroad tracks, was a public street of the city of Cincinnati, over which people and teams of all kinds were constantly passing; that several tracks of the railroad were laid across it, which were by two companies used for shifting their cars and locomotives, and gates had been put up, and gate-men were maintained at the crossing; that, at the time the deceased approached and drove onto the crossing, the gates were open, and he drove onto the tracks through the open gate on a trot, and we think the court properly left it to the jury to determine whether the deceased, under the circumstances of the case, used such care as a reasonable and prudent person would and ought; and the refusal of the court to charge the jury that he was guilty of contributory negligence, if he approached the crossing on a trot, was not error.

2. It is next contended that there was error in refusing to instruct the jury

that "if the jury find that the gate-man was an employe of the Cincinnati, Hamilton & Dayton Railroad Company, and under its control, and operated the gates while the trains of the defendant were passing, simply as the servant of the first-named company, then the defendant could not be charged with his negligence, unless, after discovering his negligence, it could, by the exercise of ordinary care, have prevented the effect of such negligence;" and in the charge given on that subject, which is as follows: "There is one thing further which is to be said about the question as to the agents of the defendant. It is claimed that the defendant is not liable for the acts of the brakeman, gate-keeper, and perhaps other employes, because they were employes of the Cincinnati, Hamilton & Dayton Railroad Company, and not the employes of the defendant company. If you find from the testimony that the defendant, the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company, was occupying the tracks of the Cincinnati, Hamilton & Dayton Railway Company by an agreement between the two companies; that the engine which caused the injury was the engine of the defendant company; and that the switchmen, gate-keepers, train dispatchers, and other officers and agents of the Cincinnati, Hamilton & Dayton Company were, by reason of this agreement, engaged in running, or aiding to run, the locomotive of the defendant company,—then, for the purposes of the movements of that locomotive on the track of the Cincinnati, Hamilton & Dayton Company, the officers and agents of the Cincinnati, Hamilton & Dayton Company, engaged in that work, were the officers and agents of the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company." It appears from the record that a contract was made between the Cincinnati, Hamilton & Dayton Railroad Company, and the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, in 1876, the seventh section of which only was put in evidence, and which reads as follows. "*Seventh.* The business of said two lines of railroad shall be conducted so as to preserve the existing relations of each with eastern and western connecting roads, and to develop, to the fullest extent, the business resources of each line; all passenger trains shall be run to and from the Cincinnati depot, party of the first part, and for the use of the same, with the tracks, side tracks thereto, and yards for passenger cars west of Mill Creek, and for the cost of switching, the party of the first part shall be allowed and paid by the party of the second part, in excess of the amount to which each shall be entitled out of the joint earnings, annually, the sum of five thousand dollars, payable monthly." There was evidence tending to show that the gate at the Freeman Street crossing was put up by the former company, and that the gate-man was employed by that company, but the engines and trains of the latter company were run and controlled by its own servants and employes, and that the engine which collided with the wagon of the deceased, when he was killed, was so run and controlled; and, as the negligence charged against the defendant by the plaintiff in her petition consisted in carelessly running the locomotive and managing the crossing, it became a material question whether the defendant could be made responsible for any negligence of the gate-man while it was using and operating the railroad. The whole of the agreement between the two companies is not produced, and it was impossible for the court, from the fragment that was introduced in evidence, to construe it, or properly determine its effect, or the relation really existing between the companies. From that part of the contract contained in the record, it appears that each company had the right to the equal and joint use of the tracks and depot, and the defendant was to pay the other company for the use of the same, with the side tracks and yard, and for the cost of switching, \$5,000 per year in excess of the amount to which it should be entitled out of the joint earnings. What the arrangements was in regard to the servants or employes of the two companies is not shown. Whether they were to be paid out of the joint earnings, and be under the joint control, of the two companies or other-

wise, does not appear from that part of the agreement in the record; and the evidence on the subject consisted of the usage and conduct of the companies. It would seem, therefore, that the court properly left it to the jury to determine as a question of fact whether the defendant was using the tracks of the other company under an agreement with it, and the gate-keeper and other employes of that company were, by reason of the agreement, aiding to run the locomotives of the defendant which caused the injury. If so, they became, by virtue of the agreement, the servants and employes of the defendant, and it became liable for their negligence. The fact that the gate-man was an employe of the Cincinnati, Hamilton & Dayton Railroad Company, and was under its control, and so operated the gates while the defendant's trains were passing, does not exclude the idea that, by virtue of the agreement between the two companies, he may also have been then equally under the control of the defendant. But we do not care to rest the decision of this question solely or mainly upon the foregoing considerations. It is generally held that railroad companies, unless required by statute, are not bound to place gates or flag-men at highway crossings, except under special circumstances which render the precaution necessary for the public safety. The duty, it is said, does not arise merely from the number of persons who use the crossing, but it may be created by an exceptionally dangerous mode of crossing adopted by the companies for their own convenience. *Pierce, R. R. 352*, and cases cited. "A railway company is not, as a rule, in the absence of a statute requiring it, or of an ordinance of a municipal corporation, bound to maintain gates at a crossing, or keep a flag-man to warn travelers of the approach of trains; but under the maxim, *sic utere tuo*, etc., instances may arise where the duty is cast upon them, or of providing some other equally safe mode, by reason of the location of the crossing and the large number of people crossing it, or where the mode of crossing adopted by the company is exceptionally dangerous." 2 Wood, Ry. Law, 1313. And in *Railroad Co. v. Matthews*, 36 N. J. Law, 531, the chief justice, in delivering the opinion of the court, said: "Under usual circumstances, in the open country, they [railway companies] can run as many trains, and at as great rate of speed, as are consistent with the safety of their passengers. They are not called on to keep flag-men, under ordinary circumstances, at cross-roads, nor give any other notice of the approach of their trains than those signals that are prescribed by statute. If greater safeguards are requisite for the safety of the community, and those public agents are to be put under greater restrictions in the exercise of their franchises, such contrivances must proceed from the legislative and not from the judicial power. But, while I thus say that these additional burdens cannot be imposed by the courts upon these companies, I also say, at the same time, and with quite as much emphasis, that the companies may by their own conduct impose such burdens on themselves. If one of them chose to build its tracks in such a mode as to necessarily make the use of a public road which it crosses greatly dangerous, I think such company, by its own action, must be held to have assumed the obligation of compensating the public for the increased danger by the use of additional safeguards. The reasonable and indispensable implication is that the railway is to be constructed so as not unnecessarily to interfere with the safe use of the public road; and if a railroad, for its own convenience, curves its track, as it leaves a deep cut within a few feet of a highway, and also sees fit to put up buildings close along such track, and by these means, or either of them, heightening the danger in the use of such highway, it seems to me very clear that such company must be held to have taken upon itself the duty of averting such danger by the employment of every reasonable precaution within its power. On such occasions as this, or whenever the situation is embraced within the principle stated, the presence of a flag-man, or some equivalent safeguard, can be demanded of the company." The crossing in question has been recognized by the railroad

companies using it as of that exceptionally dangerous character, made so for their convenience in using the tracks as a place for switching cars and locomotives, which created the duty to place gates and gate-men there as a necessary precaution on their part, and we think very properly so; for when a railroad company, for its own convenience, lays its tracks across a generally traveled public street in a populous town or city, over which people, with their teams and vehicles, are accustomed to pass almost continuously, and then uses the tracks as a place for the convenient switching of trains and engines, thus making a yard of a portion of the public street, it is bound to exercise care, proportioned to the increased danger arising from such use of its tracks, to avoid injury to persons using the crossing; and common prudence requires that it should, as a reasonable precaution for their safety, and means of preserving the legitimate uses of the street, maintain flag-men, or gates and gate-men, at such crossing, or adopt other adequate measures for that purpose; otherwise the street may be permanently obstructed, and its uses destroyed. So long as the defendant used the railroad tracks at this crossing, and operated the road, it was incumbent on it to use like care. It should anticipate the reasonable effect of the gates, and the gate-men's conduct in their management, on persons approaching the crossing, or about to cross, and operate the road at that place having due regard to such probable effect, and exercise care proportioned to the probable danger to persons using such crossing under those circumstances; and if, while so using the tracks of the road, it accepts the services of the gate-men employed by the company owning the road, instead of employing gate-men of its own, they become, for the time being, its servants, for whose negligence it is responsible; and, if it does not accept their services, its duty is to place competent gate-men there, and is responsible for its omission to do so. It might, by proper stipulation in the agreement of the railroad company with which it contracted, require it to furnish competent servants for the transaction of its business, and hold it responsible for any breach of the agreement; but it cannot, by such contract or by its failure to so contract, shift either the duty it owes to those using the street, or its responsibility to them.

3. The refusal of the court to give the third instruction requested by the defendant is also one of the errors assigned. That instruction is that "if the jury find from the evidence that, at a point on Freeman street twenty-five feet from the track upon which the locomotive that caused the injury was coming, the decedent, seated in his wagon, could, by looking in the direction of the approaching locomotive, have seen it at a distance of one hundred and fifty feet or more from the crossing, and in time to avoid the collision, his failure to discover its approach was negligence on his part, and the plaintiff cannot recover." It is said in the argument that this instruction is adopted from *Railway Co. v. Snyder*, 24 Ohio St. 678. The instructions requested and refused in that case were that if the plaintiff's daughter, who was killed, and her sister, who was accompanying her, could, by looking, have seen the train, and avoided the injury, their attempt to cross without looking was negligence; or if they were standing on the track without looking to see if a train were approaching, if they could have seen the danger, and avoided the injury, by looking, that was negligence. This court, in declining to reverse the judgment because of the refusal to give the instructions, said: "While we think the court erred in refusing a new trial on the ground that the verdict is against the weight of the evidence, we see no error in its refusal to give the instructions asked. To give the instructions asked, would have been, to a great extent, taking the case from the jury by assuming the existence of material facts in the case. The court could not say to the jury that the failure of the girls to look in the direction of the gravel train when approaching, or standing upon the track, was carelessness such as should prevent a recovery, without assuming the existence of material facts in the case which it was for

the jury to find. The instructions asked assume the agency of the elder sister, and assume the non-existence of any facts or circumstances rendering it prudent or proper for her to omit looking out. These were matters for the jury, and could not be found or assumed by the court, no matter how plainly they might be proven." These observations apply aptly to the instruction now under discussion. It assumes that there were no other facts or circumstances in the case which might properly enter into the question of contributory negligence, and in effect excluded from the jury, in its consideration of the question, the fact that gates were maintained at the crossing, and stood open in the presence of the gate-man having control; thus signifying a clear track, and amounting to an invitation to those about to cross over to do so. Then there was evidence tending to prove that there were at least four tracks crossing Freeman street at the point in question, used by both railroad companies for switching and shifting locomotives and cars. These tracks intersected at different places, so that the passing of engines along them in the direction of the crossing, and 150 feet away, was not always an indication that they would pass the crossing; and the fact that the gate remained open might easily create the belief, by persons ordinarily prudent, that they would not be run to the crossing. At least, this was a proper circumstance for the jury in determining whether the deceased exercised proper care, and the instruction requested virtually excluded it from their consideration, and we think there was no error in refusing it.

4. The only other instruction requested by the defendant which was refused, is the following: "If there were obstructions to the decedent's line of vision in the direction from which the locomotive was coming, that fact made it the more necessary that he should use other means to discover danger; and, if he could not avoid danger otherwise than by stopping and listening, then it was his duty, before going upon the track, to stop and listen; and, if his failure to do so contributed to the injury, plaintiff cannot recover." Much of what has already been said, is also applicable to the question raised by this request. As before remarked, persons approaching railroad crossings are bound to the reasonable use of their faculties in discovering and avoiding danger from passing trains, and to that end it is ordinarily their duty to listen, and, if necessary, stop, before attempting to cross; but, at crossings where gates are maintained, this may cease to be a duty, or be so only under peculiar circumstances, though the view of the track is obstructed. The placing of gates and gate-men at the crossing may have become but a prudent and proper precaution on the part of the railroad companies because of the obstructed view of the tracks, and the difficulty on the part of persons approaching in discovering danger from observation merely. At such crossings, it is the duty of the gate-men to observe the tracks, and to know when, on account of approaching trains and engines, it becomes dangerous to cross, and, whenever it does, to close the gates, and prevent persons from attempting it; and it is as much their duty to observe and know when the tracks are clear, and persons may cross over in safety, and, when it is, to open the gates, and keep them open for that purpose so long as it continues to be safe to cross, and no longer. Persons approaching such crossings have the right to presume, in the absence of knowledge to the contrary, that the gate-men are properly discharging their duty, and govern themselves accordingly; and hence, when the gates are open, and the gate-men present, they are entitled to assume that the tracks are clear, and it is safe to cross; and their failure to stop and listen before passing onto the tracks through the open gate is not, in the absence of other circumstances, negligence which will in case of injury to them caused by a passing locomotive while so attempting to cross, defeat a recovery therefor. This conclusion is sustained by the case of *Baker v. Pendergast*, 32 Ohio St. 494, where it is held that "a person about to cross a street of a city in which there is an ordinance against fast driving has a

right to presume, in the absence of knowledge to the contrary, that others will respect and conform to such ordinance, and it is not negligence on his part to act on the presumption that he is not exposed to a danger which can only arise through a disregard of the ordinance by other persons." It is true that it is further held in that case "that if the person crossing the street knew that persons were driving along the street at a forbidden speed, and had full means of seeing the rate at which they were going, the existence of the ordinance would not authorize a presumption which was negatived by the evidence of his senses." The instruction requested by the defendant now under consideration assumes that the deceased (Schneider) did not see the approaching engine, and could not, on account of obstructions to his "line of vision in the direction from which the locomotive was coming," and therefore that it was his duty to use other means to discover the danger, and, if necessary, to stop and listen. In the case assumed by the instruction, the presumption upon which he had a right to rely, viz., that the gate-men were properly performing their duty, and the track was clear, was not negatived by the evidence of his senses, or in any other way.

5. The last assignment of error we notice is that based upon the alleged misconduct of the plaintiff. It appears from the bill of exceptions that a drawing, prepared by one of the witnesses, of an engine, and the crossing, was admitted in evidence on the trial, and was taken with the papers by the jury on the submission of the case. The misconduct consisted in writing on the back of this paper by one of the plaintiff's counsel what is characterized by defendant's counsel as "points and suggestions." If not entirely unintelligible, they are so meager and obscure as to render it doubtful whether any person except the one who wrote them could make any intelligent interpretation of them, or derive any significance from them. It appears that they were *memoranda* written while the counsel for the defendant were making their arguments to the jury, by one of the plaintiff's counsel, as points to be answered by him in the closing argument. He did not at the time know that they were being made on a paper in the case, and it appears that they were not made with any intention to have them go to the jury, and neither the plaintiff nor her counsel knew the jury had them. The delivery of the paper to the jury was attended by no wrongful conduct on the part of the plaintiff or of her attorneys; and the trial court, familiar with the progress of the trial and the conduct of the jury, was better able than we to judge whether the defendant could have been prejudiced thereby. At all events, we do not regard it a matter of such consequence as to require the reversal of the judgment.

Some other errors are assigned, but they are substantially disposed of by what has already been said, and they need not be more particularly noticed. Judgment affirmed.

(46 Ohio St. 9)

HANDY v. SIBLEY.

(Supreme Court of Ohio. May 22, 1888.)

1. PLEDGE—RIGHTS OF PLEDGEE—ACCOMMODATION PAPER.

The holder of an accommodation note, indorsed to him as collateral security, can recover against the accommodation maker no more than the amount intended to be thereby secured.

2. SAME—MORTGAGE—FORECLOSURE—IMPLIED TRUST.

When such note is secured by a mortgage executed by the maker of the note, the pledgee, upon a foreclosure and sale of the mortgaged premises, after receiving payment of the debt due him from the pledgor, will be held as a trustee of the surplus, for the benefit of the mortgagor and his assigns.

3. SAME—SPECIAL POWER OF SALE.

A pledgee cannot, by a sale and purchase by himself of such accommodation note and mortgage, under a special power of sale and purchase from the pledgor, recover upon a foreclosure of the equity of redemption a sum in excess of the debt for which the note and mortgage were pledged as collateral security.

4. SAME.

The children of H. made to him their promissory note for \$25,000, secured by mortgage on real estate worth \$100,000, for his accommodation, and to enable him to pledge the same as collateral, and for no other consideration. H. pledged the note and mortgage as collateral security for the payment of a claim of S. against him for \$15,000, and gave to S. a written power to sell the pledge at public or private sale, and to purchase the same. The children, with no knowledge or notice of the power of sale given to S., joined with their father in a written assignment to W. of \$10,000 in the note and mortgage, being the surplus over and above the claim of S., and the amount of H.'s indebtedness to W. In consideration of the assignment, W. extended the payment of his claim against H. for one year. S. agreed in writing, on the face of the assignment, to hold the note and mortgage, and deliver the same to W., upon receiving the amount of his claim of \$15,000. Upon non-payment of his claim, S. sold the pledged note and mortgage at public sale, and became the purchaser thereof for the sum of \$15,000. There was no evidence that W., at or before the time of the assignment, had any notice of the power of sale; nor had the children any notice or knowledge of the sale until long after it occurred. S., after purchasing the note and mortgage, in a proceeding to foreclose the equity of redemption, claimed \$25,000, the amount of the mortgage note, with interest thereon. Held, that he was entitled to recover \$15,000, with interest, and no more.

(Syllabus by the Court.)

Error to circuit court, Hamilton county.

The original action was commenced in the court of common pleas of Hamilton county by the defendant in error, James W. Sibley, against Helen A. Handy, Mariette B. Handy, Charles E. Handy, Jennie A. Handy, (now Jennie A. Rhodes,) Anna W. Handy, and Eugene F. Williams, plaintiffs in error, and Truman B. Handy, to foreclose a mortgage as hereinafter set forth. On March 27, 1883, Helen A. Handy, Mariette B. Handy, Charles E. Handy, Jennie A. Handy, and Anna W. Handy, children of Truman B. Handy, executed and delivered to their father their promissory note, a copy of which is as follows:

"\$25,000.00.

CINCINNATI, March 27, 1883.

"Ninety days after date we promise to pay to the order of Truman B. Handy, twenty-five thousand (\$25,000) dollars, payable at the Citizens' National Bank, at Cincinnati, with interest at 6 per cent. per annum. Value received.

HELEN A. HANDY.

JENNIE A. HANDY.

"MARIETTE B. HANDY.

ANNA W. HANDY."

"CHAS. E. HANDY.

Indorsed: "TRUMAN B. HANDY."

This note was secured by a mortgage deed executed and acknowledged March 27, 1883, by the above-named makers of the note, conveying to Truman B. Handy certain described real estate owned by the mortgagors, and situated in the village of Clifton, in Hamilton county. The note and mortgage were executed to Truman B. Handy by his children, for his accommodation, and simply as surety for him, and to enable him to pledge the same as collateral, or, by having the same discounted, to obtain money for his convenience and accommodation, and for no other consideration. At the time of executing the mortgage the real estate therein described was unincumbered, and worth \$100,000. On April 2, 1883, Truman B. Handy executed and delivered to James W. Sibley his promissory note and agreement, a copy of which is as follows:

"\$15,000.00.

CINCINNATI, OHIO, April 2, 1883.

"Ninety days after date I promise to pay James W. Sibley, or order, fifteen thousand dollars, for value received; having deposited or pledged as collateral security for the payment of this note a note for twenty-five thousand dollars, secured by mortgage given me by Helen A. Handy, Mariette B. Handy, Chas. E. Handy, Jennie A. Handy, and Anna W. Handy. And I hereby give to the holder thereof full power and authority to sell or collect at my expense all or any part or portion thereof, at any place, either in the city of Cincinnati or elsewhere, at public or private sale, at his option, on the non-performance of the above promise, and at any time thereafter, and without ad-

vertising the same or otherwise giving to me any notice. In case of public sale the holder may purchase without being liable to account for more than the net proceeds of such sale.

TRUMAN B. HANDY."

Indorsed: "JAMES W. SIBLEY."

Truman B. Handy indorsed the note for \$25,000, and duly assigned the mortgage securing the same to James W. Sibley, and deposited them with him, for the purpose and with the power and authority set forth in the above note and agreement of April 2, 1883. On June 9, 1883, Truman B. Handy and his children executed and delivered to Eugene F. Williams an assignment, of which James W. Sibley had notice, and to which he assented in certain terms; a copy of which assignment and assent is as follows:

"Know all men that whereas, Helen A., Mariette B., Charles E., Jennie A., and Anna W. Handy, did on the 27th day of March, 1883, execute and deliver to Truman B. Handy their certain promissory note for twenty-five thousand dollars, (\$25,000.00,) and on the same day executed a mortgage to secure the same, payable ninety (90) days after the date thereof, with six (6) per cent. interest upon certain real estate situated in Clifton, Hamilton county, Ohio, and being the same premises described in a mortgage executed by said Helen A. Handy and others to said Truman B. Handy, recorded in mortgage book 461, page 170, Hamilton county, Ohio, mortgage records; and whereas, said note and the mortgage securing the same were for a valuable consideration assigned and transferred by said Truman B. Handy to one J. W. Sibley to secure the sum of \$15,000.00 and interest; and whereas, the said Truman B. Handy is indebted to one Eugene F. Williams in something over ten thousand dollars, (\$10,000.00,) and being desirous of securing the same: Now, therefore, we do hereby agree and consent that the said Eugene F. Williams shall receive an assignment and transfer of ten thousand dollars of, in, and to said note and mortgage of \$25,000.00, together with the interest thereon, the same being the surplus over and above the \$15,000.00 due said Sibley, and the interest due him under said note and mortgage, and that said surplus of \$10,000.00 and the interest accruing thereon, secured by said note and mortgage, shall be applied towards the payment of said indebtedness by said Truman B. Handy to said Williams, the said Williams, however, agreeing to extend the payment of his claim secured by this assignment for one year from the date hereof, and also agreeing to apply to the diminution of said indebtedness all dividends that he may receive from the late firm of Handy, Richardson & Company, of Chicago; interest to be allowed to the said Williams at the rate of 6 per cent. per annum until the payment of the indebtedness hereby secured. Said Truman B. Handy hereby so assigns said note and mortgage, and joins in this agreement.

"TRUMAN B. HANDY.

JENNIE A. HANDY.

"HELEN A. HANDY.

ANNA W. HANDY.

"MARIETTE B. HANDY.

EUGENE F. WILLIAMS.

"CHARLES E. HANDY.

By JORDAN, JORDAN & WILLIAMS,
His Attorneys.

"I do hereby acknowledge the service upon me of notice of the above and foregoing assignment made by Truman B. Handy and others to Eugene F. Williams, dated June 9, 1883, and agree hereby to hold said note and mortgage, and deliver the same to said Williams, or his attorneys, Jordan, Jordan & Williams, or his legal representatives, upon the payment to me of fifteen thousand dollars, and interest thereon at 6 per cent. from March 27, 1883, whether said \$15,000.00 and interest be paid by said Truman B. Handy or any other person. I sign the above with the agreement and understanding that nothing therein contained shall prevent me from enforcing my security at any time, or shall hold me responsible, in case other persons assert and maintain legal rights against said note or the proceeds thereof, or any part thereof.

JAMES W. SIBLEY."

The note for \$15,000 being past due and unpaid, James W. Sibley caused the note and mortgage for \$25,000, pledged as collateral security for the payment thereof, to be offered at public auction sale, on July 21, 1883, at the chamber of commerce hall in Cincinnati, Ohio, and Sibley, being the highest and best bidder, purchased the note and mortgage of \$25,000 for the sum of \$15,000. The sale was made without the consent of the children of Truman B. Handy, none of whom had any notice or knowledge of the existence or terms of the power of attorney under which Sibley sold the pledged collaterals, until long after the sale; nor did they have any notice of the time or place of such sale, nor did they learn of such sale, until long after it was made. Notice of the sale of the pledge at the chamber of commerce was given to the attorneys of Eugene F. Williams, but not to him personally; and before the sale the attorneys of Williams informed Sibley by letter that they had not notified their client of the notice served upon them of the intended sale, and that therefore he had no knowledge of Sibley's purpose to offer the pledge for sale. The condition of the mortgage deed having been broken by reason of the non-payment at maturity of the note for \$25,000, James W. Sibley filed his petition in the court of common pleas to foreclose the equity of redemption, and prayed that the premises described in the mortgage be sold, and that of the proceeds of such sale there be paid to him the amount due on the mortgage note, to-wit, \$25,000, with interest from March 27, 1883. Eugene F. Williams, who was made defendant in the foreclosure proceedings, claims in his answer that Sibley is entitled to receive out of the proceeds of the sale of the premises, as against him, the sum of \$15,000, with interest, and no more. On appeal, the circuit court, upon an agreed statement of facts, which hereinbefore have been substantially set forth, adjudged and decreed the equities of the case to be with Sibley; that the note for \$25,000 set forth in the petition, and the mortgage securing the same, belonged to Sibley; that he was entitled to a decree against the defendants for the full amount thereof, with interest; and that on failure to pay Sibley \$27,802, and costs of suit, the mortgaged premises should be sold, and the last-named sum be paid from the proceeds of such sale. To reverse the judgment of the circuit court, this petition in error is now prosecuted.

Jordan & Jordan, for plaintiff in error. *Ramsey, Maxwell & Ramsey*, for defendant in error.

DICKMAN, J., (after stating the facts as above.) Independent of the power of sale vested in James W. Sibley, by the instrument of writing dated April 2, 1883, he would not have been authorized to sell at public or private sale the note and mortgage of \$25,000, which Truman B. Handy had pledged as collateral security for the payment of his note of \$15,000. There is a distinction between a pledge of ordinary chattels and a pledge of commercial paper. A pledge of the latter as collateral security for the payment of a debt does not, in the absence of a special power for that purpose, authorize the pledgee to sell the securities so pledged upon default of payment, either at public or private sale. He is bound to hold and collect the same as they become due, and apply the net proceeds to the payment of the debt so secured. The reason assigned for this exception to the general rule in relation to the sale of property pledged is that such securities, not being usually marketable at their fair value, would generally be sold at a sacrifice, and injustice would thus be done the debtor; and it cannot be presumed it was the intention of the parties thus to deal with the securities. *Wheeler v. Newbould*, 16 N. Y. 392; *Fletcher v. Dickinson*, 7 Allen, 23; *Nelson v. Wellington*, 5 Bosw. 173; *Brown v. Ward*, 3 Duer, 660; *Banking Co. v. Lewis*, 12 N. J. Eq. 823; *Steel Co. v. Brick Co.*, 82 Ill. 548; *Zimpleman v. Veeder*, 98 Ill. 613. Ordinarily, where there is a deposit of personal property as security, there is an implied power of sale upon default, upon giving reasonable notice to the debtor to redeem. But the

pledgee of negotiable paper, who desires a more summary and speedy means of obtaining money from his security than by collecting the same when it falls due, or by a bill in chancery and a judicial sale under a regular decree of foreclosure, will obtain a special power of sale from the pledgor. In enforcing his rights, however, by a sale of the pledge, he will be held to the strictest good faith in the execution of the power for the protection of the rights of the pledgor, and will be charged with a trust for the benefit of the debtor, and the benefit of those to whom the debtor may have assigned his interest. It seems to be beyond controversy that the note for \$25,000, secured by mortgage, and given by the children of Truman B. Handy to their father, was good for that amount, although purchased by Sibley at the sale for \$15,000 only, that being the amount of the note for which the note of \$25,000 had been pledged as collateral security. Upon foreclosure of the mortgage, and sale of the premises, it appears that a sum would be realized more than sufficient to pay the note of \$25,000, sufficient to pay the principal and interest of the note of \$15,000, and leave a surplus. The question arises whether Sibley, because of his sale and purchase of the pledge, shall be permitted to retain this surplus embraced within the note of \$25,000 as his own property, or be held to account for it as trustee to Eugene F. Williams. The mortgage note of \$25,000 was executed to Truman B. Handy by his children, solely for his accommodation, to enable him to pledge the same as collateral, or, by discount, to obtain money for his convenience, and for no other consideration. They executed the note and mortgage simply as surety for their father. They had no knowledge of the power of sale given by him to Sibley until long after the sale of the pledge; nor did they have any notice of the time or place of such sale, or learn of the sale until long after it was made. We do not think that, under the circumstances, Sibley can subject their property to the payment of \$25,000, when he loaned to their father only \$15,000; or that he can retain the balance, \$10,000, without any consideration therefor. Handy deposited or pledged the note and mortgage as collateral security for the payment of \$15,000, and no more. If, at the maturity and non-payment of his claim, Sibley, without resorting to a sale of the pledge, had sought to enforce payment by foreclosure of the mortgage, he would have been entitled out of the proceeds of the sale of the premises only to the amount of his debt. He could not, by resorting to a sale of the pledge, enlarge his equities, or successfully invoke the aid of a court of equity, in an effort to exact from his debtor more than he owed him.

The principle is elementary, and as old as the Roman law, that if the creditor exercises his power of sale over the pledge he must give the surplus, after paying himself, to the debtor. D. 13. 7. 42 L; Hunter, Rom. Law, 439. And as between debtor and creditor, whatever may be the effect of a sale as to annulling all the debtor's residuary interest in a pledge of ordinary chattels, when a question arises as to the rights of third parties, who are makers of accommodation paper pledged as collateral security, such parties should not be required to pay the creditor more than the amount of his debt. It has been decided by the supreme court of Massachusetts, in *Fisher v. Fisher*, 98 Mass. 303, that if a promissory note, which is without consideration as between the original parties thereto, is delivered without consideration to another person, who pledges it before its maturity as collateral security for a debt of his own, of less amount than the face of the note, the pledgees, if they take it without notice, are to be deemed holders for value, and may maintain an action thereon for the amount due them upon the debt which it was pledged to secure. In the opinion of the court it was said: "The evidence established that the plaintiff received the note from the holder before its maturity, without any knowledge of the circumstances under which the defendants had delivered it to the payee, or the purpose for which the latter delivered it to the holder, and that it was held by the plaintiffs as collateral security for a valid debt due from

the holder to them. Under the decisions of the court these facts proved that the plaintiffs were *bona fide* holders for value, and without notice, and were therefore entitled to recover to the extent of their debt for which the note was pledged as collateral security." In *Duncan v. Gilbert*, 29 N. J. Law, 527, it is stated as the rule that the holders of accommodation paper, assigned as collateral security, cannot recover of the accommodation maker any more than the consideration actually advanced. In *Bank v. Doyle*, 9 R. I. 76, it was held that, in case of accommodation paper pledged, the pledgee can recover of the maker only the amount of the debt due him from the pledgee. And in *Maitland v. Bank*, 40 Md. 540, the doctrine was laid down that, in an action against the maker of a promissory note, made for the accommodation of the indorser, brought by the indorsee, to whom it was passed as collateral security for the payment of notes discounted by the indorsee for the benefit of the indorser, the measure of the plaintiff's right of recovery is the amount due on the debts embraced by the security, and that it is incumbent on the plaintiff to show what debts were intended to be secured by the note, and the amounts remaining due in respect thereof. "Indeed," says ALVEY, J., "all that the plaintiff is entitled to recover is the amount due on the debts intended to be secured, it being conceded that the note was taken as collateral security merely. In such case, while the plaintiff is entitled to be treated as a holder for value, it is only so to the extent necessary to protect the debts intended to be secured."

The note executed by the children of Handy and pledged as collateral security, being only accommodation paper, and being held in pledge by Sibley, with no other lien upon it, they might, after the payment of the note of \$15,000, have demanded the surrender or cancellation of the collateral. But by the assignment of June 9, 1883, it was agreed by and between Truman B. Handy, his children, and Eugene F. Williams, that there should be assigned and transferred to Williams \$10,000 of and in the note and mortgage of \$25,000, the surplus over and above the \$15,000 due Sibley, which surplus should be applied towards the payment of Williams' claim against Handy; Williams, however, agreeing to extend the payment of his claim for one year from the date of the assignment. The record does not disclose that Williams had any knowledge of the power which Handy had vested in Sibley to sell at public or private sale the collateral note and mortgage, and to become the purchaser thereof. The terms of the assignment of June 9th, and of Sibley's written agreement attached thereto, would not bring such knowledge home to Williams, any more than to the children of Handy, and it is among the agreed facts that none of the children, until long after the sale of July 21, 1883, had notice or knowledge of the existence of such power of sale. So far as Williams knew, Sibley was a pledgee of negotiable paper secured by mortgage, with no special authority to sell the same as he would a pledge of ordinary chattels, but only empowered to pursue the usual course of foreclosure proceedings. The surplus, \$10,000, was set apart to him, with the concurrence of all parties to the assignment, in view of a *bona fide* indebtedness to him by Handy, and for the valuable consideration that he would extend the payment of his claim against Handy. There is nothing in the record inconsistent with the presumption that the assignment to Williams of June 9, 1883, and the agreement by Sibley in relation thereto, were one and the same transaction. Williams having given a valuable consideration, Sibley was bound by his agreement to hold the note and mortgage, and deliver the same to Williams, upon receiving payment of \$15,000, and interest. The proviso of Sibley that nothing contained in the writing signed by him should prevent him from enforcing his security at any time, would not be notice to Williams of a special power of sale, but might convey the meaning that the one year's extension of payment to Handy should not interfere with Sibley's right to enforce his security at any time by a regular foreclosure of the mortgage. And as between Williams and Handy, and the children of Handy, the equities of the children in the surplus of the note and mort-

gage, after paying Sibley's claim of \$15,000, would, under the assignment of June 9th, follow and inure to the benefit of Williams. Nor do we conceive that the rights of Williams should be concluded in equity by the sale of the pledge under a power of which he was not cognizant at the time he agreed with Handy to extend the time for the payment of his claim against him, and which extension he might not have granted, if Sibley had definitely notified him, as he might have done, of his power to sell and purchase the pledged collaterals. The existence of the power of sale was a fact which, under the circumstances, Sibley, as a trustee, should have disclosed to Williams, and his failure to communicate the fact to him was contrary to the principles of equity. In our opinion the defendant in error, James W. Sibley, has no right to ask anything more than the full payment of his claim, with interest; and Eugene F. Williams is entitled to receive the surplus of the mortgage of \$25,000 over and above the sum of \$15,000, and interest, owing by Truman B. Handy to the defendant in error. Judgment reversed, and judgment for Eugene F. Williams.

(107 N. Y. 244)

HODGE *et al.* v. SLOAN.¹

(Court of Appeals of New York. October 23, 1887.)

1. CONTRACTS—PUBLIC POLICY—RESTRAINT OF TRADE.

One whose only business was selling sand from land which he owned, having refused to sell a piece of the land, on the ground that it would hurt his business, at last agreed to do so on the vendee's stipulation not to sell sand from it. *Held*, that the stipulation was not such a restraint of trade as is condemned on the ground of public policy.²

2. COVENANTS—RUNNING WITH THE LAND—ACTUAL NOTICE.

A covenant by a vendee of land not to sell sand therefrom, the intention being to prevent competition with the vendor, whether it runs with the land or not, is enforceable against the covenantor's grantees, buying with notice. *ANDREWS and EARL, JJ.*, dissenting.

Appeal from general term, supreme court, Third department.

The original action in this case was begun by Edward Null against Richard Sloan to restrain the defendant from selling sand off of a parcel of land sold by plaintiff to the defendant's grantor, John D. Sloan. Judgment was entered for defendant upon an order which affirmed a judgment for defendant dismissing the complaint, entered upon a decision of the court at special term. After appeal to this court, the plaintiff died, and his executor, Augustus M. Hodge, was substituted as appellant. On the 9th day of May, 1868, Edward Null was the owner of certain land containing deposits of sand, the sale of which constituted his whole business. The land included about 40 acres, and upon being applied to by John D. Sloan for a portion of the land, about half an acre, he refused to sell, because by selling he would injure his business. Afterwards, upon Sloan's agreeing not to sell any sand off of the land, the plaintiff sold to him the portion of the land he wished. A contract of sale was made which contained such agreement, and, in fulfillment of the contract, a warranty deed was given from plaintiff to Sloan containing a covenant by the grantee "not to sell any sand off of said premises." The deed was received and duly recorded, and possession taken. Afterwards, Sloan conveyed to his

¹ Reversing *Null v. Sloan*, 32 Hun, 640, *mem.*

² Contracts in restraint of trade are valid when the restriction is reasonable, *Mandeville v. Harman*, (N. J.) 7 Atl. Rep. 37; and whether the restraint is reasonable or not depends upon its being such only as to afford a fair protection to the interest of the party in favor of whom it is imposed, and not so large as to interfere with the interest of the public, *Id.* Concerning the question of the validity of contracts as affected by their being in partial or general restraint of trade, see *Dolph v. Machinery Co.*, 23 Fed. Rep. 558, and note; *Roller Co. v. Cushman*, (Mass.) 9 N. E. Rep. 329; *Smith's Appeal*, (Pa.) 6 Atl. Rep. 251; *Sutton v. Head*, (Ky.) 5 S. W. Rep. 410; *Keith v. Optical Co.*, (Ark.) 2 S. W. Rep. 777; *Finger v. Hahn*, (N. J.) 8 Atl. Rep. 654; *Match Co. v. Roeber*, (N. Y.) 18 N. E. Rep. 419.

son, the defendant, Richard Sloan, by deed containing no reference to the covenant in the deed from plaintiff; but defendant, at the time of taking the land, had full knowledge of the existence of the covenant. Against the protest of plaintiff, he opened a sand-pit, and proceeded to sell the sand therefrom. The court held that the covenant was void as against public policy, being in restraint of trade, and the complaint was dismissed.

D. S. Morrel, for appellants.

The invalidity of a contract cannot be taken advantage of by one party before restoration, by him, to the other party, of the consideration paid. *Warren v. Jones*, 51 Me. 146; 1 Benj. Sales, (Corbin, 4th Amer. Ed.) § 521, note; *Hunt v. Turner*, 9 Tex. 385. The defendant, with actual knowledge of the covenant in the deed to his grantor, holds no better position than the grantor himself. *Trustees v. Lynch*, 70 N. Y. 441, 449. The covenant does not require such restraint of trade as the law condemns. *Match Co. v. Roeber*, 35 Hun, 421; *Hubbard v. Miller*, 27 Mich. 15, 19; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Machine Co. v. Morse*, 103 Mass. 73; *Leather-Cloth Co. v. Lonsont*, L. R. 9 Eq. 345; *Trustees v. Lynch*, 70 N. Y. 446. Plaintiffs' business, and the surrounding circumstances, must be considered in determining the validity of the covenant. *Machine Co. v. Morse*, 103 Mass. 76; *Ingram v. Stiff*, 5 Jur. (N. S.) 947; *Match Co. v. Roeber*, 35 Hun, 421; *Rousillon v. Rousillon*, 14 Ch. Div. 351. The covenant runs with the land. *Norman v. Wells*, 17 Wend. 136; *Verplanck v. Wright*, 23 Wend. 506; *Van Rensselaer v. Railroad Co.*, 3 Thomp. & C. 625; *Brouwer v. Jones*, 23 Barb. 160; 1 Washb. Real Prop. 495, 504; 2 Washb. Real Prop. 286, 288. There is no inherent vice in the covenant. *Hubbard v. Miller*, 27 Mich. 15, 19; *Van Rensselaer v. Railroad Co.*, *supra*; *Trustees v. Lynch*, 70 N. Y. 446; *Post v. Weil*, 8 Hun, 418.

H. L. Huston, for respondent.

The alleged covenant is not consistent with the intention of the grant. *Hathaway v. Payne*, 34 N. Y. 116; *Hill v. Priestly*, 52 N. Y. 635; *Craig v. Wells*, 11 N. Y. 322. The covenant, if it is a covenant, does not run with the land, or bind any one but the covenantor. *Brewer v. Marshall*, 19 N. J. Eq. 545; *Norcross v. James*, 2 N. E. Rep. 946. As between vendor and vendee, covenants running with the land are not favored in law. 1 Broom & H. Comm. 731; *Keppell v. Bailey*, 2 Mylne & K. 517; *Norman v. Wells*, 17 Wend. 153, 154. In this case, equity will not charge the conscience of the defendant to observe the covenant of his grantor. *Brewer v. Marshall*, 19 N. J. Eq. 545; *Case v. Hatght*, 3 Wend. 635. The alleged covenant is in restraint of trade, against public policy, and inherently void. *Chappel v. Brockway*, 21 Wend. 158; *Dunlop v. Gregory*, 10 N. Y. 244; *Weller v. Hersee*, 10 Hun, 433; *Bank v. King*, 44 N. Y. 87; *Curtis v. Gokey*, 68 N. Y. 300; *Ross v. Sadybeer*, 21 Wend. 166; *Fisher v. Bush*, 35 Hun, 645; *Maier v. Homan*, 4 Daly, 168; *Lawrence v. Kidder*, 10 Barb. 641; *Arnot v. Coal Co.*, 68 N. Y. 558; *Nobles v. Bates*, 7 Cow. 307; *Van Marter v. Babcock*, 23 Barb. 633; *Smith v. Smith*, 4 Wend. 470; *Noah v. Webb*, 1 Edw. Ch. 604; *Sander v. Hoffman*, 64 N. Y. 248; *Mott v. Mott*, 11 Barb. 127; *Brewer v. Marshall*, 19 N. J. Eq. 538.

DANFORTH, J. The conclusion of the trial court is against our ideas of natural justice; for it takes from one party an advantage which he refused to sell, and secures to the other, without price, a privilege which his grantor was unable to buy. Nor do we find that this denial of private right is required by any rule of public policy. Assuming, with the respondent, that the covenant is in restraint of trade, it is still valid if it imposes no restriction upon one party which is not beneficial to the other, and was induced by a consideration which made it reasonable for the parties to enter into it; or, in other words, if it was a proper and useful contract, or such as could not be disregarded without injury to a fair contractor. This is the doctrine of *Chap-*

pel v. Brockway, 21 Wend. 157 and *Ross v. Sadgbeer*, Id. 166, derived by a learned court from the leading case of *Mitchel v. Reynolds*, 1 P. Wms. 181, and an examination of subsequent decisions. It is also so amplified and discussed in a case just decided by this court (*Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. Rep. 419, opinion by ANDREWS, J.) as to make any elaboration of the general rule quite superfluous. The subject of the contract at the bottom of this controversy was a piece of land which Sloan wanted to buy, and which the plaintiff was willing to sell, provided it should not be made an instrument for the destruction of his means of livelihood, or detrimental to his business. The principle which favors freedom of trade requires that every man shall be at liberty to work for himself, and shall not deprive himself or the state of the benefit of his industry by any contract that he enters into. The same principle must justify a party in withholding from market the tools or instruments or means by which he gains the support of his family, or if, as in the case before us, the instrument or means are susceptible of several uses, one of which will work mischief to himself by the loss or impairment of his livelihood, there is no reason of public policy which requires him, upon a sale of the instrument, to consent to that use, or prohibits him from binding his vendee against it. We see nothing unreasonable in the restriction which the grantee imposed upon himself. He was not a dealer in sand. He wanted to buy the land on the best terms and in the most advantageous way; and, in order to do this, it was necessary that he should preclude himself from so using it as that, by its means, he should enter into competition with the vendor. I cannot find that such a covenant contravenes any rule of public policy, nor that it is incapable of being enforced in a court of equity. It stands upon a good consideration, and is not larger than is necessary for the protection of the covenantee in the enjoyment of his business.

But the question presented is, upon the conceded facts, really one of individual right, with which the question of public policy has little if anything to do. Parties competent to contract have contracted, the one to sell a portion of his land, but only upon such conditions as will protect himself in the prosecution of business carried on upon the residue, the other agreeing to buy for a consideration affected by that condition, and enabled to do so only by acceding to it, and he therefore binds himself by contract to limit the use of the land purchased in a particular manner. There seems no reason why he and his grantee, taking title with notice of the restriction, should not be equally bound. The contract was good between the original parties, and it should, in equity at least, bind whoever takes title with notice of such covenant. By reason of it, the vendor received less for his land; and the plain and expressed intention of the parties would be defeated if the covenant could not be enforced as well against a purchaser with notice as against the original covenantor. In order to uphold the liability of the successor in title, it is not necessary that the covenant should be one technically attaching to and concerning the land, and so running with the title. It is enough that a purchaser has notice of it; the question in equity being, as is said in *Fulk v. Moxhay*, 11 Beav. 571, 2 Phil. Ch. 774, not whether the covenant ran with the land, but whether a party shall be permitted to use the land inconsistently with the contract entered into by his vendor, and with notice of which he purchased. This principle was applied in *Tallmadge v. Bank*, 26 N. Y. 105, where the equity in regard to the manner of improvement and occupation of certain land grew out of a parol contract made by the owner with the purchaser, and was held binding upon a subsequent purchaser with notice, although his legal title was absolute and unrestricted. In *Trustees v. Lynch*, 70 N. Y. 440, the action was brought to restrain the carrying on of business on certain premises in the city of New York of which the defendant was owner, upon the ground that the premises were subject to a covenant reserving the property exclu-

sively for dwelling-houses. The court below held, among other things, that the covenant did not run with the land, and that the restriction against carrying on any business on the premises was liable to conflict with the public welfare, and judgment was given for the defendant. Upon appeal it was reversed; the covenant held to be binding upon a subsequent grantee with notice, as well upon the original covenantor. So the restraint may be against the use of the premises for one or another particular purpose, as that no building thereon "shall be used for the sale of ale, beer, spirits," etc., "or as an inn, public-house, or beer-house," (*Carter v. Williams*, L. R. 9 Eq. 678;) and it is said a man may covenant not to erect a mill on his own lands, (*Mitchel v. Reynolds*, *supra*.) Many other instances of restraint might be referred to; and where it is of such nature as concerns the mode of occupying or dealing with the property purchased in the way of business operations, or even the omission of all business, or certain kinds of business, or the erection or non-erection of buildings upon the property, we see no reason to doubt the validity of an agreement, fair and valid in other respects, which secures that restraint. Indeed, it seems well settled by authority that a personal obligation so insisted upon by a grantor, and assumed by a grantee, which is a restriction as to the use of the land, may be enforced in equity against the grantee and subsequent purchasers with notice. *Parker v. Nightingale*, 6 Allen, 341, 344; *Burbank v. Pillsbury*, 48 N. H. 475. Nor is it essential that the assignees of the covenantor should be named or referred to. *Morland v. Cook*, L. R. 6 Eq. 252. In *Tulk v. Moxhay*, 1 Hall & Tw. 105, it was said that the jurisdiction of the court in such cases is not fettered by the question whether the covenant does or does not run with the land. In that case the purchaser of the land, which was conveyed to him in fee-simple, covenanted with the vendor that the land should be used and kept in ornamental repair as a pleasure-garden, and it was held that the vendor was entitled to an injunction against the assignee of the purchaser to restrain them from building upon the land. Upon the appeal, the chancellor (COTTENHAM) said: "I have no doubt whatever upon the subject. In short, I cannot have a doubt upon it, without impeaching what I have considered as the settled rule of this court ever since I have known it. Where the owner of a piece of land enters into contract with his neighbor, founded, of course, upon a valuable or other good consideration, that he will either use or abstain from using his land in such a manner as the other party by the contract particularly specifies, it appears to me the very foundation of the whole of its jurisdiction to maintain that this court has authority to enforce such a contract. It has never, that I know of, been disputed." The question before the court was stated to be whether a party taking property with a stipulation to use it in a particular manner, will be permitted by the court to use it in a way diametrically opposite to that which the party has stipulated for. "Of course," he says, "of course, the party purchasing the property which is under such restriction gives less for it than he would have given if he had bought it unincumbered. Can there, then, be anything much more inequitable or contrary to good conscience, than that a party who takes property at a less price because it is subject to a restriction should receive the full value from a third party, and that such third party should then hold it unfettered by the restriction under which it was granted? That would be most inequitable, most unjust, and most unconscientious; and, as far as I am informed, this court never would sanction any such course of proceeding." And, in language very applicable to the case before us, he adds: "Without adverting to any question about a covenant running with land or not, I consider that this piece of land is purchased subject to an equity created by a party competent to create it; that the present defendant took it with distinct knowledge of such equity existing; and that such equity ought to be enforced against him, as it would have been against the party who originally took the land from Mr. Tulk." This case is cited

and followed, as to restrictive covenants, in many cases. *Brown v. Railway Co.*, 2 Q. B. Div. 406; *Railway Co. v. Gomm*, 20 Ch. Div. 562, 576.

Each case will depend upon its own circumstances, and the jurisdiction of a court of equity may be exercised for their enforcement, or refused, according to its discretion, (*Trustees v. Thacher*, 87 N. Y. 311;) but, where the agreement is a just and honest one, its judgment should not be in favor of the wrong-doer. Such seems to us the character of the covenant in question. It is restrictive, not collateral to the land, but relates to its use; and, upon the facts found, the plaintiff is entitled to the equitable relief demanded. *Brewer v. Marshall*, 19 N. J. Eq. 537, is cited by the respondent as requiring a different construction. The general rules in regard to such covenants are not stated differently in that case; but, in the opinion of the court, it was not one for the interference of the court of equity. Among many other cases, *Tulk v. Moxhay*, *supra*, is cited; and the learned court say: "It will be found, upon examination, that these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another from defeating such rights, and not upon the idea that the engagements enforced create easements, or are of a nature to run with the land. In some of the instances the language of the court is very clear on this point." And, from a "review of the authorities," the court say "it is entirely satisfied that a court of equity will sometimes impose the burden of a covenant relating to lands on the alienance of such lands, on a principle altogether aside from the existence of an easement, or the capacity of such covenant to adhere to the title." The only question which the court regarded as possessed of difficulty was whether the covenant then in controversy was embraced within the proper limits of this branch of equitable jurisdiction. By a divided court, an injunction was denied. The circumstances were quite unlike those before us, and the decision furnishes no precedent for us to follow.

The judgment appealed from should be reversed, and new trial granted, with costs to abide the event.

All concur, except PECKHAM, J., not voting, and ANDREWS and EARL, JJ., dissenting, because, in their opinion, the covenant was a personal one, and did not bind the grantee of the land. Judgment reversed.

(110 N. Y. 55)

BORN v. SCHRENKEISEN *et al.*

(Court of Appeals of New York. June 5, 1888.)

1. EQUITY—REFORMATION OF CONTRACTS—MISTAKE—WAIVER.

Where, in an action upon a written contract, defendants allege a mistake in reducing the same to writing, but do not pray judgment for a reformation of the contract, the defect in the answer is waived, if not raised until after the trial.

2. SAME—DECREE.

In such case, if the facts, as found by the court, show that defendants were entitled to a reformation of the contract, the technical error of decreeing a dismissal of the bill instead of a reformation of the contract is not cause for remanding the case, but the decree will be modified to conform to the findings.

3. SAME—PLEADING.

Where it is sought to reform a written instrument on the ground of mistake in reducing the same to writing, there having been no mistake in the contract as agreed upon, it is not necessary to allege that the mistake was mutual.¹

Appeal from general term, superior court, city of New York.

Action by Peter Born against Henry Schrenkeisen and Martin Schrenkelsen

¹ As to the mistakes against which equity will relieve, and the proof necessary to obtain a reformation of a written instrument, see *Fehlberg v. Cosine*, (R. I.) 18 Atl. Rep. 110, and note; *Frederick v. Henderson*, (Mo.) 7 S. W. Rep. 186; *Rousseau v. Lambert*, (Ky.) 1d. 923; *Clark v. Roots*, (Ark.) 6 S. W. Rep. 728; *Kornegay v. Everett*, (N. C.) 5 S. E. Rep. 418; *Worsley v. Insurance Co.*, (Iowa,) 38 N. W. Rep. 161.

to recover royalties on a patent assigned by the plaintiff to defendants. Judgment for defendants. Plaintiff appeals.

Wehle & Jordan, (Henry Wehle, of counsel,) for appellant.

The answer does not contain an allegation which would justify a reformation of the contract. To authorize a reformation, the pleading must aver facts showing a mutual mistake, and demand the reformation. *Bank v. Eames*, 4 Abb. Dec. 83; *Stevens v. Mayer*, 84 N. Y. 296. The findings of the court do not justify a reformation of the contract. *Nevins v. Dunlap*, 83 N. Y. 676; *Mead v. Insurance Co.*, 64 N. Y. 453; *Kilmer v. Smith*, 43 N. Y. Super. Ct. 461; *Moran v. McLarty*, 75 N. Y. 25; *Jackson v. Andrews*, 59 N. Y. 244.

W. W. McFarland, for respondent.

EARL, J. The plaintiff instituted this action to recover the amount of royalties claimed to be due from the defendants upon an assignment of a patent. The invention was a folding chair, and the patent therefor was issued June 27, 1876, and the plaintiff assigned the patent to the defendants, October 7 of the same year. The assignment was absolute in form, and purported to be in consideration of \$1,200, and a royalty of 75 cents on each chair manufactured under the patent. At the same time the defendants gave to the plaintiff a license to make, use, and sell folding chairs under the patent at his shop in the city of New York, for the full term of the letters patent, the defendants agreeing during that time not to sell any chairs made under the patent in the cities of New York and Brooklyn. On the back of the license was written the following agreement: "We agree to number the chairs in rotation, pay royalty every month if desired, and show our sales-books for the confirmation of the numbers sold. We further agree to pay royalty on not less than six hundred chairs a year, and should we fail in this the agreement shall be null and void." Signed by "M. & H. SCHRENKEISEN, By M. SCHRENKEISEN." The defendants went on and manufactured some chairs under the patent, and paid the plaintiff the royalties in full for all the chairs manufactured by them. But they did not manufacture 600 chairs a year, and this action was commenced May 13, 1884, to recover royalties upon the claim of the plaintiff that he was entitled to royalties upon not less than 600 chairs each year. The defendants in their answer alleged, in substance, that it was the true agreement between the parties that, unless they were able to sell at least 600 chairs a year, the invention should be considered a failure, and abandoned, and the entire agreement between the parties should terminate and become void, and that it was the intention of the parties to express that agreement in the memorandum indorsed upon the license, and that it was not the intention of either party to thereby express an obligation or agreement on the part of the defendants to make 600 chairs a year, or pay the sum of 75 cents per chair upon that number of chairs, whether they were in fact sold or not; and they allege that they had fully accounted to the plaintiff for and paid to him all the royalties upon the number of chairs made and sold by them. It is unnecessary to notice the curious stages by which, after one trial of the action, the present issues between the parties were reached. The case was brought to trial at a special term of the superior court, and the court found, as matter of fact, that at the time of making the agreement for the sale and transfer of the patent the plaintiff desired that the defendants should become obligated to pay him 75 cents a chair on not less than 600 chairs annually; that the defendants refused to agree to that, and refused to pay royalty on any more chairs than they manufactured, but offered to agree that, if the number did not amount to 600 a year, then and in that case the agreement should be entirely null and void; that the plaintiff assented to that agreement, and, in order to express the agreement, the memorandum was written on the license as above set out; that the agreement between the parties, as finally made, was

that the plaintiff should assign to the defendants the patent, receiving \$1,200 in cash down, and 75 cents a chair upon each chair manufactured and sold by the defendants under the patent, and that, unless they were able to manufacture and sell at least 600 chairs a year, then the agreement was to become null and void; that they were not under any circumstances to pay the plaintiff more than 75 cents a chair upon each chair manufactured and sold by them; that they were to exhibit their sales-books to the plaintiff, that he might inspect the account of sales, and to number the chairs made and sold by them in rotation, and that the agreement so made was in all respects performed by the defendants; and he found, as conclusion of law, that the defendants were entitled to judgment, and that the complaint be dismissed, with costs. We think the defendants' answer sufficiently alleged the mistake in reducing the agreement of the parties to writing. It was not necessary for them to allege a mutual mistake in the reduction of the agreement to writing, there being no mistake as to the agreement. In such a case, if by the mistake of the scrivener, or by any other inadvertence, the writing does not express the agreement actually made, it may be reformed by the court. It is only where the action is to reform the agreement itself that it is required that it should be alleged in the pleading, and proved on the trial, that the mistake was mutual. Where there is no mistake about the agreement, and the only mistake alleged is in the reduction of that agreement to writing, such mistake of the scrivener, or of either party, no matter how it occurred, may be corrected. *Pitcher v. Hennessey*, 48 N. Y. 115. We think there was sufficient evidence to show that the agreement as drawn did not express the true agreement previously made between the parties; because by that agreement the defendants were absolutely obligated to pay royalties on not less than 600 chairs per year, whether they manufactured them or not, and it was at the sole option of the plaintiff, in case the defendants were in default in paying royalties upon so many chairs, to declare the agreement null and void. It is a general rule that, when a written instrument provides that it shall become void in case of default by one party to perform some covenant therein contained, it becomes void only upon the claim and at the option of the party for whose benefit the covenant was inserted, and who is injured by the default. *Hyde v. Watts*, 12 Mees. & W. 254; *Rede v. Farr*, 6 Maule & S. 121; *Roehner v. Insurance Co.*, 63 N. Y. 160. A case was therefore made upon the pleadings, proofs, and findings for a reformation of the agreement, so that it should become void in case the defendants were unable to manufacture and sell at least 600 chairs a year, and obligating them to pay royalties only upon so many chairs as they should manufacture and sell. But it is claimed that there was no prayer in the defendants' answer to have the agreement reformed, and that is true. The defendants should, by way of counter-claim, have alleged the facts entitling them to a reformation of the agreement, and should have prayed judgment for such reformation, and upon that counter-claim the plaintiff could have taken issue. But this defect in the answer was not mentioned upon the trial, or in any way called to the attention of the court, so far as appears in the record. All the proof was given without objection, as if the pleadings were in proper form to justify it, and therefore the objection to the answer must be deemed to have been waived, and is not now available to the plaintiff. It is also objected that the court at the trial term did not order the agreement to be reformed, and that it was not reformed by the judgment. In that respect, also, we think there is technical error. As the writing stood unreformed, the plaintiff was entitled to recover. But as sufficient facts for the reformation of the agreement were alleged, and as the facts found clearly entitled the defendants to a reformation of the agreement, the omission to provide for the reformation must have been by inadvertence. The elements for a reformation all existed in the record, and the judgment may now be so modified as to grant a reformation. It is clear that the case was tried upon the assumption by both parties that, if

the defendants proved the facts alleged in their answer, they were entitled either to a dismissal of the complaint, or to a reformation of the written agreement. The controversy was not over forms, but over facts. Our conclusion, therefore, is that the judgment should be modified so as to reform the agreement in accordance with the findings of fact, and the judgment, as so modified, should be affirmed, without costs to either party upon this appeal.

All concur.

(110 N. Y. 625)

HUDSON v. OCEAN S. S. Co.¹

(Court of Appeals of New York. June 5, 1888.)

MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISK.

Plaintiff, who had been for some time a longshore-man, while loading defendant's vessel was thrown into the water and injured by the fall of the platform between the vessel and the dock. According to plaintiff's evidence, it is the duty of longshore-men to attend to the fastenings of the platform, which is left loose on the shore side, and to regulate the fastenings to the rise and fall of the tide. The platform was in good order, and no neglect was shown on the part of defendant. Held, that plaintiff cannot recover for injuries sustained.²

Appeal from general term, supreme court, First department.

Action by John Hudson against the Ocean Steam-Ship Company of Savannah for damages for injuries sustained by plaintiff while engaged in loading defendant's vessel. The complaint was dismissed, and the plaintiff appeals. *Sam'l H. Randall* for appellant. *Nathan Bijur*, for respondent.

GRAY, J. The trial court refused to submit the case to the jury, and dismissed the complaint, and its action was approved by the general term. We see no error committed in so doing. The plaintiff, while engaged in putting freight on board of one of defendant's steam-ships, at its dock in New York city, by means of a truck, which he wheeled from dock to ship over a platform or "skid," was precipitated into the water by the fall of the "skid," and thereby was injured. It is usual to truck freight over such a platform, and the plaintiff had been for some time engaged as a longshore-man in that kind of work, and on that very dock. According to the evidence adduced on plaintiff's behalf, it is the duty of the longshore-men, when engaged in trucking freight, to attend to the fastenings of the "skid." It is only made fast by ropes at the ship end, the shore end being left loose to allow of its movement with that of the ship. As the tide falls, the ship fastenings must be lengthened to conform. The proofs showed the "skid" to be in good order, and the slipping of the shore end was caused by some omission of those engaged at work to attend to its fastenings; or the fall may have been caused by the swell of some moving vessel. No fault or neglect was shown on defendant's part. The principle upon which actions are allowed against a master by his servant is the obligation resting upon the former to furnish adequate and safe appliances, and such as are usual in the particular business in which the servant is employed. That is a duty implied from their contract, and failure of the master in that duty renders him responsible to his servant for injuries occurring. But, if the master has performed his duty in that respect, the servant takes all the risks involved in the work in which he is engaged, and of his own and his fellow-servants' negligence. The opinion of the learned

¹ Affirming 88 Hun. 644, *mem.*

² In general, as to the risks of employment assumed by a servant on entering the service of his master, see *Railway Co. v. Frawley*, (Ind.) 9 N. E. Rep. 594, and note; *Schultz v. Railway Co.*, (Wis.) 81 N. W. Rep. 321, and note; *Railway Co. v. Bradford*, (Tex.) 2 S. W. Rep. 595, and note; *Hewitt v. Railroad Co.*, (Mich.) 84 N. W. Rep. 659, and note; *Scott v. Railway Co.*, (Or.) 13 Pac. Rep. 98; *Olson v. Railway Co.*, (Minn.) 85 N. W. Rep. 886; *Murphy v. Greeley*, (Mass.) 15 N. E. Rep. 654; *Railway Co. v. Dillard*, (Tex.) 8 S. W. Rep. 118. As to who are fellow-servants, see *Wolcott v. Studebaker*, 34 Fed. Rep. 8, and note; *McMaster v. Railway Co.*, (Miss.) 4 South. Rep. 59.

judge at general term ably disposed of the case, and renders it unnecessary for us to further consider the appeal. The judgment of the general term, affirming the judgment entered in favor of the defendant, should be affirmed. All concur.

(109 N. Y. 389)

PEOPLE v. GILLSON.

(Court of Appeals of New York. June 5, 1888.)

CONSTITUTIONAL LAW—POLICE POWER—PREMIUM GIVING BY FOOD SELLERS.

Acts N. Y. 1887, c. 691, amendatory of Pen. Code, § 335a, making it a misdemeanor for any person who sells food to give away therewith, as a part of the transaction of sale, any other thing as a premium, gift, etc., is in violation of the constitutional provision which secures to each person his liberty and property; and is not within the proper exercise of the police power of the state, either to protect the public health and safety, or to prohibit lotteries, or to regulate trade; nor is it a valid exercise of the legislative power to enact what shall amount to a crime.

Appeal from general term, supreme court, Third department.

Trial and conviction of Hugh B. Gillson for selling food, and giving away, as a part of the transaction, a premium, in violation of the act of 1887. The defendant appeals.

Hamilton Harris and *Montignani & Scherer*, for appellant.

Franklin M. Danaher, for respondent.

Section 335a, Pen. Code, (chapter 691, Laws 1887,) is not in violation of nor contrary to the provisions of the fourteenth amendment to United States constitution. *U. S. v. Cruikshank*, 92 U. S. 542, 569; *U. S. v. Harris*, 106 U. S. 629, 644, 1 Sup. Ct. Rep. 601. That amendment has not taken from the states the powers of police that were reserved at the time the original constitution was adopted. *Beer Co. v. Massachusetts*, 97 U. S. 25; *Slaughter-House Cases*, 16 Wall. 36, 130; *Barbier v. Connolly*, 113 U. S. 27, 32, 5 Sup. Ct. Rep. 357; *Mugler v. Kansas*, 8 Sup. Ct. Rep. 273. The act does not abridge the privileges and immunities of citizens. *U. S. v. Cruikshank*, 92 U. S. 542, 569; *People v. Gallagher*, 93 N. Y. 498; *Bradwell v. State*, 16 Wall. 130; *Cory v. Carter*, 48 Ind. 327, 17 Amer. Rep. 738. It is a valid exercise of the police power as a statute in furtherance of the prohibition against lotteries. *People v. Noelke*, 94 N. Y. 142; *Wilkinson v. Gill*, 74 N. Y. 67; *Com. v. Wright*, 137 Mass. 250; *Com. v. Sullivan*, 15 N. E. Rep. 491; *Governors v. Union*, 7 N. Y. 238; *Hull v. Ruggles*, 56 N. Y. 424; *Walker v. State*, 49 Ala. 398; *Dunn v. People*, 40 Ill. 465; *Thomas v. People*, 59 Ill. 160; *State v. Clarke*, 33 N. H. 329; *Skiff v. Johnson*, 57 N. H. 475; *U. S. v. Olney*, 1 Dedy, 461. It is a valid exercise of the police power as a health law,—a regulation of trade in food products. *In re Jacobs*, 98 N. Y. 98; *People v. Marx*, 99 N. Y. 377, 2 N. E. Rep. 29; *Wynehamer v. People*, 13 N. Y. 412; *Stone v. Mississippi*, 101 U. S. 814; *Bertholf v. O'Reilly*, 74 N. Y. 509; *State v. Burgoyne*, 7 Lea, 173, 40 Amer. Rep. 60; *Dabbs v. State*, 39 Ark. 353, 43 Amer. Rep. 275; *Davis v. State*, 68 Ala. 58, 44 Amer. Rep. 128. It does not deprive the accused of his property, (*Bertholf v. O'Reilly*, 74 N. Y. 521; *Mugler v. Kansas*, 8 Sup. Ct. Rep. 273; *People v. West*, 106 N. Y. 293, 12 N. E. Rep. 610;) nor interfere with the freedom of trade, (*People v. Marx*, 99 N. Y. 386, 2 N. E. Rep. 29; *People v. West*, 106 N. Y. 293, 12 N. E. Rep. 610; *Tied. Police Power*, 490, 491; *People v. Cipperly*, 37 Hun, 326.) Nothing but a clear violation of the constitution will justify the judicial department in declaring a legislative act void. *People v. West*, 106 N. Y. 296, 12 N. E. Rep. 610; *U. S. v. Harris*, 106 U. S. 629, 1 Sup. Ct. Rep. 601; *People v. Draper*, 15 N. Y. 543; *People v. Briggs*, 50 N. Y. 553; *People v. Albertson*, 55 N. Y. 54; *Kerrigan v. Force*, 68 N. Y. 385; *Bertholf v. O'Reilly*, 74 N. Y. 509; *People v. Comstock*, 78 N. Y. 361; *Mugler v. Kansas*, 8 Sup. Ct. Rep. 273; *Stuyvesant v. Mayor*, 7 Cow. 606.

PECKHAM, J. In 1887 the legislature of this state enacted chapter 691, which is entitled "An act to amend the Penal Code by adding an additional section thereto, to be known as section three hundred and thirty-five a." That section reads as follows: "Sec. 335a. No person shall sell, exchange, or dispose of any article of food, or offer or attempt to do so, upon any representation, advertisement, notice, or inducement that anything other than what is specifically stated to be the subject of the sale or exchange is or is to be delivered or received, or in any way connected with or a part of the transaction, as a gift, prize, premium, or reward to the purchaser. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and, in addition thereto, shall be liable to a penalty of twenty-five dollars, to be recovered, with costs, by any person suing therefor in his own name." The section is placed as the last one in chapter 8 of the Penal Code, which is entitled "Lotteries;" and the chapter is devoted to enactments defining and relating to lotteries. On the 7th day of October, 1887, a purchaser of two pounds of coffee from defendant, on the 6th day of October, 1887, at the sales-room of the Great Atlantic & Pacific Tea Company, 11 North Pearl street, in the city of Albany, made affidavit, before a police justice of the city, that the defendant "did, on the 6th of October, sell," etc., "two pounds of coffee upon a representation that a thing other than what was specifically stated to be the subject of the sale, to-wit, crockery and glassware, was to be given and received, and in that way connected with and made part of the transaction, as a gift or prize to the purchaser, and in that way defendant did sell the coffee upon such representation, and did deliver, as a gift," etc., a tea-cup and saucer to the purchaser of the coffee, who received it as part of the transaction of the sale of the coffee. Upon such affidavit the justice issued his warrant, and the defendant was arrested and brought before him. He then waived an examination, and gave bail to the special sessions, where he was subsequently tried and convicted of the offense above charged. The defendant was sentenced to pay a fine of \$10, or be imprisoned for 10 days. This conviction was affirmed at the general term of the supreme court, and from the judgment of affirmance the defendant appeals to this court. A reference to the testimony on the trial discloses the fact that the witness did not buy the coffee for his own use, but in order to make a case against the tea companies. Hence the certainty observable in the testimony of the witness as to the inducements which operated upon his mind, and led him to purchase the coffee. The witness said, in his evidence, that he knew defendant, and that he was a clerk at premises No. 11 North Pearl street, in the city of Albany, which were used and occupied as a tea-store, and that on October 6th the witness purchased of defendant at that place, and defendant sold him, two pounds of coffee, "upon a representation, advertisement, notice, and inducement that a thing other than the said coffee, which was specifically stated to be the subject of said sale and exchange, to-wit, one decorated cup and saucer, was to be given, presented, delivered, and received, and in that way connected with and made part of the transaction of the purchase and sale of the coffee, as a gift, prize, premium, and reward to me;" and upon such representation he purchased and received the coffee, and the cup and saucer. He further said he would not have purchased the coffee but for the inducement of the present; that it was stated to him, if he purchased but one pound of coffee, he got a check; and, when he purchased two pounds, he got two checks, which entitled him to a present; and he would have bought but one pound if he could have got a present with one. It also appeared that the articles which formed the inducement for the purchase were lying in full view of the purchaser on a counter, and his choice of anything on the counter was given him, provided he purchased as much as two pounds of coffee; that being the sole consideration upon which his right of choice depended. The witness further testified that there were two signs in front of the store. One was a business sign,

reading, "Great Atlantic & Pacific Tea Co.;" the other, "Try our 8 o'clock breakfast coffee; checks given away with this coffee." This was substantially the testimony, and it was uncontradicted. Upon these facts, the courts below have pronounced the defendant guilty of a violation of the above-mentioned act, and it has been held a valid exercise of legislative power.

The act is attacked by the counsel for defendant as unconstitutional upon a number of grounds. In considering constitutional questions, certain rules have been laid down by courts in relation to the exercise of their conceded power to declare void, as being in violation of the constitution, enactments of the legislature which have been passed with all due and proper formalities. It has been frequently held, and is acknowledged by all courts as the undoubted and true rule, that a statutory enactment will not be declared unconstitutional, and therefore void, unless a clear and substantial conflict exists between it and the constitution; that every presumption is in favor of the constitutionality of legislative acts; that the case must be practically free from doubt; that, as to our state constitution, the question whether a statute is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions; that it may not be declared void because a court may deem it opposed to natural justice and equity; that all property is held subject to the general police power of the state to so regulate and control its use, in a proper case, as to secure the general safety and the public welfare. These principles have been frequently asserted in our courts, and are so familiar that a reference to particular authorities is not thought needful. They are good and healthful rules, and should be followed by all courts. At the same time, it must be remembered that the constitution is the supreme law of the land; and that, when an act of the legislature properly comes before the court to be compared by it with the fundamental law, it is the duty of the court to declare the invalidity of the act if it violate any provision of that law.

The defendant here appeals for his protection to the clause (among others) in the constitution which provides that no person shall be deprived of life, liberty, or property without due process of law. The meaning of this provision in our state constitution has frequently been the subject of judicial investigation, and this court has had occasion very recently to discuss it in quite a number of cases, and a further elaboration is not needed. The following propositions are firmly established and recognized: A person living under our constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. The term "liberty," as used in the constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. These principles are contained and stated in the above language in various cases, among which are *Association v. Crescent City Co.*, 1 Abb. (U.S.) 398; *Slaughter-House Cases*, 16 Wall. 36-106; *In re Jacobs*, 98 N. Y. 98, (per EARL, J.); *Bertholf v. O'Reilly*, 74 N. Y. 509, (per ANDREWS, J.); *People v. Marx*, 99 N. Y. 377, 2 N. E. Rep. 29, (per RAPALLO, J.) It is quite clear that some or all of these fundamental and valuable rights are invaded, weakened, limited, or destroyed by the legislation under consideration. It is evidently of that kind which has been so frequent of late,—a kind which is meant to protect some class in the community against the fair, free, and full competition of some other class; the members of the former class thinking it impossible to hold

their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorably to them, or unfavorably to their competitors, in the commercial, agricultural, manufacturing, or producing fields. By the provisions of this act a man owning articles of food which he wishes to sell or dispose of is limited in his powers of sale or disposition. A liberty to adopt or follow for a livelihood a lawful industrial pursuit, and in a manner not injurious to the community, is certainly infringed upon, limited, perhaps weakened or destroyed, by such legislation. It is certainly lawful to sell (as in this instance) coffee. It is an article of food, and is now almost one of the necessities of life to a large number of people. A person engaged as a retailer of coffee might very well think that he could greatly enlarge the amount of his trade by doing precisely what was done by the defendant in this case; and that, while his profits on the same amount of coffee sold would be smaller than if he gave no present, yet, by the growth of his trade, his income at the end of the year would be more than by the old method. This statute, if valid, steps in to prevent his adopting such a course to procure trade, and from it to secure an income and livelihood for himself and family. He is thus restrained in the free enjoyment of his faculties, which he ought to have the right and liberty to use in the way of creating or adopting plans for the increase and growth of his trade, business, or occupation, unless such restraint is necessary for the common welfare. This law interferes with the free sale of food; for the condition is imposed that no one shall sell food, and at the same time, and as part of the transaction, give away any other thing. It is not material if, by reason of the prohibition, the owner's sales of food are greatly cut down, and his ability to support his family thereby, perhaps, largely decreased. If the law is valid, the fact of its existence is a complete answer to the complaints of the owner of food that his liberty to sell his property, and his chance to make a livelihood, are very greatly impaired. It cannot be truthfully maintained that this legislation does not seriously infringe upon the liberty of the owner or dealer in food products to pursue a lawful calling in a proper manner, or that it does not, to some extent at least, deprive a person of his property, by curtailing his power of sale; and unless this infringement and deprivation are reasonably necessary for the common welfare, or may be said to fairly tend in that direction or to that result, the legislation is invalid as plainly violative of the constitutional provision under discussion.

This brings us to the consideration of the question whether the act is valid as a proper exercise of what is, by way of classification, called the police power of the state. That power has never yet been fully described, nor its extent plainly limited, further, at least, than this: It is not above the constitution, but it is bounded by its provisions; and, if any liberty or franchise is expressly protected by any constitutional provision, it cannot be destroyed by any valid exercise, by the legislature or the executive, of the police power. The extent of this power has been the subject of discussion in this court; and in the recent and most important case of *In re Jacobs*, 98 N. Y. 98, 107, the question was examined and most exhaustively reviewed by EARL, J., in his opinion. To reopen the subject now would be useless, and I refer to that case as authority for the statement that the legislature cannot, without reason and arbitrarily, infringe upon the liberty or the property rights of any person within the protection of the constitution of this state; and that, if the legislature shall determine what is a proper exercise of its police power, its decision is subject to the scrutiny of the courts. The subject was again reviewed in *People v. Marx*, 99 N. Y. 377, 2 N. E. Rep. 29, in an opinion written by RAPALLO, J., and concurred in by the whole court. In the *Jacobs Case*, *supra*, this court held the tenement-house cigar act, so called, unconstitutional; and in the *Marx Case*, *supra*, the section of the act relating to the manufacture and sale of oleomargarine, which absolutely prohibited its manufacture and sale, was also

held unconstitutional, inasmuch as it absolutely prohibited an important branch of industry, not injurious to the community, and not fraudulently conducted, solely for the reason that it competed with another branch. Under an exercise of the police power, the enactment must have reference to the comfort, the safety, or the welfare of society, and it must not be in conflict with the constitution. The law will not allow the rights of property to be invaded, under the guise of a police regulation for the protection of health, when it is manifest such is not the object and purpose of the regulation. See *Austin v. Murray*, 16 Pick. 121, 126; *Com. v. Alger*, 7 Cush. 53, 84, cited with approval in *Re Jacobs, supra*. As is also said in the last case, it is generally for the legislature to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety; and, if its measures are calculated, intended, convenient, or appropriate to accomplish such ends, the exercise of its discretion is not the subject of judicial review. But those measures must have some relation to these ends. Courts must be able to see, upon a perusal of the enactment, that there is some fair, just, and reasonable connection between it and the ends above mentioned. Unless such relation exists, the enactment cannot be upheld as an exercise of the police power.

The learned counsel for the people claims that the act is a valid exercise of the police power, in furtherance of the policy of the state to prohibit the setting up of lotteries and the sale of lottery tickets. A careful reading of the statute fails to show any such purpose. It prohibits the seller of food from giving away any other thing as part of the transaction of sale, and as an inducement leading to it. It says nothing as to any lottery, and does not confine its prohibition to the giving away or distribution of any other article of property by virtue of any scheme founded upon chance. The act, in effect, absolutely prohibits the giving away of any other thing with the food sold, and as part of the transaction of sale, wholly regardless of the means used to effect the giving away or delivery of such other article. The proof in this case shows there was no lottery, or pretense of lottery, in the transaction upon which the defendant was convicted of a violation of the act. There was not the slightest element of chance in the case. A counter had upon it various articles of crockery, all of which were in full view of the purchaser at the time he purchased the coffee in question. He was told that he could have any of those articles on that counter, to be picked out by himself, if he purchased two pounds of the coffee mentioned. To call such a transaction a lottery, or the checks given with the coffee a sale of lottery tickets, is to wholly ignore the true nature and character of a lottery, and also of this transaction. In this scheme the purchaser not only gets what he pays for, but by the very terms of the contract he has no chance to obtain anything more. In the purchase of two pounds of coffee, he purchases the right to choose a certain article of crockery from a counter in full view, and he gets no chance to obtain anything else. In all cases cited by the counsel in his very elaborate and painstaking brief, not one case is found where it has been held that a lottery, or anything in the nature of a lottery, existed, unless there was added to the right to obtain some kind of property, in any event, the chance, near or remote, of getting something in addition to it, of more or less value, as the case might be. Here there is no chance, and consequently nothing in the nature of a lottery, and the act cannot be upheld on the theory mentioned.

It is further argued, however, that the act is valid as a health law, a regulation of trade in food, and to prevent dealing in impure, unwholesome, and adulterated food. The same principles apply here as have already been stated; i. e., there must be some fair and reasonable relation of means to end, which courts can see and admit the force of. We think it clear there is no such relation here. We think the act has not the slightest tendency to accomplish the alleged purpose. The legislature has undoubted power to prohibit the adulteration of food, and it has already exercised it by the passage of section 407

of the Penal Code, and other laws upon the same general subject. The reasoning of counsel for the people is based upon the theory that no one will sell, as a matter of permanent business, an article at a price below what it costs him to procure it; and if he sell his coffee (in this instance) as low as the price thereof with other dealers, when he adds a gift at the time of the sale, he thereby reduces his profits below that of his competitor, and, in order to prevent such a loss, he will necessarily and inevitably sell an inferior or adulterated article. We think the reasoning is not sound. As has been before remarked, the inducement to purchase by reason of the gift may be so great that the sales are enormously increased, and the net profits at the end of the year may be greatly in excess of those of a dealer who makes no gifts, and sells a correspondingly less amount of the food. It may simply be the old story of a small profit on large sales, instead of a large profit on small sales. There is no allegation here, nor any proof, that the coffee sold was in fact an adulterated article. There are statutes now existing which would reach that difficulty, and it can therefore the more readily be seen that in truth the object and purpose of this act were not to prevent the adulteration of food, but that in reality it was passed for the purpose of protecting those dealers in food articles who preferred not to engage in this kind of business in connection therewith, and who therefore desired to prevent any one else from engaging in it.

I lay no stress whatever upon the argument that this kind of transaction naturally induces people to purchase more than they want of any article of food, in order to get the other article with it which comes to them in the shape of a gift, and the poorer people are led to extravagance in outlay. It may be remarked that in purchasing articles of food, even if one purchase more than is then absolutely necessary, the food need not be, and in all probability is not, wasted. But, aside from that, the argument is directed to that class of sumptuary legislation which, while good enough in some phases, is, when carried to minute details, simply unauthorized and illegal. The right to legislate upon the subject of intoxicating liquors is acknowledged by every one, and is founded upon the fact that their use in excessive quantities leads, in large masses of cases, to crimes, poverty, and enormous suffering, and bears most harmfully upon the sum of the happiness of the human race. So in regard to lotteries in general. A wide-spread custom of indulging in the purchase of tickets leads, among the poorer classes certainly, and also among others, to habits of recklessness, waste, and idleness. It cultivates a gambling spirit, and tends to a hatred of honest labor, and to a desire to obtain riches or money without the necessary expenditure of industrious energy. Many other instances could be given where the interference of the legislature with the personal liberty of the citizen would be at once regarded as proper, or at least legal, under the exercise of the police power. But there is a limit to such interference, in my judgment, and there does come a time when the constitutional provision, so often herein quoted, steps in to protect the citizen. As an act in furtherance of the public health or morals, no one, at this period of the history of man, would, I think, regard it as legal to enact, in this state, (changing the verbiage to suit the altered condition of the race in this country,) that no man or woman under the rank specified in the law shall thereafter wear fur on his or her clothes, or that no knight under the degree of a lord should wear shoes or boots having pikes in them more than two inches long. A British parliament enacted such measures, to prevent, as was alleged, undue expenditures, and for the preservation of the morals of the people. See 2 Edw. III, c. 1, (A. D. 1337;) 3 Edw. IV. c. 5, (A. D. 1463.) Numberless statutes of a similar nature have been passed both in England and in this country, and it is generally admitted that some of the best legislation of both countries has been found in the repeal of laws enacted by former parliaments and legislatures. It seems to me that to uphold the act in question upon the assumption that it tends to prevent people from buying more

food than they may want, and hence tends to prevent wastefulness, or lack of proper thrift, among the poorer classes, is a radically vicious and erroneous assumption, and is to take a long step backwards, and to favor that class of paternal legislation which, when carried to this extent, interferes with the proper liberty of the citizen, and violates the constitutional provision referred to.

Equally unfounded, and for practically the same reasons, is the assumption that the law is valid as a law regulating trade, and for the prevention of fraud and deception. It has no tendency to prevent either, and its regulation of trade is a mere arbitrary, unreasonable, and illegal interference with the liberty of the citizen in his pursuit of a livelihood by engaging in a perfectly valid business, conducted in a perfectly proper manner. That a man engaged in trade will not, for any length of time, continue to sell an article below what it costs him to procure it, is a safe assumption; while it is equally safe to say that he may do so for a time,—long enough to enable him to introduce his article to the notice of the public, and to create a demand for it, which he will make a profit by supplying. Or he may make a profit by supplying one article, which will amount to enough to enable him to give away some other article with it, and permit him to receive the average rate of profit in the business which he is engaged in. To prevent this by legislative action does not reasonably or fairly tend to prevent fraud or deception in the sale of articles of food. As I have said, there are now laws enough on that subject; or, if not, any law which has that end in view, and which naturally or reasonably tends to accomplish it, will undoubtedly be a valid exercise of the legislative power, and, of course, would be so declared by any and all courts.

Nor can this act stand as a valid exercise of legislative power to enact what shall amount to a crime. The power of the legislature to so declare is exceedingly large, and it is difficult to define its exact limit. But that there is a limit, even to that power, under our constitution, we entertain no doubt, and we think that limit has been reached and passed in the act under review. The power has been unlawfully exercised in this instance, for the same reasons that we have already stated, because it violates the constitutional provision which secures to each person in this state his liberty and property, except as he shall be deprived of one or both by due process of law. The principles upon which enactments relating to the adulteration of food, or the sale thereof, below a certain standard declared by the legislature, have been upheld, afford no aid to this act. Such laws have been plainly appropriate to secure the end in view, which was itself legal and commendable. They had direct relation to the public health, and a direct and plain tendency to aid in the securing of it, and to prevent fraud and deception in the manufacture or sale of different articles. Such are the cases of *People v. Arensberg*, 105 N. Y. 123, 11 N. E. Rep. 277; *People v. West*, 106 N. Y. 293, 12 N. E. Rep. 610; *People v. Kibler*, 106 N. Y. 321, 12 N. E. Rep. 795; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. Rep. 107, and 37 Hun, 319, 324; and numerous other cases.

The case of *Powell v. Com.*, 8 Sup. Ct. Rep. 992, (just decided by the supreme court of the United States,) which affirms the judgment of the supreme court of Pennsylvania, reported in 114 Pa. St. 265, 7 Atl. Rep. 913, has been called to our attention. The question arose in that case as to the constitutionality of an act of the legislature of Pennsylvania (P. L. 22, act May 21, 1885) which prohibited the manufacture and sale of oleomargarine. The Pennsylvania court held that the statute was valid as within the police power of the state, and the conviction of the defendant under it was affirmed. He brought a writ of error, and the case was argued in the supreme court of the United States; it being alleged that the act violated the provision of the federal constitution, in that it deprived the defendant of his liberty or property without due process of law, and that it denied to him the equal protection of

the laws. The federal supreme court held that no right secured to the defendant by the federal constitution was violated by the act in question, and the judgment of the supreme court of Pennsylvania was affirmed. A statute very similar to the one in question was condemned by this court in *People v. Marx*, 99 N. Y. 377, 2 N. E. Rep. 29. As that was a decision in favor of a right claimed under both the federal and state constitutions, no review thereof is provided for in the supreme court of the United States, and our decision, therefore, is necessarily final. On looking carefully over the opinion of Mr. Justice HARLAN, pronounced in the *Powell Case*, we find nothing therein which is decisive of the question now before us. The case is decided upon the ground that the manufacture and sale of oleomargarine might be detrimental to the public health because it might be manufactured of ingredients that are injurious to health, and the fact that the particular portion offered for sale by defendant might have been proved not to contain any such ingredients was entirely consistent with the possibility or probability that most kinds of oleomargarine butter did contain them. It was then stated that it was for the legislature, under such circumstances, to decide whether it was not the best way, in order to prevent the manufacture and sale of oleomargarine containing such unhealthful ingredients, to absolutely prohibit the manufacture and sale of all oleomargarine. The same may be said as to *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273; for that was decided upon the application of the police power to legislation upon the subject of intoxicating liquors, which is not in the least like the case under review.

Upon a full consideration of this act, we are entirely persuaded of its invalidity, and we must decide accordingly. The judgment of conviction must be reversed, and the defendant discharged.

All concur.

(109 N. Y. 468)

MACKELLAR v. ROGERS et al.

(Court of Appeals of New York. June 5, 1888.)

1. RIGHT TO JURY TRIAL—COUNTER-CLAIM.

A defendant in foreclosure, who pleads as a counter-claim money due and damages for breach of a contract, asking an affirmative judgment thereon, cannot demand a jury trial of the issues thus raised as of course under Code Civil Proc. N. Y. § 974, providing that "where the defendant interposes a counter-claim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact arising thereupon is the same as if it arose in an action brought by the defendant against the plaintiff for the cause of action stated in the counter-claim, and demanding the same judgment;" as the action, being for other than a money judgment, is not within Code, § 968, providing that an issue of fact in an action for a money judgment only must be tried by a jury; but is within Code, § 970, which provides that where a party is entitled to a jury trial in an action not specified in section 968, he may apply, upon notice, to the court for an order directing issues to be stated for trial; and where defendant fails to make such application, but notices the cause for trial at special term, where no jury can be had, he waives his right to jury trial.

2. APPEAL—REVIEW—DISCRETION—TRIAL BY JURY.

The refusal of a request by defendant who has pleaded a counter-claim, in an action to foreclose a mortgage, for leave to make application at special term for the framing of issues to be sent to a jury, is discretionary, and not reviewable.

Appeal from general term, superior court, city of New York.

Action by Thomas MacKellar against George W. Rogers and others to foreclose a mortgage. Judgment for plaintiff. Defendants appeal. Code Civil Proc. N. Y. § 968, provides that an action in which the complaint demands judgment for a sum of money only must be tried by a jury, unless jury trial is waived, or reference directed. Id. § 970, provides that "where a party is entitled * * * to a trial, by a jury, of one or more issues of fact, in an action not specified in section 968, he may apply, upon notice, to the court for an order directing * * * issues * * * to be stated for trial."

Martin J. Keogh, for appellant. *George M. MacKellar*, for respondent.

DANFORTH, J. The action was for the foreclosure of a mortgage. The answer expressly admitted the material allegations of the complaint, but set forth new matter, characterized it as a counter-claim, and demanded an affirmative judgment for \$31,115.57, money due, besides \$20,000 damages for breach of contract. The plaintiff, by reply, put these matters in issue. The defendant gave notice that the issues of fact so joined would be brought to trial at the then next special term, and at the same time a like notice was given by the plaintiff. At the time mentioned both parties appeared, and, as the record states, the cause having been reached for trial, counsel for defendant "demanded a trial by jury of the counter-claim set up in his answer, as his constitutional and legal right." This application was denied on the ground "that the proper mode of applying for a jury trial under such circumstances is upon notice of motion to have special issues sent to a jury for trial." The defendant then asked leave to make application at special term for the framing of issues, but it was denied. To grant or refuse such request was clearly a matter of discretion, and its exercise is not the subject of review in this court. The trial, however, went on and resulted in a judgment for the plaintiff, according to the prayer of his complaint. It was affirmed by the general term, and we have only to inquire whether the defendant was, under the circumstances, entitled to a jury trial as a matter of right.

The appellant's contention rests upon section 974 of the Code of Civil Procedure, which provides that "where the defendant interposes a counter-claim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact arising thereupon is the same as if it arose in an action brought by the defendant against the plaintiff, for the cause of action stated in the counter-claim, and demanding the same judgment." The conditions upon which the right depends exist in favor of the defendant, but that right is not absolute or unqualified; it is relative and limited, and, in the words of section 974, "within" certain "foregoing sections" only is "a counter-claim to be deemed an action." We find nothing there which required a court to sanction the course pursued by the defendant. If tolerated, it would enable a person sued to postpone and delay the plaintiff in the prosecution of a just cause until, at a convenient time, and before another tribunal, he had presented a cause of action subsequently brought into court, and the determination of which has no necessary connection with the plaintiff's demand in suit. It would, moreover, permit him to do this after selecting a different court for the trial of his issue, and evade that trial at the moment it was to commence by the expression of his mere wish to go into a different forum, thus putting his adversary at defiance, and interrupting the court in the transaction of business which he himself had in a formal manner brought before it. It is to be conceded that the mode of trial of the issue tendered by his counter-claim might be the same as if it had arisen in an action. But a counter-claim in an equity suit is not a case where a right to a jury trial existed at common law. *Chapman v. Robertson*, 6 Paige, 627; *Jennings v. Webster*, 8 Paige, 503. It is not secured by the constitution; it is not to be had as of course, for the action is not within section 968, of the Code, *supra*,—the complaint demanding other judgment than for a sum of money. It is conferred by statute, (section 974,) and so is within section 970, *supra*, which requires an application upon notice to the court for an order directing the questions arising upon the issues to be stated for trial. No such application was made. Moreover, the right given by section 974 attached when by the reply issue was joined upon the allegations of the answer. The subsequent step taken by the defendant in noticing the issues so joined for trial at a court of which a jury forms no part was inconsistent with any intent to take advantage of the right to a jury trial. That right could be waived, and by this notice the defendant must be held to have consented to a trial before the court, and without a jury. Neither the Code nor the cases cited by the ap-

pellant are opposed to this view. The Code (section 1009) specifies certain modes by which trial by jury may be waived, but the provision is not exclusive, and the same effect may be given to any evidence, either of conduct or acquiescence, by a party, which in other cases would require a conclusion that a right designed for his benefit had been waived. In *Wheelock v. Lee*, 74 N. Y. 496, the plaintiff joined equitable with legal causes of action, so that in one of its aspects the action was triable at special term, and the court held that the defendant, by noticing it for trial, did not waive his right to have the issues on the legal causes of action submitted to the jury. In the case before us the only issues to be tried were those tendered by the defendant. They were triable before a jury; but if the parties consented might also be tried before the court without a jury. Each party noticed the case for trial before a court for which no jury could be drawn, and the notice which carried the cause there must be deemed an unequivocal election by both parties to have the case so tried. In *Davison v. Associates*, 71 N. Y. 333, the form of the action was in equity. The plaintiff demanded a jury trial because, as he alleged, the evidence would show a cause of action at common law for damages merely. It was held to have been properly denied, the court saying that "the plaintiff elected to bring an equitable action, and thereby elected the forum in which it should be tried." Less effect should not be given to the formal notice which not only discloses a party's own choice as to the mode of trial, but requires the adverse party to attend according to that choice. We agree, therefore, with the conclusion of the general term, and affirm the judgment.

All concur; EARL, J., in result.

(109 N. Y. 448)

PURDY v. COAR.

(Court of Appeals of New York. June 5, 1888.)

1. ESTOPPEL.—By DEED.

A grantor cannot, after conveying land, estop his grantees and their successors, from denying the validity of an incumbrance on the land, by a certificate that such incumbrance is valid and binding on the land.

2. SAME.

A clause in a deed that the title conveyed shall be "subject to all liens of mortgages" on the land is not an admission, on the part of a subsequent purchaser, that a mortgage which such purchaser had herself signed as wife of a former owner is valid and binding on the land.

Action for foreclosure of a mortgage, by Elijah F. Purdy against Mary Jane Coar. Judgment for plaintiff, and defendant appeals.

Harris & Corwin, (John H. Corwin, of counsel,) for appellant. *S. W. Rosendale*, for respondent.

FINCH, J. This is a case in which dates are of importance. On September 8, 1884, one John Coar was the owner of the premises now in controversy. On that day he made and executed to one Frederick C. Walker a bond and mortgage to secure \$7,000, and interest. Two days later, and on September 10th, Coar conveyed the property to Marshall, and the latter to Mrs. Coar, the present defendant. In the absence of any proof to the contrary, it must be presumed that these deeds were delivered at their date. 2 Greenl. Ev. § 297; *Van Rensselaer v. Vinkney*, 3 Lans. 59; *Elsey v. Metcalf*, 1 Denio, 323; *Harris v. Norton*, 16 Barb. 264. On September 12th the mortgage to Walker was recorded. On September 14th, as appears by its date, Coar signed a certificate that the Walker mortgage was a good and valid security, and that there was no defense to it. He had then ceased to be the owner of the property, and had no authority from his wife, who was owner, to make such representation. On September 23d the deed to Mrs. Coar was put on record, and thereafter, and while the record title was in her, and on the 14th of October,

the Walker mortgage was assigned to the present plaintiffs, who bought it in reliance upon Coar's certificate. That assignment was recorded October 15th. For default of payment, this action was commenced to foreclose the mortgage. Mrs. Coar defended, alleging that no consideration passed from Walker; that she signed the mortgage supposing that the consideration named had been paid; that the plaintiffs gave no consideration for the assignment; and that the mortgage was void for want of consideration. Upon the trial she sought to prove this defense in various ways, but all her efforts were baffled by the ruling of the court that she was estopped by her husband's certificate, made when he had ceased to have any interest in the land, and when she alone had become the owner. She called her husband as a witness, and asked him to state "all the facts concerning the inception and continuance of the mortgage." The question was objected to as incompetent and immaterial, and because the witness was estopped by his certificate from attacking the mortgage. But he made no such attack. He put in no answer, and was not defending the action. Granting that he was estopped as a party, his evidence was admissible in behalf of his wife, unless she also was estopped by the certificate. She asked what consideration he received from Walker, and whether his wife knew of the sale of the mortgage to plaintiffs. All these inquiries were excluded. She attempted, also, to assail the consideration sworn to by plaintiffs as the basis of their purchase. She asked how the cabinet work of which he spoke, was paid for; and whether Coar's notes, which the plaintiffs surrendered, were at that time due. These questions were not allowed to be answered. By these rulings the whole defense pleaded was made unavailable. Judgment went for the plaintiffs, which was affirmed by the general term upon the ground that the certificate of the husband estopped the wife. That learned court seemed guided by a conviction that the certificate was made before the conveyance to Mrs. Coar; and the result is arrived at by presuming that the certificate was delivered at its date, although all the facts rebut that presumption; but that the deed to Mrs. Coar was not delivered at its date, although all the facts favor that presumption. And this error is intensified by the suggestion that there is no proof when that deed was delivered. The defendant offered to show that, when her husband made the arrangement with plaintiffs for a sale of the mortgage, it was after the deed had been delivered to her by Marshall. This was excluded. Now, the certificate had no force or validity until it operated as an estoppel; and that could not occur to Walker, for he took the mortgage two days before the certificate was made; and it could not occur as to plaintiffs until they purchased on the faith of it; and so the defendant did not prove that she got her deed before the certificate became operative, simply because she was not allowed to. And, besides, if we depend on the record for the date of the delivery of her deed, that still antedates the certificate as an operative instrument, for the assignment to plaintiffs was some time after; and, until they bought, the certificate was no better than blank paper, unless for the possible purpose of at some time contradicting the writer. So that the question returns whether a grantor, who has conveyed, can thereafter estop the grantee by a certificate declaring a previously executed mortgage to be a valid incumbrance upon the grantee's property. We think not. He may estop himself, but has lost the power to affect by his declarations the title of his grantee.

But, beyond the argument of the general term, we are met by suggestions of the learned counsel for the plaintiffs which do not depend upon the effect of the certificate, and which demand serious consideration. He contends that Mrs. Coar, the defendant, was merely the purchaser of an equity of redemption, and took subject to the mortgage, and so cannot contest it. *Bennett v. Bates*, 94 N. Y. 354. The pith of the doctrine is that the circumstances of the purchase amount to an admission of the validity and lien of the outstanding incumbrance. But there was no such admission by Mrs. Coar. She did not

take subject to the Walker mortgage, describing or identifying it as such; nor did Marshall, as grantee of Coar. The latter's deed contains this language: "Subject, nevertheless, to all liens of mortgages and taxes thereon." Acceptance of this deed did not admit that there were any such liens. If they existed, the title was subject to them, but their existence and validity was not conceded. The defendant seeks to show that what is now claimed to have been a mortgage was not such, and was not a lien on the land, and so was not one of the incumbrances subject to which she purchased. She did not buy subject to all apparent and pretended and invalid mortgages that could be set up, but subject to mortgages that were a lien, and so actual and real and valid. It is said she knew all about this mortgage because she signed it. I think that is true; but what she knew about it she was not permitted to tell. She may have known that it was not a valid mortgage as against her when she took her deed, and declined to buy subject to it, while quite willing to take title subject to mortgages that were in truth a lien on the property. That would account for the peculiar phraseology of the deed, and the careful omission to recognize or identify this particular instrument as a mortgage at all. It may very well be that, upon the undisclosed facts in this case, the land in Mrs. Coar's hands is equitably bound by the plaintiff's mortgage; but we cannot prejudge the case, or assume that the facts will be proved precisely as we suspect they existed. The defendant has a right to make her defense if she can; but, so far, has been denied a hearing.

The judgment should be reversed, and a new trial granted; costs to abide the event.

All concur.

(109 N. Y. 441)

FITZGERALD v. QUANN.¹

(Court of Appeals of New York. June 5, 1888.)

HUSBAND AND WIFE—ACTIONS AGAINST WIFE—JOINDER OF HUSBAND.

In an action against a married woman for slander, the husband must be joined as defendant; neither Acts N. Y. 1882, c. 172, amending act N. Y. March 20, 1860, § 7, providing in what courts a married woman may be sued, and that execution may be issued against her separate property, as if she were sole; Code Civil Proc. N. Y. § 450, providing that a married woman may appear, prosecute, or defend in an action, alone or joined with others, as if she were single, and that her husband need not be joined where the action concerns her separate estate; nor Id. § 1206, providing that judgment for or against a married woman may be enforced as if she were single,—abrogating the common-law rule in that respect. DANFORTH and FINCH, JJ., dissenting.

Appeal from general term, supreme court, Fifth department.

Action by Ann Fitzgerald against Charles Q. Quann and Mary L. Quann, his wife, for slander. The special term dismissed the complaint as to the husband, which order was, on an appeal to the general term, reversed; and defendant Quann appealed to this court.

James Wood, for appellant. Treadwell Cleveland, for appellee.

PECKHAM, J. The very satisfactory opinion delivered by the learned justice at the general term, when this case was before that court, renders it unnecessary to enter upon any general discussion of the question in this court. The counsel for the defendant, in his argument before us, conceded the rule to be well established, and almost universally acted on, that statutes changing the common law must be strictly construed, and that the common law must be held no further abrogated than the clear import of the language used in the statutes absolutely requires. However much modern judges might sometimes be inclined to doubt the beneficial results to be derived from an always strict adherence to the rule, grounded upon some possible doubts of the high

¹Affirming 38 Hun, 652.

order of excellence, in all cases, of the common law, or of its being without exception the perfection of human reasoning in any other than a very narrow, technical, and one-sided way, yet the rule itself is too securely and firmly established and grounded in our jurisprudence to be altered other than by legislative interference. This court acted upon such rule in the late case of *Bertles v. Nunan*, 92 N. Y. 152; and, because there was no statute which plainly altered it, the common law was held, in that case, to remain the law in this state in regard to the conveyance of real estate to a husband and wife jointly, and that upon the death of either the survivor took the whole estate.

It is claimed, however, that there is an express enactment abrogating the common law in regard to the liability of a husband for the torts of his wife, and that such enactment is to be found in chapter 172 of the Laws of 1862, entitled "An act to amend the act entitled 'An act concerning the rights and liabilities of husband and wife,' passed March 20, 1860." The court is referred to section 7 of the act, which reads: "A married woman may be sued in any of the courts in this state; and, whenever a judgment shall be recovered against a married woman, the same may be enforced by execution against her sole and separate estate, in the same manner as if she were sole." This section, clearly, does not reach any such result. It evidently contemplates the existence of causes where it would be proper to sue a married woman alone; for the provision making her sole and separate estate liable on execution upon a judgment recovered against her would lead one to that inference. But the section does not assume to state what those causes are. This is done in the third section of the same act, which amends the seventh section of the act of 1860; and in this amended section it is stated that "a married woman may, while married, sue and be sued in all matters having relation to her sole and separate property, or which may hereafter come to her by descent, devise, bequest, purchase, or the gift or grant of any person, in the same manner as if she were sole; and any married woman may bring and maintain an action in her own name for damages against any person or body corporate for any injury to her person or character, the same as if she were sole," etc. In the subsequent section of the act of 1862 (section 5) it is provided that, in an action brought or defended by any married woman in her name, her husband shall not, neither shall his property, be liable for the costs thereof, or the recovery therein. It is thus seen that, in a statute which legislates upon the subject of the rights and liabilities of husband and wife, a portion of one section treats of the rights of the wife as to suing and being sued "in the same manner as if she were sole," and the cases are stated in which she may be thus sued; and the case of a tort committed by her during coverture, for which a suit is brought also during coverture, is not embraced therein. This brief examination of the statute makes it still clearer that the seventh section, above quoted, did not assume to enact that a married woman was to be sued alone in all cases, but simply that when suable she could be sued in any of the courts of the state. We think there was no express legislation in this act which alters the common law in relation to this question.

It is claimed, however, that section 450, when taken in connection with section 1206, of the Code, alters the rule. Section 450 reads: "In an action or special proceeding, a married woman appears, prosecutes, or defends, alone or joined with other parties, as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property." The second sentence of the above section was added in 1879. If it be assumed that, without it, the first sentence of the section had made an alteration in the common law, and that, under such first sentence, a married woman was to be sued alone, in all cases, as if she was single, we think the addition of the second sentence places the law where it was before the passage of any part of the section. Some meaning must be given the words, and some purpose attached to the legislative

will, if it be possible to do so. That meaning and purpose are, as it seems to us, to state the cases in which it is not necessary to join her husband under the provisions of the first sentence of the section. If it were not intended to effect an alteration to that extent and in that manner, it cannot be seen what earthly purpose is effected by the amendment. The section, as it stood before the amendment, certainly rendered it unnecessary to join the husband with the wife in cases affecting her separate property; and unless the effect of the amendment be to state those cases where such joining is unnecessary, leaving it necessary in all other cases, it is difficult, if not impossible, to give any sense or meaning to the amendment. In our opinion, such is and was intended to be the effect of the amendment, and, unless in cases affecting her separate property, a married woman should be sued with her husband. This result is not affected by the language of section 1206 of the Code, which reads thus: "Judgment for or against a married woman may be rendered and enforced in a court of record, or not of record, as if she was single." This section refers, as it states in plain language, to the enforcement of a judgment against a married woman, and has no reference to the question of when it is proper or necessary to join her husband in suits against herself.

This brief summary is all that it is thought necessary to say on this subject, in addition to what has been so well said at the general term. It is not possible to reconcile the various decisions of the supreme court upon this question, nor do we regard it as of very great importance which way it is decided. We cannot see, with the clearness necessary for an alteration of the common law, that the various statutes upon the subject of the rights and liabilities of married woman have, by their general scope, bearing, and effect, by necessary implication, as claimed by counsel, altered the law, and rendered it unnecessary to join the husband with the wife in such a case as this. A lengthy discussion of those acts, and of the reasons which lead us to this conclusion, would serve no useful purpose, and will therefore not be entered upon. The judgment appealed from should be affirmed, with costs.

All concur, except DANFORTH and FINCH, JJ., dissenting.

(109 N. Y. 436)

SMITH v. COLE.¹

(Court of Appeals of New York. June 5, 1888.)

DEED—DELIVERY—ACCEPTANCE—JOINT GRANTEE.

In an action by one grantee against another grantee in the same deed, to compel him to deliver the deed to the county clerk for record, defendant testified that he had not accepted, but only received the deed for examination, and was not satisfied with it; but for what reason did not appear. Defendant had retained the deed for 10 years without making any objection thereto, and had not requested any other conveyance, or offered to return the deed. Payments of the purchase money had been made after the grantees had seen the deed and it had been delivered. *Held*, under all the circumstances, that the referee was justified in finding the delivery and acceptance of the deed, and that plaintiff was entitled to the relief sought.²

Appeal from general term, supreme court, Third department.

Action by Charles S. Smith against James A. Cole to compel defendant to give up for record a deed in which they were joint grantees. Judgment for plaintiff, and defendant appealed to the general term, where the judgment of the special term was affirmed, and the defendant appealed to this court.

Esek Cowen, for appellant. *C. M. Davidson*, for appellee.

FINCH, J. If the deed delivered by Lyon was so delivered and accepted as to become operative as a grant to all the grantees, or to the plaintiff alone in respect to his share or proportion, then the defendant has no right, because

¹Affirming 39 Hun, 248.

²As to what constitutes delivery, see *Flannigan v. Goggins*, (Wis.) 36 N. W. Rep. 846, and note; *Hill v. McNichol*, (Me.) 13 Atl. Rep. 883.

he happens to be in possession of the deed, to refuse to permit it to be recorded. In that event the right of the plaintiff to protect his title by a record of its evidence would be indisputable, and the defendant be wholly in the wrong in withholding the deed to prevent such record. But the debate on this appeal goes back of that assumption, and questions it. The referee has found as a fact that the deed was delivered to the defendant, and accepted by him. The learned counsel for the appellant challenges that finding; insisting that the testimony of the defendant that he refused to accept is wholly uncontradicted, and should have been taken as the truth, and that, although he was a party and interested, there were no circumstances justifying a contrary inference. It is at this point that we feel constrained to begin our difference with the appellant. More than 10 years have elapsed since the deed was delivered; nobody has offered to return it or tendered it back to the grantor; payments of purchase money have been made, without complaint of the sufficiency of the conveyance; and, what seems to me quite important, none of the grantees have ever demanded of the grantor any other conveyance of the property. It is, to say the least, quite strange and unnatural that the grantees in this deed, if they refused its acceptance, should for 10 years continue to pay for the property, and complete those payments, and never once demand the deed to which the contract gave them a right. Such conduct is scarcely explicable except upon the theory that they already had a deed with which they were satisfied. The attendant circumstances, therefore, did admit of inferences hostile to the defendant's evidence, which it was the duty of the referee to consider and weigh; and made the question one of fact, which we are not permitted to review.

We must assume, therefore, that the defendant accepted the deed. The plaintiff has also accepted it on his part, and the case comes back to the assumption with which we started, that one grantee of an effective and operative deed cannot, as against another, prevent its record upon that other's demand, unless there is force in another position taken by the appellant, which, at least, requires deliberate reflection. It is argued that a grantor who has contracted to convey the whole of the land, or the whole of his interest, to several grantees as co-tenants, although in unequal proportions, and delivers a deed to one of them, covering the whole property or interest, must be presumed, unless some special understanding to the contrary is disclosed, to have delivered the deed as a conveyance to all, and for acceptance by all, and, unless all accept, there is no delivery, since that delivery is to all or none. Otherwise, it is argued, one who sells the whole land to several, although they take in different proportions, may find himself conveying to one while his deed is rejected by others, and his one sale be broken into numerous fragments. I am impressed with the suggestion as quite reasonable and just, and can easily imagine a case in which its application might fairly be demanded; but its bearing upon the present controversy depends on another question of fact. The proof that any one of the grantees rejected the deed, and refused to accept it, comes wholly from the defendant as a witness. The referee has found as a fact that "the deed was duly and legally delivered and accepted;" and there was neither finding, nor request to find, that the acceptance of the deed was refused by some grantee other than defendant. In the absence of such a finding, the testimony of the defendant that one of the grantees refused to accept the deed is more or less contradicted by adverse inferences to which the facts give rise. No such grantee ever gave notice to the grantor of a refusal, or demanded another and different deed. All remained silent and uncomplaining for more than 10 years. The grantor had a right to infer that the deed, delivered for all, had been accepted by all. The foundation, therefore, upon which the argument rests, is in dispute, has not been found as a fact, or even requested to be found; and so we cannot assume it, or rest an argument upon it. If the question had gone to the referee, the same infer-

ences and modes of reasoning which led him to find, against the defendant's testimony, that he accepted the deed, would lead him also, against the defendant's testimony, to find that the grantee Heacock accepted it as well. The general finding of the referee of due and legal delivery and acceptance fairly means delivery to all and acceptance by all. We are unable to construe it otherwise, or to deny that the circumstances were such as to warrant inferences contradictory of the defendant's testimony; and so the conclusion of the referee must govern. This deed, according to defendant's statement, was shown to all the grantees; and, if they determined not to accept it, the further fact that, having no deed, they paid up the purchase money, and never demanded another, is incomprehensible. Whether or not the conclusion of the referee should have made the circumstances outweigh the evidence of the party is a question we cannot consider. He did do so, and it is our duty to say that the evidence he disbelieved was not uncontradicted. The judgment should be affirmed, with costs.

All concur.

(109 N. Y. 454)

INGLEHART *et al.* v. THOUSAND ISLAND HOTEL CO. *et al.*

(Court of Appeals of New York. June 5, 1888.)

1. FRAUDULENT CONVEYANCES—RIGHTS OF CREDITORS—CORPORATIONS.

In an action by a judgment creditor to set aside a sale under a prior judgment as fraudulent, it appeared that T. commenced suit against defendant on a valid debt, the payment of which was resisted on technical grounds, and recovered judgment, from which an appeal was taken, and the judgment reversed, that pending such appeal, and prior to its decision, T. assigned his judgment to K. for much less than its face value, defendant stipulating with K. to abandon its appeal, and consent to an affirmance of the judgment; that the property in question was sold under the judgment about three months after its entry on said stipulation, the purchaser paying full value therefor; that plaintiff took no steps to open or set aside the sale or the judgment of affirmance, or to litigate T.'s claim, delaying more than two years before bringing his present action. *Held*, that under Rev. St. N. Y. c. 7, tit. 3, § 4, declaring the question of fraudulent intent one of fact, and not of law, such facts did not show that the stipulation to affirm the judgment was, as matter of law, fraudulent, but that the question of fraud was one of fact.

2. SAME—ASSENT OF STOCKHOLDERS.

The president of a corporation entered into an agreement with a judgment creditor of the corporation that an appeal from the judgment by the corporation should be dismissed, and judgment of affirmance entered, and that such creditor should sell the corporation property under the judgment, bid the amount thereof at the sale, and, in case he became purchaser, convey the property to such president's brother at a price much less than the amount of the judgment. *Held*, that the corporation and all its stockholders having consented to the stipulation dismissing the appeal and affirming the judgment, the sale thereunder could not be set aside.

3. APPEAL—REVIEW—QUESTION OF LAW—PRESUMPTION.

Under Code Civil Proc. § 1337, providing that a question of fact arising upon conflicting evidence cannot be determined upon an appeal to the court of appeals unless where special provision is made by law, and section 1338, providing that, "upon an appeal to the court of appeals from a judgment reversing a judgment entered upon * * * a decision of the court upon a trial without a jury, * * * it must be presumed that the judgment was not reversed * * * upon a question of fact, unless the contrary clearly appears in the body of the judgment or order appealed from," etc., where an order of the general term reversing the judgment of the trial court does not declare that such reversal was upon the facts, the court of appeals will assume that it was for error in law.

4. EQUITY—JURISDICTION—REMEDY AT LAW.

Where a junior lien has not been cut off by a sale of the property under a prior lien, the holder of such junior lien cannot maintain an action to set aside the sale under the prior lien, as the intervention of equity is needless.

Appeal from general term, supreme court, Fourth department.

On January 27, 1874, the plaintiffs, Hiram F. Inglehart and others, commenced an action against the defendant, the Thousand Island Hotel Company, a corporation carrying on the hotel business at Alexandria Bay, Jefferson

¹Reversing 40 Hun, 634, *mem.*

county, and on April 9, 1875, recovered judgment for \$1,370.11. Execution was issued thereon and returned unsatisfied. On May 1, 1878, said hotel company had become the owner of the hotel called the "Thousand Island House," and the land on which the same is situated. On August 7, 1878, the defendant Alfred Tiley duly filed a mechanic's lien against the hotel company, and upon said hotel and the land on which the same stands. On March 19, 1874, said Tiley commenced an action to foreclose said lien, and on August 11, 1875, judgment was rendered in said action declaring said lien to the extent of \$3,936.74 damages and \$199.88 costs, and directing a sale of said property for the purpose of satisfying the same. From said judgment the Thousand Island Hotel Company appealed to the general term. Said appeal was submitted to the general term in October, 1876, and on December 29, 1876, a decision was made by the general term reversing the judgment and ordering a new trial, but the order of reversal was never entered in Jefferson county. Pending said appeal, and on November 27, 1876, the defendant Tiley sold and assigned said lien and judgment to defendants Kennedy, Spaulding & Co. On December 28, 1876, an agreement was made between Oren G. Staples, president of the hotel company, and said Kennedy, Spaulding & Co., the owners of the Tiley judgment, whereby it was stipulated that judgment of affirmance upon said appeal should be entered; that Kennedy, Spaulding & Co. should assign said judgment to Charles F. Staples, brother of said Oren T. Staples, for \$2,400, and that they would advertise and sell the hotel property and bid on such sale the amount of their judgment, and if they purchased the same they would convey it to Charles F. Staples on the payment of said sum of \$2,400. Judgment of affirmance was accordingly entered in Jefferson county clerk's office, December 30, 1876. At the time said stipulation was made, and judgment of affirmance entered, none of the parties to the same or their attorneys had any knowledge whatever of the action of the general term in reversing said judgment. The property was accordingly advertised for sale, and was bid off by Kennedy, Spaulding & Co. for the amount of the Tiley judgment, March 18, 1877. The plaintiffs in this action attended said sale, and bid upon the same, and the property was first struck off to them. They thereupon withdrew their bid, and announced to those present that the Tiley judgment had been reversed, and that the sale thereunder would be invalid. The report of sale was afterwards duly confirmed by the court, and the conveyance of the aforesaid property was executed to Kennedy, Spaulding & Co. This action was brought to set aside the judgment of affirmance of the Tiley judgment, entered upon stipulation, and the sale thereunder, and to restore the lien of plaintiff's judgment, or for permission to redeem the hotel property from such sale. The case was referred to Martin A. Knapp, Esq., who directed judgment to be entered dismissing the complaint. From the judgment entered upon the report of the referee the plaintiffs appealed to the general term, where the judgment was reversed, and a new trial ordered, and from the judgment and order of reversal the defendants the Thousand Island Hotel Company, Charles F. and Helen M. Staples, now appeal to this court, stipulating in their notice of appeal for judgment absolute in case the judgment and order appealed from are affirmed. Code Civil Proc. § 1337 provides that a question of fact arising upon conflicting evidence cannot be determined upon an appeal to the court of appeals, unless where special provision is made by law. Section 1338 provides that, "upon an appeal to the court of appeals from a judgment reversing a judgment entered upon * * * a decision of the court upon a trial without a jury, * * * it must be presumed that the judgment was not reversed * * * upon a question of fact, unless the contrary clearly appears in the body of the judgment or order appealed from." Rev. St. c. 7, tit. 3, § 4, provides that the question of a fraudulent intent in making a conveyance of lands shall be deemed a question of fact, and not of law.

Dennis O'Brien, for appellant. *Bradley Winslow*, for respondent.

FINCH, J. There is a difficulty in maintaining the decision of the general term which we are unable to overcome. The foundation of the plaintiff's right of action, treated as a creditors' bill, is fraud. If that be absent, he has no ground of complaint. The trial court did not assert its existence; and, when requested to do so, first, as matter of fact, and next as matter of law, refused the request as to each. The general term reversed the judgment; but since its order does not declare that such reversal was upon the facts, we must assume that it was for error in law. Code Civil Proc. §§ 1337, 1338; *Kane v. Cortes*, 100 N. Y. 132, 2 N. E. Rep. 874. We cannot go to the opinion to ascertain. *Van Tassel v. Wood*, 76 N. Y. 614. We are thus left to inquire, what was the error of law involved in the referee's decision?

The respondent first claims, that, upon the facts found, the purchase of the property by Staples was necessarily and inevitably with a fraudulent intent, and no other inference can possibly be drawn; whereby there followed the conclusion of fraud in law, which the referee, although requested, refused to find. The pivot on which the whole transaction swings is the affirmance of the Tiley judgment by stipulation. If that had not been done, the sale which did occur would not have taken place. If that affirmance could have been honest, fair, done in good faith, and without fraudulent intent, then the question whether it was so done is a question of fact, and not of law. It needs only a study of the situation to discover that the stipulation to affirm the judgment was not necessarily and inevitably fraudulent. Tiley had an honest debt for its full amount. No answer to it as a debt is pretended. He was entitled to his pay up to the full amount. He sought to enforce it as a lien on the hotel property, and brought his action for that purpose. The hotel company defended upon technical grounds. These were at least debatable, and certainly not meritorious. Tiley succeeded, and obtained judgment, and the company appealed; all the other parties submitting to the decision. Before the decision of the general term, the company stipulated to abandon its appeal, and consented to an affirmance of the judgment. Beyond any question, it may have acted honestly in so doing, and Staples might without fraud advise and urge that action. It is not fraudulent conduct to abandon an effort to deprive an honest creditor of the whole or some portion of his debt. Nor is one creditor hindered or delayed by ending an effort to hinder or delay another. At this time Tiley had sold his debt and his lien to Kennedy, Spaulding & Co., without the knowledge of Staples. The lienor, oppressed by the delay, or fearful of the dangers of the contest, sold at a sacrifice. The firm had a right to buy, and buy cheap, for they bought a lawsuit, with its contingencies. They took Tiley's place, and had all his rights. They were entitled to every dollar of his debt, and defrauded nobody if they got it. Standing in that attitude, they enforce their judgment by a public sale after due notice. Other creditors were at liberty to bid, and did bid. But it is said a fraud was practiced upon them by failing to disclose the stipulation of affirmance. The facts tend to dispel that idea. The judgment on the stipulation was entered on the 30th day of December, 1876, and became on that day a matter of record open to every observation. The sale did not take place until the 13th of the next March. For almost three months public notice by the record had been given of the fact of affirmance. There is no finding, and no request to find, that the plaintiffs were ignorant of this fact thus publicly disclosed, and which it was their duty to know. The fact of the reversal on the 29th day of December, 1876, was known to plaintiffs at the sale, for they declared the fact. If they had examined the records, as we may presume that they did, they knew that no order of reversal had been entered, and they saw that the assignees of Tiley were enforcing the judgment as affirmed. Before the sale, therefore, they knew all the facts, and were in no manner blinded

or deceived. They took no steps to open or set aside the sale, or to set aside the judgment of affirmance by coming in as parties and seeking to litigate the Tiley claim, but two years later begin this action, seeking to restore the lien of their judgment upon the property. The purchasers bid up to the full amount of the Tiley judgment, and that amount was the full value of the property; for, while it is found that such was the value, there is not a word of proof, or even a claim, that it was worth a single dollar more. What happened then, was this only: the assignees of Tiley took the property at its fair and full value, in discharge of an honest debt. Assuredly there is no fraud in the result, for that is that one creditor has collected his debt by taking the debtor's property at a full and fair valuation, and by force of a preference to which he was lawfully entitled. These considerations show, not that there may not have been a fraudulent intent, but that the question is one of fact, of conflicting inferences, and not one in which a conclusion of fraud is inevitably to be drawn as a conclusion of law; for, if the title of Kennedy, Spaulding & Co. was good, they were at liberty to sell it to whom they pleased, and at such price as they could obtain and chose to accept; and no charge of fraud could be sustained. I do not see, therefore, how it is possible to sustain the reversal of the general term upon the ground that the transaction was fraudulent in law. If Tiley had remained owner of the judgment, and it had been affirmed by stipulation, and he had bid the property in for the full amount of his judgment, which was its fair value, and then sold it at half price to Staples, who would have been wronged? What creditor would have been defrauded? Does it alter the case that not he, but his assignee, did exactly that? If, on a trial before a jury upon an issue of intent to defraud creditors, these facts had all been proven, and the defendant asked to go to the jury upon the question, and the plaintiff asked that a verdict in his favor be ordered by the court, I think it very clear that the last request could not have been properly granted, and the question would have been one for the jury. That supposition tests the action of the general term. The referee refused to find fraud even as a fact upon the conflict of evidence. The general term might have reversed on the facts because they were of a contrary opinion, but did not do so, and stand upon the ground that there was fraud in law, and the facts admit of no other possible inference. In that, we think, they erred. The legislature has been averse to the rule at one time adopted by the courts that fraud in such cases was a question of law, and sought to end the controversy which had raged almost bitterly by explicitly enacting that in such cases the question of fraud should be one of fact. [Rev. St. c. 7, tit. 3, § 4.] And, while it may nevertheless be true that facts may be proven from which the inference of fraud is so necessary and inevitable that a verdict to the contrary would not be endured, and so a fraud as matter of law be established, yet this is not such a case, and cannot properly be so treated.

But there is another aspect of the case presented by the facts, which depends upon the relation in which Staples stood to the hotel corporation as one of its directors and its general manager, and which steers clear of the question of fraud. It is claimed that by reason of that relation his action was voidable at the suit of the corporation or its creditors, and he may be compelled to disgorge the profit which he has unlawfully made. Going back to the moment of time when Staples agreed that the judgment should be affirmed, it is pointed out that his duty to the corporation and as manager and director was put in collision with his interest as an individual; that his duty was not to consent to an affirmance of the judgment, while his personal interest was the other way; that his duty was, on the sale, to get the highest price possible for the property of the company, while his interest was the reverse; and that a court of equity will not stop to inquire in such a case whether the trustee has acted honestly, but will never endure that he act at all under a temptation destructive of his duty, and will set his action aside, or compel him to

account for any profits he may have made. But it is to be observed that this rule has its appropriate application where the trustee deals with his company, and so may be said to be acting on both sides, or dealing with himself. In the present case Staples was not dealing with the corporation. He bought nothing of that, and made no contract with it, but dealt wholly with third persons, to whom he owed no duty, and with whom he was at perfect liberty to make the best bargain possible. He touched the corporation but at a single point, and that was in the stipulation of affirmance. It may be said of that action that his duty and his interest were, as it respects such stipulation, in collision. But the act was not his. It was the act of the corporation itself, executed by its attorney in the action. The corporation assented. It does not complain. Apparently all four of the stockholders concurred, and no wrong was done them. Nobody complains or can complain, unless it be the creditors. But Staples owed no duty to them to refuse or prevent the proposed affirmance, or continue an unjust litigation for their benefit. He owed them the duty of paying the just debts of the company out of its property. That is what he was doing. He was arranging to satisfy the Tiley debt, which was a prior lien. He owed them the duty of not wasting the corporate property. He was stopping the waste of an unjust defense, and an expensive litigation. If it be said that part of Tiley's claim was not a debt of the corporation, and the trustee was bound to resist it, the answer is, we do not know that, and cannot try that question over again. The four persons who owed such portion were the same four who became the corporation, and may have assumed in their corporate character, by agreement or by conduct, the duty of payment resting on them as individuals, or the lien may have clung to the building despite the change of title. But they did defend and were beaten. It is true, there was a reversal by the general term, but we do not know even the ground of that reversal, except as recited in the opinion below and by reference to the reports of the court. Assuming the reversal to have been as stated, it is a true, if somewhat trite, observation, that it is easy after the battle to tell how it should have been fought. Nobody knew beforehand that a reversal would be secured, and nobody knows now what the contingency of a new trial or an appeal to the court of last resort would have involved. Courts and judges sometimes differ, and it is not always easy to be sure who is right and who is wrong. The creditors of the corporation had no equity to require that the directors should persist in their appeal, and no shadow of wrong was done to them when the corporation defendant submitted to the judgment of the court already rendered, and allowed an honest creditor to collect an honest debt. And so we discover no dealing between Staples and the company, no contract of his with the corporate body of which he was a member, no act of his own which the company could avoid as in fraud of his duty to it; but simply an act of the corporation itself, performed, not by Staples, but by its own chosen and authorized attorney, which it might equally have done if Staples had already received an actual assignment of the judgment,—an act in which his participation as a stockholder assenting to it may be the subject of scrutiny and the basis for alleging an actual fraudulent intent, but involves no contract or dealing between himself and the company, or is voidable as such.

It is further contended that the sale on the Tiley judgment did not cut off the plaintiff's judgment because there was no *lis pendens*, and they were not made parties to the foreclosure. If that be true, the intervention of equity was needless, and no basis for this action was established. The plaintiffs, in that event, have their lien, and may enforce it. This suit assumes that it has been lost, and asks to have it restored. The order of the general term should be reversed, and judgment on the report of the referee affirmed, with costs.

All concur.

(109 N. Y. 421)

UHLMAN v. NEW YORK LIFE INS. CO.

(Court of Appeals of New York. June 5, 1888.)

1. INSURANCE—TONTINE POLICY—RELATION BETWEEN COMPANY AND POLICY-HOLDER—EQUITY—ACCOUNTING.

The relation of a life insurance company to a policy-holder under the tontine plan is not that of trustee and *cestus que trust*, but is simply one of contract; and a court of equity cannot, therefore, direct an account between said parties concerning the funds arising from said plan, by reason of its jurisdiction over trusts.

2. SAME.

Nor has a court of equity jurisdiction to order such account simply because the transactions of the company from which the fund to be apportioned under said plan arises, are complicated and intricate.

Appeal from general term, court of common pleas, city and county of New York.

Action by Frederick Uhlman against the New York Life Insurance Company for an account of the receipts, etc., under the tontine plan, of which plaintiff was a policy-holder. At the special term an interlocutory order was made directing an account. Upon appeal to the general term, this order was set aside, and a new trial awarded, from which judgment of the general term plaintiff has appealed.

Alex. Blumenstiel, for appellant. *Wm. B. Hornblower*, for respondent.

PECKHAM, J. The plaintiff commenced this action for the purpose of obtaining an accounting from the defendant in regard to matters stated in the complaint. It was therein alleged that on the 29th of December, 1871, the defendant issued to the plaintiff a certain policy of insurance, and that the plaintiff had duly complied with all the conditions of said policy; that it was a policy known as "The Ten-Year Dividend System Policy," and that the ten years expired in December, 1881; that all the premiums had been paid by the plaintiff during that time, and the policy was in force at the time of the commencement of this action. The plaintiff then alleged, upon information and belief, that the defendant, during this time, had wrongfully appropriated the surplus and profits, or a large portion thereof, belonging to the plaintiff under the policy, and had diverted the same to other purposes than the benefit of the plaintiff, and that it had not kept the fund and its accumulations separate, and that defendant refused, for dishonest and unlawful reasons, to furnish the plaintiff with an account, as demanded. Plaintiff also alleged that defendant became a trustee of the various moneys that were paid to it on account of the policies of the class to which the plaintiff's policy belonged, and that plaintiff, relying upon the terms of said policy and the supposed honesty of the defendant as a trustee of the funds above mentioned, took out the said policy, and paid the premiums required, and assumed the risks and conditions mentioned therein, and that he had in all things duly performed all the conditions of the policy. The plaintiff then prayed judgment that the defendant be compelled to render a true and just account to the plaintiff of the names of the parties insured by it under the system in which the plaintiff had been insured, the amount of each and every policy thus issued, a detailed account of premiums paid into and received by the defendant on account of said policies, the amount of surplus and profits which each of said policies had earned, together with a number of other details in regard to the accumulation and disposition of such fund. Judgment was also demanded that the defendant be compelled to make good and pay all such sums which it had unlawfully misappropriated or expended out of said fund, and that it be compelled to issue to the plaintiff an annuity bond of the amount to which he is entitled, or, at his option, to pay the value in cash to him; and that a receiver of the fund,

and all the books and papers connected therewith, be appointed, pending this action, as well as after judgment, if it is deemed advisable and proper. A copy of the policy issued by the defendant to the plaintiff was attached to and formed a part of the complaint, by which it appeared that on the 29th of December, 1871, the defendant insured the life of the plaintiff in the amount of \$5,000, for the term of his natural life, commencing at noon on that day; that the policy was issued to and accepted by the assured "(1) on the special agreement and conditions relative to policies on the ten-year dividend system;" and "(2) that the ten-year dividend period would be completed on the 29th of December, 1881; (3) that no dividend should be allowed or paid upon the policy unless the person whose life is assured shall survive until the completion of the ten-year dividend period, and unless the policy shall then be in force; (4) that all surplus or profits derived from such policies, on the ten-year dividend system, as shall cease to be in force before the completion of their respective ten-year dividend periods, shall be apportioned equitably among such policies of the same class as shall complete their ten-year dividend period; and that, previous to the completion of its ten-year dividend period, this policy shall have no surrender value in cash or in a paid-up policy." The defendant answered this complaint, and denied all the allegations of misappropriation or wrong-doing, and alleged the proper and equitable apportionment of the fund, and an offer to give to the plaintiff what he was entitled to therein, either in cash or in shape of an annuity bond. The issues thus joined came on for trial at a special term, and upon the trial plaintiff abandoned all allegations as to any misappropriation of the fund or any wrong-doing whatever in regard thereto, and based his cause of action upon his right to an accounting from the nature of the transaction, as appearing in the contract evidenced by the policy of insurance issued to him. The plaintiff claimed that, upon the mere proof of the issuing of a policy such as was issued to him, and that it had been kept alive during the 10-year period, and was in full force at the time the dividend was payable, gave him the right to demand from the defendant a full and complete accounting of the debit and credit items of what he terms the "Tontine Account," with a list of the members entitled to participate therein, and also all the details demanded in his prayer for judgment in the complaint. He maintained that it was unnecessary to prove any of the allegations of misappropriation or improper action, or even any mistake in relation to the principles upon which the apportionment had been made; but that, from the mere nature of the transaction itself, he had the right to maintain an action to compel the defendant to make a full accounting in regard to all the matters spoken of. The special term substantially held with the plaintiff, and granted an interlocutory judgment, providing for the taking of an account, and for the entry of a judgment thereon for the amount of cash which should be found to be due the plaintiff, or, at his option, an annuity bond for an equal amount. The defendant, under section 1001 of the Code, upon a case made, moved for a new trial at the general term, and, after argument of that motion, the general term granted the new trial, and vacated the judgment above mentioned. From the order granting a new trial the plaintiff has appealed here, giving the usual stipulation in such cases. He claims now to maintain the action, and to have the right to an accounting, upon the ground (1) that the relation between the plaintiff and defendant is not one solely of contract, but that, as to the participation in the profits of this tontine system, that relation is similar to one of trustee and *cestui que trust*; (2) on the ground that the account itself, although there is but one side to it, is of a nature so difficult and complicated that it cannot be properly tried in an action at law, and hence this action is the appropriate remedy. The right to maintain this equitable action, based upon either or both these grounds, will therefore be discussed.

As to the first. We are convinced, after a careful examination of the char-

acter of the relations existing between these parties, that it cannot be said that the defendant is in any sense a trustee of any particular fund for the plaintiff, or that it acts, as to him and in relation to any such fund, in a fiduciary capacity. It has been held that the holder of a policy of insurance, even in a mutual company, was in no sense a partner of the corporation which issued the policy, and that the relation between the policy-holder and the company was one of contract, measured by the terms of the policy. See *Cohen v. Insurance Co.*, 50 N. Y. 610; *People v. Insurance Co.*, 78 N. Y. 114. Upon the payment of the premiums by the various policy-holders embraced in the tontine class, the money immediately becomes the property of the company, and no title thereto remains in any of the policy-holders. Under such a policy as this, there is no obligation on the part of the corporation to keep the premiums paid on such policies separate and apart from its other funds. Nor is there any obligation on its part to invest such funds in any particular way, or at any particular time. The contract contemplates the fact that the funds will be invested; but the character of such investment is left absolutely to the discretion of the defendant, except as it may be limited by the laws of the state. This question of separate investment, and what use should be made of the money received on policies of this description, has been discussed in the late case of *Bogardus v. Insurance Co.*, 101 N. Y. 328, 4 N. E. Rep. 522, in an opinion by RUGER, C. J. The policy in that case was substantially identical with the one in question; and what was said by the chief judge in that case upon this subject may be repeated and reaffirmed here. It is true that, in speaking of the rights of the plaintiff in that case, (which arose upon a failure of the plaintiff to keep the policy in force during the whole of the tontine period,) the chief judge, while holding that the failure to keep the policy in force was fatal to any right of action which the plaintiff might otherwise have had, stated that "the method to be adopted by the defendant in managing the funds paid to it by its several policy-holders was necessarily, under the insurance laws of the state, confided to its judgment, discretion, and skill, and the plaintiff has no cause of complaint in reference thereto, except in the event of the survivorship of Abraham Bogardus for ten years, and the continued existence of her policy. Upon the happening of such event, and not until then, she would become entitled to an accounting as to such fund." It was clearly not before the court, and the learned judge probably did not have in mind the particular rights as to an accounting, or under what circumstances those rights would exist in case the plaintiff's policy had been continued in force, and the question of those rights had been the question then to be decided. The subject under discussion was as to what, if any, rights the plaintiff in that case had, with the fact existing that the policy which was the foundation of the whole transaction had ceased to exist, and by the terms thereof had become forfeited before the action was commenced. It had ceased to exist because the plaintiff had refused or neglected to pay the premiums as they became due; and the plaintiff gave, as a reason for refusing to pay them, certain facts which it was claimed were sufficient to justify the refusal. This court decided against the plaintiff on that question, and that was the only proposition that was directly decided. Here the question is distinctly up as to what rights the plaintiff had after the expiration of the 10-year period, the policy itself being in force; and, unless there was some relation fiduciary in its nature, the right to an accounting on that ground cannot be claimed. We think the payment of a premium by the policy-holders of this class of policies is much more like that of a deposit in a bank by a depositor, as to which it is conceded that there is no such relation of trustee and *cestui que trust*. See *Foley v. Hill*, 2 H. L. Cas. 32. By the very terms of this policy, the amount of the fund is necessarily uncertain. What it may be depends, not only upon the number of policies taken out during the period,

but upon the number of policies in the class which may lapse or become forfeited, and upon the amount of the proper expenses of the company which shall justly become chargeable to this fund. So that the dividend which may come to the plaintiff, or any other policy-holder, depends upon numerous contingencies; and in relation to all these matters the parties have agreed in specific terms, contained in the policy itself, that this surplus or fund, derived as already stated, "shall be apportioned equitably among such policies of the same class as shall complete their ten-year dividend period." Here is the extent of the obligation of the defendant,—that it shall equitably apportion this sum. As has been said, there is no title in the plaintiff to any specific moneys. There is in reality no specific or separate fund, as it is made up simply by a system of debits and credits contained in the books of the company, which debits and credits are made during the running of the tontine period. There is no separation of the fund belonging to this system, and no legal necessity for such separation from any other fund or property belonging to the defendant. The situation of the parties is that of debtor and creditor simply, the amount of such debt being determinable by this equitable apportionment, which, taking the language of the policy into consideration, necessarily means that the apportionment is to be made by the corporation through its officers. The case of *Martin v. Brooks*, 94 N. Y. 71, has no tendency whatever to uphold the plaintiff's claim. In that case the plaintiff had deposited with the defendant a certain sum of money, upon the trust that defendant would use it in the purchase of certain property in which plaintiff was to have one-half, and the defendant the other half, interest. It was held that the money thus placed in the defendant's hands continued the property of the plaintiff, and was impressed with a trust in the hands of the defendant which entitled the plaintiff to call him to an account as to the disposition of the money, the purchase of the property, its price, etc., and that the burden rested upon the defendant of showing these facts. We have no doubt of the correctness of that decision, and just as little that it is no authority for the plaintiff's contention herein. We do not, however, accede to the claim of the defendant herein, to its full extent, as made in the brief submitted, which is that the apportionment, as made by the defendant, is absolutely and at all events conclusive upon the policy-holders. We hold that, under the terms of this policy, the apportionment was to be equitably made, and in the first instance by the defendant's officers or agents. But, inasmuch as the agreement is that the apportionment shall be an equitable one, the question of what is an equitable one, all the facts and circumstances being known, may be one over which the courts have supervision. *Prima facie*, the apportionment, as made by the defendant, should be regarded as a compliance with the terms of the policy; or, in other words, should be regarded as an equitable apportionment. It should be thus regarded, because, by the terms of the policy, the duty of making it is cast upon the corporation, and it ought to be presumed that the defendant has performed its duty, instead of presuming that it has failed to do so. But the question is still left, has or has it not complied with its agreement to make an equitable apportionment? And the plaintiff, and all others similarly situated, have the right, upon proper allegations of fact showing that the apportionment made by the defendant is not equitable, or has been based upon erroneous principles, to have a trial, and make proof of such allegations, and, if proved, the court will declare the proper principles upon which the apportionment is to be made, so as to become an equitable apportionment. The various cases cited in the brief submitted, where the legislature has appointed parties to apportion stock in a bank created by its laws, etc., and where the courts have held that the apportionment by the board thus created was final, do not, we think, conclude us here. The principles are entirely different. But as the plaintiff herein has made no proof of any misappropriation or wrong-

doing, we are of the opinion that, upon the first question argued, he has failed to show any right to an accounting by the defendant.

The second ground upon which an accounting was claimed, was that the account was complicated. There are undoubtedly many expressions in the books stating that, where accounts are so difficult and complicated that it would be impracticable to examine them upon a trial at *nisi prius*, equity takes jurisdiction of an action, even on that ground alone. To this effect are 1 Story, Eq. Jur. § 445; Will. Eq. Jur. 91, 3 Pom. Eq. Jur. § 1421. In note 4 of the last above cited section, after stating the rule as above mentioned, (that the account should be so complicated that a court of law would be incompetent to examine it at *nisi prius* with the necessary accuracy,) it is said: "But, under the present practice in England, matters of account may now be referred to officers or referees, so that the rule, as above stated, can now hardly be followed." See *Railway Co. v. Nixon*, 1 H. L. Cas. 119-121. In speaking of an equitable jurisdiction to grant an accounting, this court, in *Marvin v. Brooks*, *supra*, stated (per FINCH, J.) that "the best-considered review of the authorities puts the equitable jurisdiction upon three grounds, viz.: the complicated character of the accounts, the need of a discovery, and the existence of a fiduciary or trust relation. The necessity for a resort to equity for the first two reasons is now very slight, if it can be said to exist at all, since a court of law can send to a referee a long account, too complicated for the handling of a jury, and furnishes, by an examination of the adverse party before trial, and the production and deposit of books and papers, almost as complete a means of discovery as could be furnished by a court of equity." Judges in the English equity courts have been somewhat slow to maintain jurisdiction in a case where the ground thereof was solely that the account was complicated; and, although there are very many cases in which the statement has been made that equity would sometimes take jurisdiction on that account, yet in most of them it is seen that there were added to that other grounds making it proper for equity to assume cognizance of the cases. However it may be, it has at least been stated that whether or not the court would take jurisdiction upon the sole ground of the account being complicated was a matter largely within the discretion of the court. See *Railway Co. v. Martin*, 2 Phil. Ch. 758; also *Phillips v. Phillips*, 9 Hare, 471, and *Bliss v. Smith*, 34 Beav. 508. We are not inclined to enlarge the principle, or to hold that in all cases the mere fact of a complicated account being at issue will oblige the court to take jurisdiction. Considering the fact as stated by FINCH, J., in the case above alluded to, that the plaintiff has now all the facilities for examining a complicated account in an action at law that he would have in equity, if there are other reasons—important and material ones—existing against the assumption of jurisdiction by a court of equity of an action of this nature, those reasons should have their full weight; and if, after giving due effect to all the circumstances, it appears that there would be a balance of very great inconvenience and possible oppression to the defendant, the plaintiff should be remitted to his action at law to recover his damages, in which action, if the taking of an account becomes necessary, it may be easily taken. In such a case as this, we think there is such balance of inconvenience existing in favor of the defendant. Upon the theory of the plaintiff, every one of the policy-holders of his class has a right of action such as this against the defendant to call it to an account, and to cause it to give, in the trial of the action, a detailed account of every transaction (proved by reference to or the production of its books, and by the oaths of its officers) which took place, from the commencement to the termination of the tontine period, in regard to those matters material to be known upon the question of an equitable apportionment of the fund. There would be no necessity for an allegation, much less the slightest, even *prima facie*, proof of wrong-doing, or that there

had been any mistake made by the company in the apportionment made by it. But the mere fact that an individual was the owner of one of those policies in force at the termination of the tontine period would give him a right of action, and a right to demand this proof from the defendant. The mere statement of such a fact, it seems to us, is conclusive against the existence of any such right. Of course, it is not to be supposed that each individual policy-holder would avail himself of this right; but the fact that each one might would place the company in the power of unscrupulous parties to take advantage of it for the purpose of endeavoring to levy contribution from it, which it might pay in order to secure freedom to itself from troublesome, expensive, unnecessary, and wholly disingenuous investigations (and made in numerous suits) into the affairs of the company, and its accounts, running through many years. That this should be permitted without an allegation, even on information and belief, that any fraud, mistake, or impropriety in the accounts, or in the manner of their statement, or in the result attained, had been made by the officers or agents of the company, would seem to be intolerable. Our attention has been called to a decision by the Massachusetts court of *Pierce v. Society*, 12 N. E. Rep. 858. That case was decided under the peculiar wording of a statute of Massachusetts in regard to complicated accounts, and we do not think it should be followed by the courts of this state.

Having examined the two grounds upon which the plaintiff based his right to maintain this action, and coming to the conclusion that neither is tenable, it follows that the general term of the common pleas correctly granted a new trial, and that its order to that effect should be affirmed, and judgment absolute given against the plaintiff, with costs.

All concur, except RUGER, C. J., not voting.

(100 N. Y. 504)

CARR v. PROVIDENCE-WASHINGTON INS. CO.¹SAME v. SECURITY INS. CO.²

(Court of Appeals of New York. June 5, 1888.)

MARINE INSURANCE—ACTION ON POLICY—ACTUAL TOTAL LOSS.

Where a wrecked vessel, insured against "actual total loss only," is allowed by the insurers to be sold to satisfy a claim of salvors employed by the insurers, who had the right under the policy to rescue the vessel, the insured not being a party to the contract with the wreckers, nor having notice of the sale, and having served a notice of abandonment which was not accepted, the insurers are precluded from insisting that the vessel was not a total loss within the meaning of the policy.

Appeals from general term, supreme court, Fifth department.

Actions on a marine insurance policy by Michael Carr against the Providence-Washington Insurance Company and the Security Insurance Company. Judgment for plaintiff, affirmed by the general term, and defendant appeals.

Benjamin H. Williams, for appellant. *L. W. Thayer*, for respondent.

ANDREWS, J. The insurance on the *Almeda* was against "actual total loss only." In the month of November, 1877, the vessel was stranded at Port Glasgow, on Lake Erie. The plaintiff, owner and master of the vessel, gave immediate notice of the disaster to the agents of the undertaking at Buffalo. They sent one McKenna as their agent to Port Glasgow, who, after examining the wreck, directed the plaintiff to remove the rigging and whatever he could to the land. The plaintiff, in his evidence, described the situation of the vessel, and the efforts he made to rescue her. He said: "When the vessel struck the beach, we went on broadside. Her plankshire and her keelsons were crushed, and she humped up in the middle about three feet. Her center-board box was all started. The head ledges of the center-board box were started. The rudder was unshipped, and washed away. She was all started in the transom,—all started loose. She filled with water up to the level of the lake. I remained with her forty-eight hours to do what I could to save her, and every man I had aboard worked to the last minute. I then left her, and came to Buffalo. I left the mate in charge of the vessel. Served a notice on the insurance agent of the loss." The plaintiff further testified that McKenna said: "The vessel was not worth getting off; that he was working for the insurance company, and he should have to get her off if he only took a piece of her to Detroit; that she was insured for a total loss, and it would not be a total loss if he got a piece of her off." On the 8th of November, 1877, the plaintiff served written notice of abandonment on the underwriters, but they refused to accept an abandonment, but determined to make an effort to save the vessel. They thereupon bargained with a company of wreckers, and agreed to pay them \$2,500 on condition that they got the vessel off and delivered her at Buffalo or Detroit; but if they failed they were to receive nothing. The wrecking company succeeded in getting off the vessel, and towing her to Detroit, and on reaching Detroit she sunk near the shore in shallow water. In January, 1878, the underwriters not having paid the salvage expenses, the vessel was libeled by the wrecking company for the \$2,500, and in the same month was sold by the marshal under a decree in admiralty in that proceeding, at public sale, for the sum of \$675, which, as the proof tends to show, and as the referee finds, was her full and fair value at that time. The purchaser afterwards fitted her up as a barge at an expense of from ten to fifteen hundred dollars, and she was in use as a barge for some years afterwards. The evidence also tends to show that the cost of repairing the damage to the vessel caused by the disaster would have exceeded her value when repaired. The

¹ Affirming 33 Hun, 86.

² Affirming 33 Hun, 686, *mem.*

plaintiff was not a party to the contract with the wrecking company. It was exclusively a contract between the underwriters and that company, made by the underwriters on their own account for the purpose of rescuing the vessel, and thereby preventing an actual total loss under the policy. The plaintiff had no notice of the contract or of the proceedings in admiralty. The underwriters did not tender the vessel to the plaintiff, or offer to restore her, nor is it claimed that they demanded of the plaintiff reimbursement for the salvage expenses. The rigging and other articles taken from the vessel were taken to Buffalo, and were also sold under process in the admiralty proceedings. The question whether, under the circumstances proved, there was an actual total loss of the *Almeda* within the policy has been argued with great ability by the respective counsel. There can, we suppose, be no doubt that there may be an actual total loss of a vessel within the true meaning of that phrase in a policy of insurance, although the vessel remains *in specie*; or, in other words, there may be an actual total loss according to the law of marine insurance, although the vessel is in existence as such when the loss is claimed. "Actual total loss" does not imply in all cases the actual physical destruction of the thing insured. The case of hostile capture or condemnation, or where the ship is justifiably sold by the master from a necessity springing from a peril within the policy, are illustrations. In these cases the ship remains *in specie*, but is irretrievably lost to the owner, and this is considered as constituting an actual total loss which renders the insurer liable without abandonment. *Benecke, Ins. 336; 2 Pars. Mar. Ins. 74, 86, and cases cited.* It is insisted on the part of the plaintiff that the same principle applies to a case where the vessel has sustained damage from a peril within the policy, which, although not destroying its character or identity as a vessel, nevertheless has injured it to such an extent that the cost of repairs will exceed the value of the vessel when repaired. There is no legal distinction, it is claimed, between the total loss of the thing and a total loss of the value of the thing, and that in the one case as well as in the other there is as to the insured an actual total loss within the fair meaning of the policy. We are not prepared to assent to this construction of the contract. We have not been referred to any authority which supports it. The general rule as to what constitutes the total loss of a ship is stated by SEWALL, J., in the case of *Murray v. Hatch*, 6 Mass. 465. He says: "If the ship is afloat, or if it is practicable to put her afloat, and if she is capable of being repaired at any expense, it is not a total loss within the meaning and intent of the policy." The cases in this state in respect to memorandum articles, where the insurer is liable only for an actual total loss, in the main sustain the view that total loss in value, of memorandum articles, so long as they remain *in specie*, is not an actual total loss of such articles within a policy of marine insurance. *Maggrath v. Church*, 1 Caines, 196; *Le Roy v. Gouverneur*, 1 Johns. Cas. 226; *Wadsworth v. Insurance Co.*, 4 Wend. 33; *De Peyster v. Insurance Co.*, 19 N. Y. 278; but see *Wallerstein v. Insurance Co.*, 44 N. Y. 204. The case of *Burt v. Insurance Co.*, 78 N. Y. 400, was a case of insurance on a ship against "actual total loss" only. The question of what constitutes an actual total loss of a vessel within the law of marine insurance was elaborately considered in the opinion of TALCOTT, J., delivered at general term, and the authorities were reviewed. The judgment was affirmed in this court substantially upon the opinion of the general term. We have referred to the question here for the purpose of showing that there is much doubt at least of the correctness of the proposition urged by the counsel for the plaintiff, that an insurance on a vessel against "actual total loss only" covers the case of a total loss of value, although the ship remains in the form of a ship, capable of being repaired at some cost, and is not placed, by sale or otherwise, beyond the power of the insured to procure her arrival.

But we are of opinion that the judgment in this case should be affirmed for the reason that the underwriters permitted the vessel to be sold upon a

lien created by themselves, after they had taken possession of the vessel under the authority conferred by the policy, whereby the title was irrevocably lost to the plaintiff without fault on his part. The policy provides that the underwriters, in case of loss or misfortune, may "interfere and save the vessel, and that in case the insurance was against total loss only, and no claim for the same was sustained, then the whole of such expenditure, and the amount paid or incurred by the insurers, should be a lien upon the vessel, and recoverable against the vessel or the insured, at the option of the insurers." The underwriters, under the policy, had an undoubted right to save and restore the vessel, and thereby render it certain that there was no total loss under the policy. The clause quoted entitled them, if, acting in good faith, they succeeded in rescuing the vessel, to reimbursement for their expenses either out of the vessel or from the insured. The defendants refused to accept an abandonment, as they had a right to do. They denied that there was an actual total loss, as claimed by the plaintiff, and what they did in the way of rescuing and saving the vessel was to demonstrate the fact as claimed by them. The underwriters having elected to take possession of the vessel under the rescue clause, it is plain, we think, that they could neither sell the vessel voluntarily or permit it to be sold under judicial process in satisfaction of a lien which they had created, without thereby making the loss to the plaintiff an "actual total loss," whatever may have been its original character. The sale under the decree in admiralty divested irrevocably the title of the plaintiff to the vessel. He was in no default. The policy authorized a lien in favor of the insurers for their reimbursement. But they created a lien in favor of the wrecking company, and, without notice to the plaintiff, or calling on him for reimbursement, permitted the vessel to be sold to satisfy it. We think the underwriters are and ought to be precluded from insisting that the vessel was lost by the sale, and not by the sea peril. If the vessel had sunk in the middle of the lake when in tow of the tug on the way to Detroit, could the insurers have insisted that she was not an actual total loss within the policy, because she was not totally destroyed when lying at Port Glasgow, before the insurers took possession? The insurers were not bound to measure the vessel, but, having undertaken to do so, they were bound to restore her to the plaintiff if they succeeded in saving her. They have not restored her, and now cannot do it.

The point that the mortgagee of the vessel should have been made a party was not taken by demurrer or answer, and was therefore waived. Code, § 499. The contract was made with the plaintiff. He had an interest as owner of the property in the collection and application of the insurance money. The one-year limitation in the policy has attached so that an action could not now be maintained by the mortgagee in his own name. The plaintiff was a proper party, and will hold the proceeds of the policy for the benefit of the mortgagee, if the latter is equitably entitled to them. We think the judgment should be affirmed.

All concur.

(109 N. Y. 406)

PEOPLE v. HAWKINS.

(*Court of Appeals of New York. June 5, 1883.*)

1. HOMICIDE—INSANITY AS A DEFENSE—DECLARATIONS OF DEFENDANT.

Upon trial for murder, where insanity is relied upon as a defense, statements of defendant, made to a physician six weeks after the killing, as to his condition at the time of the homicide, are inadmissible in evidence.

2. SAME—MURDER—INSTRUCTIONS.

Upon trial for murder, the evidence for the state all tending to prove deliberate and premeditated killing, while the prisoner claimed it to have been upon sudden impulse, the court after correctly instructing as to the distinctions between the different degrees of murder, referring to the various dispositions of men, said that some were of a considerate nature, and others more prone to violent passion; the

minds of some more active, enabling them to reach conclusions quicker than those of more sluggish temperament; and it was therefore for the jury to say whether in the particular act there was deliberation sufficient to make it murder in the first degree; that it was essential that some thought or reflection should precede the act before it could be called deliberate, but that if there was such thought or reflection, followed by determination, that was deliberation within the meaning of the law; and, if they believed the evidence of the prosecution, there was deliberate premeditation of the crime, but that, if they believed the defendant's testimony, it was, in the opinion of the court, a case of murder in the second degree, but that it was a question of fact for the jury to determine. *Held*, that the charge was correct.

8. SAME—EVIDENCE.

Defendant, on the night of the killing, got a horse and buggy, and, misrepresenting his destination, drove to the house of deceased, who was his mother, invited her to ride with him, and, while out driving, shot her, carried her body some distance, took it from the buggy, and placed it by the roadside. The next morning he threw his pistol into a pond, told no one of what had been done, and misrepresented where he had been the previous night, until the evidence pointed clearly towards him, when, without manifesting remorse, he made a confession, in substance as his testimony on the trial, which was to the effect that the killing was upon sudden impulse arising from provocation. *Held*, that the evidence justified the verdict of guilty of murder in the first degree.

Appeal from court of oyer and terminer, Suffolk county.

Indictment for murder. Defendant was convicted of murder in the first degree, and sentenced to death. Appeal was taken directly to the court of appeals, under Laws N. Y. 1887, c. 493.

B. F. Tracy, for appellant. *Wilmot M. Smith* and *James H. Tuthill*, for the People.

DANFORTH, J. The defendant was convicted of murder in the first degree. He alleges error on the part of the trial judge—*First*, in rejecting evidence to show that he was insane when the act was committed; *second*, in charging the jury; and, these failing, asks for a new trial upon the ground that the verdict is so against the weight of evidence, and against law, that justice requires it. The homicide was committed on the 1st of October, 1887, at the town of Islip. The trial came off on the 5th of December following, and one Dr. Gray, being examined as a witness for the defense, stated that about two weeks before that time he had visited the defendant, conversed with him, and received a history of his case, together with his symptoms. He was then asked by defendant's counsel: "*Question*. Was there anything that attracted your attention to him in September last? *Answer*. Yes, sir. *Q*. What? *A*. His description of it to me. *District Attorney*. I do not think it is proper to base a question upon his description of how he was. *The Court*. The prisoner is a competent witness for himself on that subject. *Counsel for Defendant*. If the defendant was giving his symptoms to the doctor historically, and without any suggestion on the part of the doctor, it seems to me that that would be more important, and it would be more likely to be truthful and sincere, than any evidence we might bring here now for him. At least it is not subject to the criticism that it has been suggested to him. *The Court*. I think it is the prisoner's statement, unsworn; that is, he told the doctor so. But the symptoms, as he detailed them, get to the jury without the obligation of an oath. You may prove the symptoms by him, and then put them all in the form of a question to the doctor. I sustain the objection." The same point is raised by a similar exception at a later stage of the trial. The ruling of the trial judge is well supported by the reason given by him. The prisoner's declaration in November as to his condition in September was not competent as evidence of his actual condition at that time, nor could it be the basis of a scientific opinion as to whether he was sane or insane at that period. Had the question related to his condition at the time of the interview, the result might be quite different. Everything said or done at a given period serves to disclose the mental state of the actor; but his narration as to what he said, or did, or of his feelings, or bodily ailments,

upon a former occasion, furnishes no foundation for an opinion as to his actual state or condition at that time. It is of no higher grade than the declarations of third persons as to a past transaction, and in like manner is inadmissible. The witness was admitted to testify as an expert concerning the mental condition of the person in question, and his opinion would be of value only when founded on facts observed by himself, or proved by other witnesses under the obligation of an oath, or upon hypothetical statements. To a certain extent an expert exercises the functions of a juror. His opinion is his verdict upon the point submitted to him, and must be based on competent evidence. The representations of a sick person of the nature, symptoms, and effects of any malady under which he is laboring at the time of making those representations, are sometimes received as original evidence, but I find no case which allows those representations to be received as evidence of his condition at any other period.

The defendant excepted to that part of the charge in which the word "deliberation" and the word "premeditation" were defined. In general, but explicit, words the learned judge first called the attention of the jury to the distinction between the crime of murder and the crime of manslaughter. Restating the conceded fact that "the defendant fired a shot at his mother," he said: "If he intended to kill her, he committed murder. But if, under any state of mind, he fired a shot without that intent to kill, then he committed manslaughter;" and adds: "If he committed manslaughter, he committed, as counsel for defense conceded, manslaughter in the first degree." The learned judge next explained the degrees of murder; that the first was "the taking of human life with deliberation and premeditation;" and, referring to the temper and disposition of men as exhibited in different individuals, he recognized in some the considerate faculty, and the easy submission of others to the impulse of anger, malice, or other violent passions,—suggesting that the mind of one man is quick and active, enabling him to reach a conclusion as if by instinct, while that of another is sluggish, carrying him along slowly; "and therefore," he said, "it is left to the jury always to determine whether there was in the particular act sufficient deliberation in the mind of the particular individual who is on trial to warrant a conviction of murder in the first degree. When you come to define the word, all that the law requires is this: that there should besome reflection and some thought that precedes the blow. If there is thought, if there is reflection on the act, and if there is a choice and a determination as the result of those mental actions, then there is sufficient deliberation within the law." The trial judge then read from the case of *People v. Conroy*, 97 N. Y. 62, the remarks of the learned chief judge of this court in elucidating the meaning of these important qualifying words, and said: "You will apply that principle in this case. If you believe the evidence upon the part of the prosecution, there was deliberate preparation for this crime. On the other hand, if you believe the testimony of the prisoner as to the manner in which the crime was committed, I am inclined to think that it would indicate murder in the second degree. But still it goes to you as a question of fact for you to determine." The charge was full and comprehensive. No request was made for other instructions; and as to the accuracy of that given, and its support by the evidence in the case, we entertain no doubt.

Upon the remaining point—that which presents the verdict as against evidence, and leading to an unjust judgment—we cannot hesitate. We find it impossible to infer from the evidence that the act of the defendant, and for which he was indicted, was either unpremeditated or unintentional. On the contrary, we are brought by it to believe that the act was one he intended to do. We see throughout the testimony, whether it be that adduced by the people, or that given by the defendant, an intention matured by reflection and carried into execution by means and upon an opportunity procured in pursuance of a defined plan. In its formation there was no haste; in its execution

there was no exhibition of passion, emotion, or impulse. His first step was accompanied by falsehood; and, when the transaction was completed, there was no manifestation of remorse. Informed of the suspicion that he had killed his mother, he replied, "You cannot prove it." In all things he proceeded as calmly as in his narration upon the trial, when he told the story of the murder in a manner described by one of his own witnesses, without "a flicker of a muscle, except so far as was necessary to articulate." His plan and methods partook of that character. "The first thing," says the learned counsel for the defendant, "the first thing a sane man thinks of when planning a crime is, how may the crime be committed, and the identity of the criminal concealed." That this was the thought and intention of the defendant seems not improbable when, with confidence in his precautions, although conscious of his crime, he put the coroner to the proof. He trembled only when the discovery was made known to him, and he was charged with the offense. There was no substantial evidence of his insanity, though insanity was averred, and that question went to the jury. They found him sane, and they disbelieved his story. The record contains nothing which, under any reasonable or fair construction, would allow a different result. He is confirmed in no particular, and every inference warranted by the evidence is opposed to his account of the homicide. The person killed was his mother. Until then she lived at Islip, where she kept house. At 9 o'clock Saturday evening, October 1st, she was in her sitting-room, reading. Her daughter, who had been with her, said "Good night," and went to bed, leaving her in the room. The other members of the family had already retired, and it does not appear that she was afterwards seen alive by any one save the defendant. The next morning her body, wounded to death by a pistol shot, was found lying by the roadside. The defendant lived at Bay Shore, where he was a clerk in his uncle's store. The two places were about one mile apart. Between 3 and 4 o'clock on the afternoon of Saturday he engaged of S., a stable keeper at Bay Shore, a horse and calash top-buggy, which he desired should be equipped with side curtains, to go, as he then said, to Babylon, to meet Mr. Penny, a friend of his uncle, on the arrival of the late train. About 9 o'clock in the evening he called for the team, paid for it, and drove off. He returned to the stable a few minutes past 11. He engaged the same rig for 6 o'clock Sunday morning. He came to the stable at that hour. Near the stable was a pond, and he was seen to throw something into the water. The lap-robe which he had with him Saturday evening, and the cushion, were, upon examination the next day, found to be stained with blood, and blood was also found in other parts of the buggy. The carpet also had been saturated with blood, but had been wet with water. Foot-prints, found near the mother's house, and others near her body, and at various places in the road between the two points, corresponded to the shoes of the horse driven by the defendant Saturday evening; and in his room were found his shirt and overcoat, each stained with blood. On Monday the pond was searched, and the defendant's revolver found, one chamber loaded, the others discharged. The bullets found in the body corresponded with the caliber of the pistol. The defendant was arrested on Sunday, and, being asked by the coroner to give an account of his whereabouts from the time of taking the buggy Saturday evening to the time of his return, described a route corresponding to that required by the intended destination as given to the stable keeper, but different from the one which he had actually taken, and which statement was shown in every respect to be false, but which, if true, would have excluded the idea that he had seen his mother on the night in question, and would have established his innocence. There was in these facts evidence of his guilt. But all possible doubt was dispelled when, on Monday, he confessed the killing of his mother. According to his statement, on leaving his uncle's house Saturday evening, and on his way to the stable, he drank two bottles of beer, and carried with

him two other bottles. In his overcoat pocket he had a pistol. From the stable he drove to his mother's house, went in, and spoke to her. She came out, and both got into the wagon, and before going four or five rods they began to talk, and disagreed, as he said "they had from time to time." He said they were talking about his engagement "to a girl, and he was about to turn around to fetch his mother home, when she called the girl a vile name; and," continues this witness, to whom, in the presence of others, the confession was made, "he said that, quicker than thought, he took his pistol from his pocket, and put it within an inch of his mother's head, and shot her. He said she was looking right ahead; don't think she saw him at all; don't think that she knew when he pulled the pistol; but he shot her, and the cap, he told me, flew back and struck him on the nose. He said that she still breathed, and he drove down below Mr. Gunther's, down to the shore, and he shot her again. He said she still breathed yet. He turned his horse, and drove up the avenue, where he went down onto the Brentwood road, and, as he got up to where he turned the horse, he says, he shot her again there. There, he said, her breath just breathed right out,—left her body. He said he turned his horse around, and drove down to where she was laid. He said he took and lifted her over the wheel, and dropped her out of the wagon, and he drove from there to Mr. Penny's to Babylon, and got a cigar," and thence back and forth over various roads to the stable.

Upon the trial he was a witness in his own behalf. His testimony was not inconsistent in any material feature from the confession I have already given. He names additional circumstances: That he went to his mother's house on Tuesday before the fatal Saturday, to take orders for the store at which he was employed. He was then engaged to be married to one H. S. The wedding day was named; and on that Tuesday, he says, his mother said she wished to see him in reference to his marriage. He promised to be down on Saturday, and on that day engaged for that purpose a horse and wagon of S. He admits that he did not intend to go to Babylon, and that his statement to S. that he did was false. He drove from the stable directly to his mother's house, put his horse under a neighboring shed, entered the kitchen, and thence went to the sitting-room, where he found his mother alone and reading. She said, "Good evening," and kissed him. "She asked if I had come over to see her about my marriage." He said, "Yes," and asked if the folks had gone to bed. She said, "Yes." "I then asked if there was any danger of their coming down again. She said she didn't know. I said that I had a horse tied under the shed, and that I would have to pay for him anyhow, and we might just as well use him, and I asked her to go for a ride west." She assented, and got ready. By his advice she put out the light, and by his advice left the door unlocked. They left the house, entered the wagon, and he drove west. He recollects, he says, nothing of importance until his mother said, "I hear you are to be married soon," and he said, "Yes, I am going to be married to-morrow." She asked me, "Who to," and I said, "to Miss Hattie Schreck, at Northport." *Question.* What then did she ask you? *Answer.* She asked me how long I had been acquainted with this girl. I said, 'A year and a half, or about a year.' She asked me if she had any relations. I said, 'No, or only one sister, who lived at Northport, who lived at Cold Spring.' *Q.* What then was said? *A.* I said that Elbert Arthur took her out of an orphan asylum at New York, and had brought her up. She asked me if she had been well brought up,—if she was well educated; and I said, 'Yes.' Then she asked me if she was a Christian. I said, 'No.' *Q.* What next occurred? Then she asked me—She told me that she had had other prospects for me; that I had been well brought up, and well educated, and she hoped that I would look higher for a wife. I told her that I loved the girl, and had engaged myself to her, and I intended to marry her. And she laughed at me, and said that I would get over it. *Q.* What next was said? *A.* She asked me if she

was virtuous. I said, 'Yes, she was;' and I told her to take care, for when she spoke of her honor she touched my heart; and then she asked me if there was anything—if there was not anything that she could do to make me put off the marriage. I said, 'No; there was not.' Q. What was next said? A. She wanted to know if there was not anything that she could do to make me put off the marriage; and I said, 'No; there was not.' Q. Well, what next did she say, if anything? A. She wanted to know if she was well educated; and I said, 'Yes, she was.' Q. What remark did your mother make just before you shot her? A. She said, 'Asbury, that girl is a low, base, German prostitute.' Q. What did you do? A. I drew my revolver, and fired. Q. Was there the slightest premeditation at all? A. No, sir; there was not." He then testified that he drove around in different directions, and reached the stable with his horse at 11 of the clock. Thence he went to his "room, where he changed his clothes," "took a wash," and "put on his Sunday clothes." On further examination he said his pistol was in the coat pocket on his left side, next to his mother; he reached for it with his right hand, cocked, and fired it. Notwithstanding his statement that he fired three times, only one bullet or pistol wound was found. How much of the story should be believed, what inferences should be drawn from it, the jury were to say. It was relied upon to show provocation and sudden passion. The mother knew of the intended marriage. She was a careful, considerate, good woman, affectionate to her son. It was proven that some weeks before this ride she knew of the intended marriage, and disapproved of it; that she even considered whether, in order to prevent it, she should make such disposition of her property as would keep it from her son. It was the subject of conversation with her sister and with her daughter. Her conclusion was not to do so. It does not appear that this was known to the defendant. But in view of this knowledge of the mother, and her opposition to the marriage, it might reasonably be inferred that before the night in question she knew the woman with whom it was to be contracted, and that such facts had reached her as laid the foundation for her disapproval. "Was it likely," the jury might ask, "that this mother, wishing nothing but good for her son, loving him, and manifesting that love by affectionate demonstrations, would put to him a series of needless questions, asking for information as to the character and conduct of the girl, which she herself was able and prepared to answer? Were they bound to believe that this mother, having such information as impelled her to speak as the defendant says she did speak, would lead him on to describe the person he professed to love, and was about to marry, she at the same time being prepared to denounce her as a prostitute?" If the jury did not believe this, then there was no pretense or semblance of a provocation; nothing to show that the act was done in the heat of passion, or upon impulse; nothing to cast a shadow in the way of a conclusion that the act of the defendant was a premeditated and deliberate killing, constituting murder. So the jury regarded it, and we are unable to draw a different inference. A new trial must therefore be denied, and the judgment appealed from affirmed.

All concur.

(110 N. Y. 77)

BARNARD v. BROWER.

(*Court of Appeals of New York*, June 5, 1888.)

ATTORNEY AND CLIENT—CONTRACT TO CLEAR TITLE OF TAX LIENS—PERFORMANCE.

An attorney, in 1883, entered into a written contract with a part owner of certain land in Brooklyn, incumbered with taxes and assessments from 1862 to 1880, and sales for taxes prior to 1875, to procure a final and permanent judgment that all such taxes, sales, etc., were illegal and void, and constituted no lien on the land, for a fixed sum. He obtained a decree in partition, setting off one-half of the land to defendant free from any liens of F. and G., the purchasers under the tax sales. G., in 1882, paid to the city of Brooklyn 60 per cent. of the assessed value of the land, under Laws N. Y. 1882, c. 348, § 1, providing that such payment, made by a

person owning or having an interest in the land, should extinguish the lien for unpaid taxes in any case where the amount of taxes due exceeded 80 per cent. of the assessed value. In 1883, before the contract, the court of appeals held all taxes assessed prior to that time in Brooklyn void, and the sales to F. and G. void. By chapter 868, Laws 1883, all unpaid taxes levied in Brooklyn from 1861 were legalized and confirmed, but the tax sales made theretofore were not validated. *Held*, that it was the intention of the parties to the contract to obtain a judgment against the city of Brooklyn, and all claiming an interest in the taxes, declaring the taxes void; and, not having done so, the attorney had not performed his contract,—the taxes still being an apparent lien on the property.

Appeal from general term, city court of Brooklyn.

Daniel P. Barnard, plaintiff, sued James C. Brower, defendant, to recover for legal services rendered defendant by his testator. Judgment for defendant, and plaintiff appeals.

John T. Barnard, for appellant. *William T. Gilbert*, for respondent.

RUGER, C. J. The plaintiff's testator brought this action to recover for legal services rendered to the defendant under a written contract made between them March 25, 1883. By this contract, and the schedules annexed thereto, it appeared that the defendant was part owner of three several parcels of land in the city of Brooklyn which were incumbered by taxes and assessments to a large amount, covering a period of 20 years, previously levied and assessed thereon, and that sales, for a term of years, had been made thereof, upon some of such taxes and assessments, to D. H. Goodrich, A. S. Wheeler, William M. McFarlane, and the city of Brooklyn. The defendant was advised by the plaintiff's testator that these sales, taxes, etc., were irregular, illegal, and void, and would be so declared in legal proceedings. It was thereupon substantially agreed that the plaintiff should institute and bring to a legal determination proceedings to annul all the sales, taxes, assessments, claims, or incumbrances which appeared, from the tax and assessment search annexed to the contract, to be against or upon the premises in question for non-payment of taxes and assessments, and procure a final and permanent judgment from a court of competent jurisdiction deciding that all such sales, taxes, assessments, etc., are illegal and void, and constitute no lien or incumbrance upon said premises, or any part thereof, and that he would also compel, by legal determination, through a final judgment, a *bona fide* purchaser, if said purchaser be obtained for the premises in question, within 60 days after such first-mentioned final judgment should be declared, vacating, setting aside, and declaring void and illegal such sales, taxes, assessments, and claims, to accept the title of this defendant and his wife thereto, without payment of any of such taxes, assessments, or liens. It was further provided that the defendant should pay the plaintiff's testator the sum of \$1,500 in full satisfaction of his claim for services upon the recovery of such final judgments. Upon the trial of the action, the plaintiff, to sustain the issues on his part, produced and proved a judgment roll showing the entry of an interlocutory judgment taken by default in a partition suit between James C. Brower, plaintiff, and Emeline E. Brower, his wife, William M. McFarlane, and David Goodrich, defendants, in the city court of Brooklyn, of the date of July 20, 1883, whereby it was adjudged that the plaintiff, James C. Brower, is seized and entitled in fee to one equal undivided half of the premises in question, subject to the inchoate right of dower of his wife, and that Emeline E. Brower is seized and entitled to the other equal undivided half part of the said premises. It was further thereby ordered and adjudged that the defendants William M. McFarlane and David H. Goodrich have not, nor has either of them, any right, share, interest, or lien of, in, and to the said premises, or any part thereof, and that each of their alleged claims, as set forth in the complaint, is null and void. It was further ordered that partition be made of the premises between the plaintiff and his wife, and commissioners were appointed to make such partition, and render report of their proceedings to the

court. It further appeared that the commissioners thereafter made report of their proceedings, and partitioned the premises in accordance with the terms of such interlocutory judgment, and that such report was confirmed by the court. Final judgment was rendered in the action on the 26th day of July, 1883, whereby it was adjudged that the said James C. Brower and Emeline E., his wife, do each hold the said premises so set off to them, respectively, in severalty, free, clear, and discharged of all and every estate, lien, or claim of any of the parties to this action. Further proceedings were subsequently had in that action to perfect such judgment as against David H. Goodrich; but it is unnecessary to notice them particularly, as we shall assume, for the purpose of the discussion, that the court acquired jurisdiction to render the first judgment against all of the parties thereto. The plaintiff also proved that prior to December 1, 1882, David H. Goodrich paid to the registrar of arrears of the city of Brooklyn a sum of money equal to 60 per centum of the assessed value of the premises, under section 1 of chapter 348 of the Laws of 1882, and that such sum was received by the registrar as a payment for and on account of the taxes then in arrears upon the premises. A clearer view of the force and effect of the agreement between the parties will be obtained by considering the circumstances existing at the time the contract was executed. The liens in question embraced taxes and assessments made for each year from 1862 to 1880, and the sales thereon were all made for taxes assessed prior to the year 1873. It had been held by this court in May, 1882, in *Brevoort v. City of Brooklyn*, 89 N. Y. 128, that the taxes and assessments theretofore imposed upon real estate in the city of Brooklyn, and the sales made thereon, were wholly void, for the reason that they were based upon assessment rolls which did not contain an affidavit of the assessors in the form and to the effect required by law. By chapter 363 of the Laws of 1882 the legislature had passed an act legalizing and confirming all of the unpaid taxes upon real estate in the city of Brooklyn which had been imposed thereon subsequent to the year 1861. It was held by this court that the act in question did not validate tax sales which had been theretofore made of lands in such city. *Clementi v. Jackson*, 92 N. Y. 591.

It thus appears that, at the time this contract was made, there was no want of legal authority to show that the various sales of the land in question, made to Goodrich and McFarlane, were entirely void, and conferred no legal interest upon the several purchasers thereof. But serious questions were left unsettled; among others, the right of the city of Brooklyn to enforce the collection of such taxes against real estate in that city under the validating act, and as to the effect of the payment by Goodrich of a sum equal to sixty per cent. of the assessed value of the property to the city of Brooklyn, under chapter 348, Laws 1882, providing that "any person owning or having an interest in any lands in the city of Brooklyn upon which the unpaid taxes or assessments, or both, shall exceed sixty per centum" of the assessed value of such lands, might extinguish the same by paying such sixty per centum to the registrar of arrears of said city. It would therefore seem quite obvious that the object of the parties in making this contract was to secure a judgment against the city of Brooklyn, and all parties having an interest in the collection or enforcement of such taxes, or the sales made thereunder, declaring them illegal and void, and as constituting no lien or incumbrance upon the land. It is quite clear that the judgment roll given in evidence accomplished no such object. It did nothing more than to reaffirm the doctrine already established by the case of *Brevoort v. City of Brooklyn*, *supra*. Every disputed question as to the validity of these taxes, and their existence as a lien upon the premises in question subsequent to the validating act, was left by this judgment in the same condition in which it was when the contract was made. The plaintiff seeks to obviate the effect of this conclusion by arguing that the payment of the 60 per cent. by Goodrich to the city of Brooklyn ex-

tinguished any claim that it might have for the taxes. It is by no means certain that this was its effect, as Goodrich was not, by its terms, entitled to avail himself of the benefit of the act; but the conclusive answer to the argument is that such payment was not within the contract made between the parties. The defendant stipulated for a final judgment extinguishing the lien of such taxes and assessments, and binding upon all parties interested therein; and that he has assuredly not obtained. The obtaining of such a judgment by the plaintiff was a condition precedent to any right of recovery on his part, and until he showed such a judgment he did not, under the contract, establish a right to the compensation therein provided. The question in this case is not whether the defendant's land is lawfully free and clear from taxes and assessments, but whether the plaintiff has obtained an adjudication which conclusively establishes that it is. The judgment roll exhibited by the plaintiff may be assumed to be valid and binding upon the parties thereto, and, as to them, establishes the fact that they had no title to or interest in the premises; but it binds no other parties, and leaves the taxes and assessments an apparent lien upon the defendant's lots, and their validity open to dispute hereafter. We are therefore of the opinion that the plaintiff showed no right to recover in this action, and that the judgments of the courts below should be affirmed. All concur.

(109 N. Y. 473)

STILLMAN v. NORTHRUP.¹*(Court of Appeals of New York. June 5, 1888.)*

1. USURY—AS A DEFENSE—BURDEN OF PROOF—PRINCIPAL AND AGENT.

To defend a suit on a promissory note on the ground of usury, it is not enough to show that plaintiff's agent took and exacted usurious interest, but it must be shown that he took and exacted such interest with the knowledge and assent of plaintiff at the time; nor is it enough to show that plaintiff supposed her agent was to receive some compensation from defendant for his trouble in effecting the loan.

2. GUARANTY—ASSIGNMENT—PAYMENT OF MORTGAGE.

A guaranty, given to N. to secure the payment of a mortgage that had been assigned to him, may, in the absence of any express stipulations to the contrary, be assigned by him with the mortgage.

3. SAME—CONSTRUCTION.

Although the mortgage was a mere security for a principal debt represented by a note, a written guaranty for the payment of the mortgage is operative when, by its language, it is plain that it was intended as an effectual guaranty for the payment of the debt secured by the mortgage.

4. SAME—ASSIGNMENT WITH BOND AND MORTGAGE.

In an assignment of a bond and mortgage, the omission to assign therewith the guaranty is remedied by a second assignment of the same bond and mortgage with the guaranty, which vests in the assignee, as was originally intended, all the securities incident to the bond.

Appeal from general term, supreme court, Fourth department.

About February 1, 1876, Thomas Bishop applied to Nelson F. Stillman, a brother of the plaintiff, for a loan of \$1,000, and Nelson, acting as the agent of the plaintiff, made the loan upon a promissory note made by Bishop, and indorsed by the defendants. At the time of making the loan, and as a condition thereof, Nelson demanded of Bishop \$50 over and above the legal rate of interest, and Bishop paid him that sum. The note was not paid at maturity, and the defendants were charged as indorsers thereon. On the 10th day of February, 1877, the defendants obtained from Bishop a mortgage upon certain real estate owned by him, for the purpose of securing themselves as indorsers, and of obtaining an extension of time to Bishop for the payment of his note, and also of transferring the same to the holder of the note, so that it would take the place thereof. Thereafter, on the 17th day of the same month, the defendants transferred and assigned the mortgage,

¹ Reversing 87 Hun, 641, *mem.*

together with the bond accompanying the same, to Nelson, who then held the note, and was acting as the agent of the plaintiff, and he surrendered the note to the defendants. In the written assignment the defendants guarantied the payment of the mortgage in the following language: "And the said Orville B. Northrup and George B. Northrop, for value received, hereby guaranty the payment of the above-named mortgage hereby assigned by them to the said Nelson F. Stillman." On the 26th day of September, 1877, Nelson assigned the bond and mortgage to the plaintiff, without mentioning the guaranty; and on the 21st day of July, 1880, he executed a further assignment of the bond and mortgage to the plaintiff, by which the guaranty was expressly assigned. Bishop, the mortgagor, died insolvent, and the mortgaged premises were sold upon the foreclosure of a prior mortgage, and the entire proceeds were used to apply upon that mortgage. Subsequently the plaintiff commenced this action against the defendants to recover upon their guaranty the amount due to her upon her bond and mortgage. The defendants alleged in their answer that the note indorsed by them was void for usury, and that the mortgage, a substituted security, was void for the same cause. The action was referred to a referee, and tried before him, and he found that the mortgage was usurious, and that the guaranty was personal to Nelson F. Stillman, and therefore not available to the plaintiff; and upon both grounds he ordered judgment in favor of the defendants, dismissing the complaint. Other facts, so far as material, appear in the opinion.

Scripture & Backus, for appellant. *C. H. Searle*, for appellee.

EARL, J., (*after stating the facts as above.*) If the note made by Thomas Bishop, and indorsed by the defendants, for the money borrowed of the plaintiff, was void on account of usury, then the substituted security, the mortgage given to secure the same debt, was tainted with the same infirmity, and also void. There is no proof or claim that the plaintiff received any part of the \$50 which was exacted by her brother as a condition of the loan to Thomas Bishop, or that she had any benefit whatever therefrom. It is undisputed that she actually loaned and advanced to Bishop \$1,000, the full amount of the note. It is undisputed that the money loaned belonged to her, and that her brother acted as her agent in making the loan. There is no proof whatever that she authorized him to take or exact more than the legal rate of interest, and it is undisputed that he took and exacted it for himself, and that he had the sole benefit of it. To render the note void for usury, it is not sufficient for the defendants merely to show that plaintiff's agent took and exacted the \$50 as a condition of the loan; but it was incumbent upon them to show that he took the \$50 with the knowledge and assent of the plaintiff, so that she, at least by acquiescence, became a party to the usurious exaction. *Condit v. Baldwin*, 21 N. Y. 219; *Estevez v. Purdy*, 66 N. Y. 447; *Van Wyck v. Watters*, 81 N. Y. 352; *Phillips v. MacKellar*, 92 N. Y. 34. And the burden of establishing such knowledge and acquiescence on the part of the plaintiff rested upon the defendants, and they were bound to sustain that burden by satisfactory evidence. The defense of usury, involving crime and forfeiture, cannot be established by mere surmise and conjecture, or by inferences entirely uncertain. If, upon the whole case, the evidence is just as consistent with the absence as with the presence of usury, then the party alleging the usury has failed; and so it has been repeatedly held. *Booth v. Swezey*, 8 N. Y. 276; *Valentine v. Conner*, 40 N. Y. 248; *In re Consalus*, 95 N. Y. 340; *Morris v. Talcott*, 96 N. Y. 100. It is not sufficient, in this case, for the defendants to show that the plaintiff knew of the usurious exaction after she had made the loan, and the note had been given. She must have known of it at the time. Nor is it sufficient to show that she supposed that her agent was to receive some compensation for services which he rendered

to the defendants. There is evidence that, at the request of Thomas Bishop, the borrower, he went from his home, in Oneida county, to Madison county, to look at a farm, with the view of taking a mortgage on it as security for the loan, and that he spent some time in negotiating the loan, which ultimately culminated in the note; and, if the plaintiff supposed that the borrower was to pay her agent something for the trouble and services which he rendered to him in effecting the loan, that would not be sufficient to show that she had knowledge of any usurious exaction.

We have carefully read and scrutinized the evidence in this case, and we think there is a total failure of proof to show that the plaintiff had any knowledge whatever of the exaction made by her agent, or that, at the time of the loan, she assented thereto or acquiesced therein. Nelson F. Stillman, as a witness, testified positively that, so far as he knew, the plaintiff had no knowledge or information whatever that he had received the \$50, and that he did not tell her anything about it, and she testified that she had no knowledge or information whatever as to the payment of the \$50. She was not present at the time the note was taken by her agent, or the money drawn upon the check given by her, and she denied most emphatically that she had any knowledge whatever of the alleged usurious exaction. Upon her cross-examination, conducted with great persistence and skill, she was made to testify that she supposed her brother was getting some compensation for his trouble from the borrower. Even if she knew that, it was not sufficient to show that she knew he was taking more than legal interest for the loan of the money, or that he was making any usurious exaction. But it does not appear when she supposed that; nor does it appear that she had any knowledge upon the subject. It was a mere supposition that he was to have compensation for his labor. The only other evidence was that of one of the defendants, Orville B. Northrup, who testified that he had a conversation with the plaintiff more than three years after the money was loaned, and the note taken, as follows: "I asked Mrs. Stillman if she knew Nelson F. Stillman took \$50. She said she knew it, but that she did not receive any of it." It does not appear from this when she learned that her agent took \$50. Her answer to the inquiries does not necessarily or properly imply, in view of her entire evidence, and all the other evidence in the case, that she knew it at the time of the loan. Her answer to the question put by Northrup, that "she knew it," is just as consistent with the claim that she knew it afterwards as with the claim that she knew it at the time; and it cannot be said upon this evidence that these defendants have sustained the burden of showing that she knew of the alleged usury, and acquiesced in it at or before the time it was taken and exacted. We are therefore of opinion that the defendants, within the rules of law above alluded to, have failed to establish the defense of usury which they alleged in their answer.

Upon the trial of the action, the defendants claimed that their guaranty was personal to Nelson F. Stillman, and was therefore not assignable; and they offered to show what the conversation was at the time the mortgage was assigned, and the guaranty given, which being objected to on the part of the plaintiff, they asked to amend their answer "by setting up the fact that this guaranty was directed to be drawn to Nelson F. Stillman personally, and that it was the intention of the parties at the time that it should be drawn to Nelson F. Stillman personally; and we ask that it may be reformed in that respect, if it don't already read, so to conform with the intention of the parties at the time." Plaintiff's counsel objected to the allowance of the amendment, and the objection was overruled, and the amendment was allowed. The answer, however, was not amended, and appears in the record as it was originally drawn. Some evidence was thereafter given tending to show that it was the intention of the parties that the payment of the mortgage should be guaranteed to Nelson F. Stillman. There was no evidence that the guaranty as

written did not express the true intention of the parties. But the referee held that the assignment as written was personal to Nelson F. Stillman, and was therefore not assignable. He did not order the guaranty to be reformed, and we are therefore to construe its language as we find it in the record. It does not appear in the evidence that there was any reason for limiting the guaranty to Nelson F. Stillman. The note which the plaintiff held, and which, at the time of the guaranty, was in the hands of her agent, was perfectly good; the defendants being entirely solvent and able to pay. The land mortgaged was represented by the defendants to be ample security, and they were asked to guaranty the payment of the mortgage, and did so. There was no agreement and no conversation that the effect of the guaranty was to be lost in case Nelson F. Stillman assigned the mortgage. It is true that a guaranty could be so drawn as to be personal, and to have force and effect only as to the party to whom it is given, and so as not to be transferable or assignable to any other person. But, in order thus to limit a guaranty, the language should be plain and peculiar, and the intention of the parties should not be left in uncertainty. Here, by the plain language, there is an absolute guaranty of the payment of the mortgage, and it is described as a mortgage assigned to Nelson F. Stillman, and there is no limitation of the guaranty to him personally. But, even if the guaranty should be construed as a guaranty of payment to Nelson F. Stillman, it would yet be a guaranty which he could assign with the mortgage. Like any other promise made to him, it could be assigned, and could be enforced by any party to whom it was assigned. The case of *Smith v. Starr*, 4 Hun, 123, is much relied upon by the defendants to sustain their contention. We do not yield to the authority of that case, and are not satisfied that it was well decided. It rests upon no authority, and is not well supported by reason. This is not like a bond conditioned for the honesty or fidelity of a clerk or agent. Such bonds are personal to the obligees, and cannot, before breach, be transferred, so as to inure to the benefit of other parties. Therefore the cases of *Wright v. Russell*, 3 Wils. 530, *Barker v. Parker*, 1 Term R. 287, and other cases cited in *Smith v. Starr*, are not applicable to such a guaranty as this. There is nothing personal about the guaranty of the payment of a mortgage, and it can only be made so by very express and plain language. Instead of guarantying the payment of the bond, the defendants guarantied the payment of the mortgage, and the claim is now made that the guaranty is inoperative, as the mortgage was a mere security for the principal debt represented by the bond. But the question is, what did the defendants mean by the language which they used? They assigned both the bond and mortgage, and intended to give an effectual guaranty of the debt secured by the mortgage, and the language must be so construed. There was no intention to give an inoperative guaranty; but the intention was to give one which should be, in the hands of the party to whom it was given, an effectual security, and the guaranty must be applied to the debt secured by the mortgage.

It is further claimed that the first assignment of the bond and mortgage by Nelson F. Stillman to the plaintiff did not convey to her the guaranty. Even if that were so, we think the subsequent assignment of the bond, mortgage, and guaranty to her was effectual to vest the guaranty in her. If, by mistake, when the first assignment was made, the parties omitted to assign the guaranty, that mistake could certainly be corrected by a subsequent assignment so as to convey to the plaintiff what it was originally intended she should have, and this is more clearly so as Nelson F. Stillman was all the time her agent,—took the guaranty as her agent,—and intended to do what the law would have compelled him to do, namely, to vest in her the entire security which he had taken for her debt. But it is well settled that the assignment of a bond and mortgage carries with it the guaranty of payment or collection, although not mentioned in the assignment. *Craig v. Parkis*, 40 N. Y. 181.

The transfer of the debt to the plaintiff carried with it, as incident thereto, all the securities for its payment.

We are therefore of opinion that the action was not well defended, and that the judgment should be reversed, and a new trial ordered before a new referee; costs to abide event.

All concur.

(110 N. Y. 64)

PECK v. PECK *et al.*

(Court of Appeals of New York. June 5, 1883.)

1. TRUSTS—CONSTRUCTIVE TRUSTS—CONFIDENTIAL RELATIONS—SALE ON EXECUTION—REDEMPTION.

The heirs of an intestate estate had agreed upon a settlement of differences as to its division. The father-in-law of E., one of the heirs, who was in debt, had agreed to redeem and pay any judgments against E. A brother of E., also an heir, obtained from him a confession of judgment for a debt due him of \$100, under an agreement to use it only as a lien, and not to enforce it before May 1st. The father-in-law of E. had bought his interest in the estate at an execution sale, agreeing that E. could redeem from the sale at any time. E.'s brother entered judgment by confession, April 3d, and redeemed E.'s interest in the estate, paying the sheriff the amount paid by E.'s father-in-law, and April 4th obtained a sheriff's deed. E., relying on the settlement between the heirs and his brother's agreement, took no steps to enforce it against his brother's judgment. *Held*, that the contract between E. and his brother was valid, and the brother did not obtain all of E.'s interest, but held it as trustee *ex maleficio*, subject to the payment by E. of the \$100 judgment, with interest thereon, and the amount paid by his brother in redeeming from the original judgment.

2. SAME—PURCHASE OF JUDGMENT.

Where one of the heirs of an estate, who had been managing it, agrees with his brother, another heir, to protect his interests, but, after an agreement between the heirs for a full settlement of all differences between them as to its division, buys a judgment of \$6,000 against his brother for \$3,000, he is not entitled, as against his brother, to the full amount of the judgment, but only to what he paid, with interest.

3. SAME—TENANTS IN COMMON—PURCHASE OF MORTGAGE.

Where one of certain heirs buys for \$10,000 an outstanding mortgage of \$17,000 against the estate, when there was no pressing necessity to take care of it, he being at the time managing the estate at a salary, and knowing that his brother, one of the heirs, had no means except such as he might realize from the estate, he can collect from his brother only the amount actually paid, even though the latter knew of the purchase; no demand being made on him then for contribution.

Appeal from general term, supreme court, Second department.

Julia Blanche Peck, plaintiff, assignee of Ernest Peck, sued Theodore G. Peck and Gordon Peck, to determine the rights of Ernest Peck in the estate of his father, John Peck, deceased. From the judgment defendants appeal.

Calvin Frost, for appellants. *L. E. Chittenden*, for respondent.

PECKHAM, J. The learned counsel for the appellants has, with a most commendable desire to bring to an early termination this unfortunate litigation, waived all his exceptions taken upon the trial which do not directly bear upon the merits of the important matters in dispute between the parties, and both counsel have united in submitting for our determination the three main subjects of dispute, upon which the parties are wholly unable to agree.

The first question that arises is in regard to what rights Gordon Peck obtained by the redemption under the judgment confessed by Ernest, the plaintiff's assignor, to him in March, 1883. A brief statement of the more important facts upon which the question arises is necessary here. In 1881, John Peck, of Haverstraw, died intestate, leaving considerable real and personal property, subject to mortgages and other liens. His affairs were left in considerable confusion, and great difficulty was necessarily experienced in closing them up. His son Ernest, who is the husband and assignor of the plaintiff, was insolvent, and had judgments to a large amount entered up against him. Immediately upon the father's death, Ernest and the other sons got into diffi-

culties and disputes in regard to the settlement of the estate, and as the other heirs remained on the homestead, and Ernest, with his wife and children, lived away, the difficulties and disputes did not terminate. On January 4, 1882, while the difficulties still existed, and the estate was unsettled, the whole interest of Ernest was sold on an execution issued upon a judgment against Ernest obtained by one Schundtz, for \$244. Thomas Morrell, the father-in-law of Ernest, bid in the property for that sum, under an agreement with him that he might at any time thereafter redeem his interest, and receive it back, by paying the above amount and interest. The differences continued between the brothers in regard to the settlement of the estate, and the various claims made by them in regard thereto, when, in the fall of 1882, the counsel for the respective parties consulted together, and it was finally understood between them, and ratified by their respective clients, that all matters of difference should be settled by an agreement between the counsel, which should be carried out by their clients. Numerous meetings of counsel were had, and on February 21, 1883, an agreement had substantially been come to between them on most of the matters at issue. The fact of the counsel having substantially arrived at an agreement at a meeting between them on or about February 21, 1883, was known by the brothers Ernest, Theodore, and Gordon almost immediately, and soon thereafter by Morrell, and it was fully understood that Ernest and Morrell, as part of the settlement, should take up and pay the judgments against Ernest, which were thus to form no obstacle to the immediate completion of the settlement; and of course neither of the two latter had any suspicion that any effort would be made in the mean time, or at all, to enforce such judgments, or to obtain control of them by the brothers for any purpose whatever, and this must have been understood by the brothers. Immediately after this meeting, on February 21st, Gordon met and had a conversation with Ernest, and asked him for a confession of judgment to secure him for the debt Ernest owed him of about \$100, for something wholly disconnected with the estate. Ernest told him he had no money, and could not pay his debts until he got his dues from the estate, and he would not confess any judgment if it was to be enforced against him before such settlement. Finally Ernest consented to give such a judgment provided it was to be used only as a lien, and not to be enforced in any event before May 1st following; and, under such positive agreement on the part of Gordon, Ernest subsequently, and on the 19th of March, sent the confession of judgment to a lawyer at Haverstraw, who delivered it to Gordon. On the 8d of April, 1883, Gordon docketed this judgment, and with his brother Theodore went to the sheriff's office, and by virtue of this judgment redeemed the interest of Ernest from the sale under the Schundtz judgment, and paid to the sheriff the amount of Morrell's bid and interest, and on the 4th of April the sheriff conveyed to Gordon all the interest of Ernest in the homestead, by deed duly delivered, which Gordon had recorded. Theodore was present at the time of the redemption, and had full knowledge of it, and of the delivery and receipt of the deed. Ernest relied on Gordon's promise not to enforce the judgment, and both he and Morrell, in good faith, believed that all the matters between the heirs had been settled; and by reason thereof neither took any steps or made any arrangements to secure or protect Ernest's interests against the judgment of Gordon, or the other judgments against Ernest.

I do not pretend to have stated all the facts in this case relating to this special subject, but only those which I think are sufficient to make the question to be decided intelligible. That question is, can Gordon maintain his claim that, by this redemption, he has succeeded in obtaining all the interest of Ernest in the homestead, and that he is now the absolute owner thereof? We do not think he can. We think it would be a fraud upon Ernest to permit it, and we do not know of any rule of law or equity which prevents a court from so declaring. We think the meaning of the evidence upon which the finding

of the court is based, as to the terms upon which the judgment was confessed, is that the defendant Gordon was to have his judgment as a security for his debt, and it was not to be enforced in any event until May 1st, and that if anything occurred in the mean time, rendering it necessary for Gordon to act in order to keep his judgment alive, he should do no more than the occasion called for, and the effect should be nothing more than to keep it alive as a security. We think the redemption under it, and the claim to thereby retain the whole interest of Ernest in the estate, operates with great injustice upon Ernest, and is in effect a gross fraud upon him. It is true, as stated by appellant's counsel, that at the time of the redemption the right of Ernest to redeem under the statute from the sale on the Schundtz judgment had terminated with the expiration of the year from January 4, 1882; but he still had an interest in the premises, and the title thereto remained in him until the expiration of the 15 months from the time of sale. During this three months he could still confess a judgment which would be a lien upon his interest, or he could mortgage it, and the judgment creditor or mortgagee could redeem. See cases cited in opinion of ANDREWS, J., in *Wood v. Rabe*, 96 N. Y. 414, at 423, 424. In addition to this, however, Ernest had his right to redeem under his agreement with Morrell, which was valid *Ryan v. Doa*, 34 N. Y. 307. As he had an interest in the estate which was sold under the Schundtz judgment, the agreement can be upheld under the authority of the above case, which, although distinguished and limited in the subsequent case of *Levy v. Brush*, 45 N. Y. 589, has not been shaken as an authority upon this proposition. The redemption, therefore, by Gordon, if it should stand, would be a great damage to Ernest; and it is of great practical importance to him, and to plaintiff as his assignee, to decide it, even though the time has now passed in which Ernest could, by confessing a judgment or mortgaging his former interest, give a right to such judgment creditor or mortgagee to redeem, as stated above. It is also stated that Ernest was not injured because Theodore was present at this time, and was ready to redeem under and by virtue of his ownership of other judgments against Ernest, in case Gordon had not done so. We cannot decide this question upon a possibility as to what some one else would have done if Gordon had not redeemed, and also for the reasons hereinafter given, when that question will be discussed as to the right of Theodore to act adversely to Ernest in regard to any judgments purchased by Theodore. We hold that Theodore had no right to thus use those judgments, any more than Gordon had to use the one under discussion, and then claim the full title to the interest of Ernest.

We fail to see any reason why the agreement between Gordon and Ernest was not a valid one. It was on good consideration; for by getting the judgment Gordon obtained what he wanted, an acknowledgment of the existence of the debt, the amount thereof, and security for it. He made the agreement that he would not enforce it for a certain time, and thereby he obtained the judgment. He has violated his agreement, and, while clinging to the results of it, he denies its efficacy in law. He says the effect of what the plaintiff asks is to make him a trustee, and to create a trust by parol in lands, under circumstances not permitted by law. We do not think so. The effect of his conduct is that a court of equity treats him as a trustee *ex maleficio*, and as in that capacity holding title to the interest of Ernest in the homestead in trust for Ernest or his assigns, subject to the repayment of the amount paid by Gordon when he redeemed from the Schundtz judgment, and also to the payment of the amount of his own judgment, with interest on the amount he paid upon such redemption from the time of such payment, and interest on the amount of his judgment from the time of the docketing thereof. The defendant Gordon is held to occupy such a position, not because he commits a fraud by refusing to perform a contract void by the statute of frauds. The contract he made was not void. It was one simply not to enforce a judgment for a

certain time. He violates the real substance of this agreement, not by redeeming the interest of Ernest, but by thereafter claiming to own it all under the redemption. Instead of being merely liable in damages for this breach, the character of a trustee *ex maleficio* is imposed upon him because of the peculiar relations which the facts show these men, who were brothers, sustained to each other at that time. The negotiations for a settlement of all differences were substantially concluded, and a settlement effected, one of the terms being that Ernest or Morrell was to pay or take care of all the judgments against Ernest, and all parties knew this; and Ernest and Morrell relied on this fact as a reason for taking no steps to secure or protect the interest of Ernest, no one supposing that any hostile use would be made of any judgment when, because of the supposed settlement, all reasons for it had ceased.

Under such circumstances, there was a relationship existing between Gordon and Ernest upon the question of the use of this judgment by confession, grounded not only upon the specific agreement already spoken of, but also upon the faith placed in the settlement of all differences, which made such relationship fiduciary in its character, and which naturally led Ernest to suppose that no advantage would be taken of him by his brother by a fraudulent and unfair use of the judgment which he confessed for a security only. And it is seen that the judgment was itself confessed only upon the assumption that this agreement, settling all controversies, was about to be carried out; and the inference is fairly to be drawn from the evidence that it was precisely because such agreement had been arrived at, and all subjects of difference were about to be disposed of, that Gordon takes the opportunity to present his claim, and to ask for the security of a judgment. Under all the facts, we think the case of *Wood v. Rabe, supra*, is authority for the statement that Gordon is placed in the position of trustee of Ernest, with reference to his title to the interest of Ernest, which he claims to own under his redemption by virtue of his judgment by confession, subject to the payments to Gordon as above described.

2. Theodore G. Peck, on the 2d of April, 1883, having the same knowledge in regard to the situation as his brother Gordon, purchased a judgment in favor of one Billings against his brother Ernest, amounting, with interest, to about \$6,600, for the sum of \$3,000, and now claims that he is entitled to be paid the full amount of that judgment which he still holds. We think he has no such right. In addition to his knowledge of the circumstances which have been stated in regard to Gordon, Theodore had stated to Ernest at the Hoffman House, in 1882, that he would protect his interest in the estate, and had written him a letter, dated March, 1882, in which he reiterated the promise. He had been substantially the agent of Ernest in regard to the estate, and was under express obligations to look after and preserve his interest in it. It is true the authority of Theodore, to collect rents and make leases, etc., of the estate, had been annulled by Ernest under the contract entered into between the four brothers, and the power of attorney therein referred to had been by him revoked. Yet Theodore was still to some extent in possession of the estate, attending to all the business in regard to it, and received all the rents, income, and profits thereof, and Ernest might well have supposed from his conversation with Theodore and the letter referred to that he would fulfill his obligations, and not seek to take advantage of him. Notwithstanding the revocation of the power of attorney, and the annulling of the contract, their relations in regard to this matter continued to be fiduciary in their nature; and it cannot be tolerated that Theodore, under such circumstances, should be permitted to take advantage of his position for the purpose of making money out of his brother. He should be permitted to hold the judgment for the amount only that he paid for it, with interest.

3. There was a mortgage upon a portion of the premises owned by John Peck

at the time of his death, which, in the fall of 1881, amounted, principal and interest, to between \$16,000 and \$17,000. So far as appears, there were no threats on the part of the mortgagee to foreclose, nor was there at the time of the purchase by Theodore any immediate and pressing necessity to forthwith take care of that mortgage. In the latter part of 1881, Theodore purchased the mortgage for \$10,000, and took an assignment of it to himself, and now claims to hold it for its full amount. We think he is not entitled to do this. One of the leading cases upon the subject of the right of one tenant in common to bid in an outstanding title or incumbrance on the estate is *Van Horne v. Fonda*, 5 Johns. Ch. 388, at 407. The learned chancellor there says that, although he would not deny that one tenant in common might not in any possible case bid in an outstanding title for his exclusive benefit, yet (continuing) he says: "When two devisees are in possession under an imperfect title, derived from their common ancestor, there would seem, naturally and equitably, to arise an obligation between them, resulting from their joint claim and community of interests, that one of them should not effect the claim to the prejudice of the other. It is like an expense laid out upon a common object by one of the owners, in which case all are entitled to the common benefit, on bearing a due proportion of the expense. * * * Community of interest produces a community of duty, and there is no real difference on the ground of policy and justice, whether one co-tenant buys up an outstanding incumbrance, or an adverse title to disseize and expel his co-tenant. It cannot be tolerated when applied to a common subject in which the parties had equal concern, and which created a mutual obligation to deal candidly and benevolently with each other, and to cause no harm to their joint interest."

In this case, if the mortgage were due, and the defendant Theodore desired to redeem, he must of course have redeemed by paying the whole mortgage, or whatever amount the mortgagee was willing to take. He could not redeem his share of the estate from the lien of the mortgage by paying simply what would amount to his share of the mortgage. If an incumbrance be bought in by a co-tenant, or paid under such circumstances as exist in this case, the payment would operate as an equitable assignment from the mortgagee to himself, and his right under such equitable assignment would be to exact contribution from his co-tenants for the amount he had paid to redeem the mortgage. 3 Pomeroy, in his excellent work on Equity Jurisprudence, § 1221, states this doctrine fully. The same principle is decided in *Rothwell v. Dewees*, 2 Black, 613. See, also, *Weaver v. Wible*, 25 Pa. St. 270, and *Lloyd v. Lynch*, 28 Pa. St. 419, at 424. The case of *Streeter v. Shultz*, 45 Hun, 406, is in no way adverse to this principle. In that case a mortgage upon the property was foreclosed. Shultz was a tenant in common with the plaintiff by virtue of a conveyance of an undivided half of the premises from the plaintiff to him, subject to a mortgage given by the plaintiff to secure the purchase money. At the foreclosure sale of that mortgage Shultz bid in the property for himself. He was also the owner of a subsequent mortgage given by the plaintiff to him on the plaintiff's undivided part of the premises; and the court held that under such circumstances, it being a public sale, judicial in its nature, and the relations between the parties being at arms-length, the case was taken out of the ordinary rule, and that the defendant, upon bidding in the property, obtained a good title thereto. In this case, on the contrary, at the very time when Theodore purchased the mortgage, (which was at private sale,) he was residing in the family mansion, where he had continued to reside since his father's death, and for a long time before it, and he knew that Ernest was in greatly embarrassed circumstances, with judgments entered up against him, and that he was wholly dependent upon what he would realize as his share of his father's estate for the means of extricating himself from his difficulties. At the same time Theodore was managing the estate, and was receiving all the rents, income, and profits therefrom, the result being that Ernest was kept

wholly unable to buy any mortgage himself, or to contribute towards the purchase of any such. Upon these facts, a court which permitted Theodore to buy in a mortgage for much less than its face, and to insist upon payment to him at the same rate as if he had paid all that was due thereon, would administer, in my opinion, neither law nor equity.

The counsel for the defendant Theodore claims, however, that even if he would not have the right at first to hold the mortgage for the full amount, yet, when informed of the purchase, the plaintiff's assignor, Ernest, should have offered to contribute his share of the purchase price of the mortgage; that such offer should have been made within a reasonable time after knowledge of the purchase, and the failure of Ernest to make it entitled the defendant to enforce the mortgage for its full amount. We do not think that the defendant places himself within any rule permitting such a result. All that appears in the evidence on the subject is that the defendant Theodore purchased this mortgage in December, 1881, and that on the 9th of February, 1882, when a question arose as to leasing a rolling-mill on his father's premises, Ernest was present, and heard that Theodore had purchased the mortgage. It is not found as a fact, but Theodore says in his evidence, that the price he gave for it was mentioned, and that he then said that he should hold it for the full amount of principal and interest. Ernest says he does not think the amount paid by Theodore was mentioned. It was not a conversation addressed to him, and no demand for contribution, and no intimation to that effect was made by Theodore. At that time the contract had been made by which Theodore was constituted the agent of the estate to attend to its business, and a salary agreed to be paid him therefor, and he was receiving all the income and rents therefrom. Under these circumstances, we think it cannot be plausibly contended that, even if Ernest heard the price paid by Theodore for the mortgage, and his claim to hold it for the full amount due thereon, that Ernest was bound to tender contribution of his share under penalty of a right on the part of Theodore to enforce the mortgage for such full amount. This is entirely different from the case cited by the counsel, of *Mandeville v. Solomon*, 39 Cal. 125. In that case one tenant in common discovered what he feared was a flaw in the title to some portion of the property, and he thought it best to purchase the outstanding title, if it could be done for the sum named, and he asked his co-tenant to make contribution for that purpose. His co-tenant refused. He subsequently purchased the outstanding title, paying the sum stated for it, and immediately wrote to his co-tenant all the particulars, and asked him to contribute his share, and he made no answer, but entirely neglected to contribute anything. Long subsequent to that time the co-tenant desired to avail himself of the purchase, and the court held that he was too late. The case of *Lee v. Fox*, 6 Dana, 171, at 176, is substantially an authority for the proposition announced here, although there is a mere statement contained in the opinion that the election should be made within a reasonable time. We think that in this case there was no such presentation of the subject to Ernest as to call upon him to make an election, even if it could be assumed that such a purchase, under the circumstances, if a demand had been made, called for contribution at the peril of an enforcement of the mortgage for the full amount. The above are all the questions submitted to this court, and in regard to each of them we think the decision of the general term was correct. Its order denying a new trial should therefore be affirmed, with costs.

All concur.

(110 N. Y. 50)

LIENKAUF v. CALMAN *et al.*¹

(Court of Appeals of New York. June 5, 1888.)

1. INSURANCE—ASSIGNMENT OF POLICY AS COLLATERAL SECURITY—RIGHTS OF SUBSEQUENT CREDITORS.

In an action by the assignee of an insurance policy against a subsequent attaching creditor of the assignor, it is unnecessary to prove the policy; and such creditor cannot resist the assignee's right to the proceeds of the policy where the insurance company has recognized the assignment, and its liability thereunder.

2. SAME.

Where an insurance policy has been assigned to a mortgagee of the insured goods by the mortgagor, as required by the mortgage, as additional security, a subsequent attaching creditor of the mortgagor cannot take advantage of defects in the mortgage to defeat the claim of the mortgagee to the insurance fund.

Appeal from general term, supreme court, First department.

The plaintiff, William H. Lienkauf, a banker of Mobile, Ala., loaned to the Mobile Furniture Manufacturing Company, a corporation of that state, the sum of \$12,000, taking the company's note for its repayment, secured by collaterals of a mortgage upon the company's property in its warehouses, and of a policy of insurance in the La Conflance Insurance Company of France, covering the whole or a portion of the mortgaged property. Subsequently a portion of the mortgaged property insured by the said policy was destroyed by fire, and the loss was adjusted, under the same, at the sum of \$4,554.50. An attachment was levied upon these moneys, in the hands of the agents of the insurance company in New York, in an action brought in the New York supreme court by the defendants in the present action, as plaintiffs, upon a claim against the Mobile Furniture Manufacturing Company. The agents of the insurance company paid to this plaintiff a part of the moneys in their hands, and reserved sufficient to protect themselves against the attachment. Upon this action being brought against the agents to recover the balance of moneys so retained by them, an order was made permitting them to deposit the moneys to the credit of the action, and substituting the present defendants in their stead. The referee found for the plaintiff, and from the judgment affirming a judgment on his report the defendants have appealed.

Stine & Calman, for appellants. *William Man*, for respondent.

GRAY, J., (*after stating the facts as above.*) The appellants opposed the plaintiff's right to recover the moneys in the insurance agent's hands, which represented the balance of the sum at which the loss under the policy was adjusted, on several grounds; but there are only two which are material to be considered here. They say that the policy of insurance and the assignment thereof were not sufficiently proved, and that the mortgage to plaintiff was void for defective execution.

As to the first of these grounds of objection to the recovery, we think the appellants have misapprehended their situation in the matter relatively to the plaintiff's claim upon the insurance company. The agreement between the plaintiff and the Mobile Furniture Manufacturing Company was that the repayment of the loan to them was to be secured by a mortgage of their personal property, and by the transfer of a policy of insurance insuring that property, or portions of it, against loss by fire. The policy was not collateral to the mortgage; but was collateral to the note promising to repay the loan. When the plaintiff made his claim upon the insurance company under the policy, which had been delivered to and retained by him pursuant to the agreement I have mentioned, the insurers recognized it, and transmitted the sum at which the loss was adjusted to their agents in New York for payment. If the insurance company recognized their liability under the policy, and the

¹ Affirming 89 Hun, 658, *mem.*

right of the plaintiff to claim for the amount of the loss, it does not lie in the defendants' mouths to resist that right of the plaintiff, if, prior to their attachment, plaintiff's title had attached to the moneys. We think the policy was not material to be proved, inasmuch as its existence as a liability of the company had been admitted by it by the adjustment of the loss and the remittance of the moneys. The policy was surrendered then, and forwarded to the home office in France as the voucher for the payment of the amount of the loss. The witness merely proved the fact that there was such a policy issued by the La Confiance Company to the Mobile, etc., Company, which had come to his possession as agent, and had been sent to France upon payment of the loss, and that there was noted on the policy an assignment to the plaintiff. The referee's finding that the policy was procured and delivered to the plaintiff when the loan was made, was supported by the evidence, and that plaintiff held the policy until the fire occurred and the loss was adjusted. It was admitted that the policy contained the usual clause against assignments. But this clause in policies is for the benefit of the insurance company; and, if they do not object to the assignment, the defendants certainly are not in a position to do so, as it is not a provision which would inure to their benefit. The proof shows that the policy belonged to plaintiff, and was held by him as a collateral security for repayment of the loan; and, under the authorities, as a chose in action, it was capable of being assigned by parol, and a delivery, when there was a valuable consideration. *Hooker v. Bank*, 30 N. Y. 83-87; *Greene v. Insurance Co.*, 84 N. Y. 572.

As to the second ground of defendants' objections, which I have noted, that the mortgage to plaintiff was void, I do not think that question affects the plaintiff's right of recovery. The point taken is that it was not acknowledged or verified in any way, and that it was not a valid obligation of the Mobile, etc., Company. The proof shows that the mortgage was signed and sealed by certain individuals representing themselves as the president and directors. It purported by its terms to be the act of the company, through its president and directors, under power and authority given to those officers by the stockholders, at a meeting previously held, where a resolution authorizing its execution for the purpose of borrowing the moneys in question from plaintiff had been adopted. It is not necessary for us to decide, in respect of this instrument, further than that it represented a promise or agreement of the corporation, within the scope of its legitimate purposes, through its officers, and must be considered as a valid contract, though not bearing its corporate seal. It was a memorandum in writing, evidencing a corporate act, and making the corporation liable to the plaintiff; and it is not for the defendants to object to irregularities or defects of execution. The doctrine that no corporate act can be binding without being in writing, or under the corporate seal, has long ceased to be maintained. *Ang. & A. Corp.*, § 231; *Danforth v. Turnpike Co.*, 12 Johns. 227; *Trustees v. Cagger*, 6 Barb. 576; *Moss v. Avell*, 10 N. Y. 449-454. But a sufficient answer to the appellant's argument is that the plaintiff's right to the policy, or to its proceeds, did not depend on the mortgage. Though the mortgage contained the agreement of the company to keep their property insured against loss by fire for the plaintiff's benefit, it did not affect the policy itself as an additional collateral security available to plaintiff. The clause was nothing more than the promise of the company, expressed in the instrument, to provide further for plaintiff's security in loaning money to them. The learned referee disposed rightly of the case, and his opinion covered all the points made by the defendants in such wise as to make further notice of them by us unnecessary. The judgment and order appealed from should be affirmed.

All concur.

(110 N. Y. 613)

PEOPLE v. LYONS.

(Court of Appeals of New York. June 5, 1888.)

1. CRIMINAL LAW—APPEAL—REVIEW IN CAPITAL CASES—EXCEPTIONS.

Under Laws N. Y. 1887, c. 498, § 528, providing that "when a judgment is of death, the court of appeals may order a new trial if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below," a defendant cannot claim, as matter of right, the benefit of errors occurring on the trial, and not excepted to, but can only ask the court to determine upon the whole case whether or not justice requires a new trial, or whether the verdict is against law or evidence.

2. HOMICIDE—MURDER IN THE FIRST DEGREE—SUFFICIENCY OF EVIDENCE.

On a trial for murder, it appeared, on behalf of the prosecution, that some time before the crime defendant had a quarrel with deceased, and that, the day before, deceased struck defendant, severely cutting and bruising his face; that on that evening defendant said he would get "hunk" with deceased, that he would put a bullet in him the next time he saw him, etc.; that the next day defendant borrowed a pistol, the lender testifying that it was unloaded, and immediately went to the rear of the building, and was heard to "click" it, remaining long enough to load the pistol; that shortly thereafter he said he meant to get "square" with deceased; that he then went to a street corner where deceased was likely to be, although his way home was not in that direction, met him, and after some animated conversation, a witness testifying that there was no assault, fired the fatal shot, immediately running away and leaving the state; that defendant had been previously twice convicted of an attempt to commit burglary. On the other hand, defendant testified that deceased assaulted him, showing a slight wound; and a witness stated that he saw defendant leave the scene of the shooting, wiping blood from the same, in corroboration, and that the shooting was in self-defense. Defendant also alleged that it was accidental; he not supposing the pistol to be loaded. *Held*, that a conviction for murder in the first degree was warranted by the evidence.

3. SAME—EVIDENCE—RELEVANCY.

Evidence of a quarrel between defendant and deceased three or four weeks before the homicide is admissible as showing the commencement of the history of the relations between the parties.

4. SAME—INSTRUCTIONS—EXCUSABLE HOMICIDE.

An instruction that, if the pistol was fired by accident and misfortune, "you must be further satisfied, before you can acquit on the ground that the homicide was excusable, that the prisoner was engaged, at the time, in doing a lawful act by lawful means, and with ordinary caution, and without any unlawful intent;" and that, if defendant had been assaulted, "he would have no right to arm himself, and to go to the place where he expected to meet the man who had wronged and ill treated him, and inflict any bodily injury whatever upon him. That would be vengeance, and it is not doing a lawful act in a lawful manner,"—is not improper, as conveying the idea that defendant was guilty even if he had unexpectedly and without seeking deceased met him, and if the pistol at the time had been accidentally discharged.

5. SAME.

An instruction that, if defendant was threatened with personal injury, he should have avoided meeting deceased, or going through the streets where he might be, and should have called upon the law for protection, is not erroneous, as conveying the idea that defendant, after being threatened by deceased, had no right to come to a place where deceased might be, or to walk the streets in his vicinity.

Appeal from court of general sessions, city and county of New York.

Laws N. Y. 1887, c. 498, § 528, provide as follows: "When a judgment is of death, the court of appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below."

Blake & Sullivan, (Stephen S. Blake and Adolphus D. Pope, of counsel,) for appellant. *John R. Fellows*, Dist. Atty., and *Benj. F. Dos Passos*, for the People.

PECKHAM, J. This is an appeal from a judgment of conviction of the prisoner of murder in the first degree in the court of general sessions for the county of New York. The prisoner was indicted for the murder of one Quinn in August, 1887, in the county of New York. He was tried in the

general sessions before the recorder, and, having been duly convicted and sentenced to death, his counsel appealed from such judgment to this court under the act permitting such appeal, known as "Chapter 493 of the Laws of 1887." It is claimed on the part of the defendant that the evidence does not show the defendant guilty of murder in the first degree; and under the act of the legislature above mentioned, this court having the right to examine the record, and determine upon the whole case whether the verdict was against the weight of evidence or against law, or if justice requires a new trial, we are asked to make such examination in this case, and to reverse the judgment on the ground above mentioned. The case being one in which the only judgment to be pronounced upon conviction under the indictment is that of death, an appeal from such judgment makes it the duty of this court to examine with very great care and attention the whole record for the purpose of discharging the duty imposed upon us by the legislature, and determining whether, upon that evidence, justice does require a new trial. In making that examination for the purpose of such a determination, the statute says it is not necessary that an exception shall have been taken to any decision made by the court below. Still, as has been already said by this court, a defendant, under this statute, cannot here claim as matter of right the benefit of errors occurring on the trial, where no proper objection was made, and no exception taken to the decision of the court below. Such failure to make an objection, and take proper exception, deprives the defendant of his claim, as matter of right, to a reversal of the judgment. Under such circumstances, he can only ask that the court will determine, upon the whole case, the question whether justice requires a new trial or not, or whether the verdict was against the weight of evidence or against law. The court is then vested with power, in its discretion, to disregard the neglect, and review the case upon the merits. *People v. Driscoll*, 107 N. Y. 414, 14 N. E. Rep. 305.

Having the power, we have exercised it in this case, and have examined fully and carefully the whole record, and we are clearly of opinion that the verdict was not against the weight of evidence or against law, and that justice does not require a new trial. On the contrary, we are fully convinced that the defendant was treated with eminent fairness throughout the whole trial, and that the verdict is in accordance with law, and that a new trial should be denied. Not because we have any doubt upon the question, but simply because it is a capital case, we think it proper to state the facts which we think the jury would have been well justified by the evidence in finding in this case. The defendant is a man between 25 and 30 years of age, a resident all his life of the city of New York. The deceased was also a resident of the same city, and had been all his life, and was a young man of rather above the ordinary height, and, as the evidence tended to show, something of an athlete. Some time in May, probably the 30th, 1887, the deceased, the prisoner, and some others, including two or three young women, went to a picnic at the upper end of the island, at which there was dancing. While there, there was some disturbance among this party, and something like the commencement of a quarrel between the deceased and the prisoner; the deceased demanding of the prisoner that he should apologize for some words which he had spoken of one Meehan, who was a companion of the deceased. The defendant refused to do so, and said that he would not take water from him even if he was a wrestler. The whole party were finally put out of the ground, and from that time until the 4th of July there is no particular account of the relations existing between the prisoner and the deceased. On the 4th of July the same parties met, either just prior to their going to a bathing place in the upper part of the town, or at such bathing place, and there they all had a bath. From the testimony of the women it would appear that all the women were drinking freely, and the men of the party were partners in the same business. They wandered up and down

through the town, between the bathing place and Thirty-Sixth, Thirty-Eighth, and Fortieth streets and Second avenue, going into various saloons, and taking various drinks, and loafing about until the evening of the same day. The party then separated for a short period. The same evening the deceased and the defendant again met in a saloon where the defendant and one of the women were drinking; and the deceased, being on the outside, sent some one in to the defendant, and asked him to come out, which he did; and then, according to the evidence, Quinn took exception to something which he said the defendant had remarked in regard to his (Quinn's) conduct, and, although the defendant denied having made the remark, the deceased nevertheless assaulted him, first with his open hand, and then with a bamboo cane which he carried, to such an extent as to quite severely cut his face, blacken his eye, and cause the blood to flow freely down his face and over his clothing. The severity of this assault is variously described by the witnesses,—some making it an exceedingly gross and desperate assault, others making it of a much less savage nature, but all agreeing that the defendant was assaulted and struck with the hand and cane of the deceased, and that his eye was blackened and his face bloody from the effects of the assault. It is agreed, also, that the defendant made no resistance to this attack, but endeavored to get out of the way of the deceased. After the assault was over, the defendant met one of the girls, and said to her: "You were right after all; you had me done up by Quinn this afternoon." To which the girl replied: "I hope you don't think I had you done up." This was the same evening of the assault, and a short time after it occurred. Evidence was given upon the trial that the defendant that same night made threats in regard to the deceased, and said he would get "hunk" with him, and one witness testified that he said he would put a bullet in him the next time he saw him. Others testified he said: "He did me to-night, but I'll do him the next time I see him;" or, "I'll do him to-morrow;" or, "He did me to-night, and I'll do him when he has his friends and I have mine." The next day, July 5th, the defendant was not at work, but met a companion, with whom he walked through the streets of the city, and they finally went to a saloon, about 2 o'clock P. M., where the bar-keeper was a brother of the companion with whom defendant was walking. Defendant asked him if he had a pistol; and the bar-keeper, seeing his brother, who was behind the defendant, shake his head, told the defendant he had not; it was at home and broken. About this time another companion came into the saloon, and asked the defendant where he got the "shiner," (meaning the black eye,) and defendant told him that Quinn had given it to him the night before, and threatened to do it every time he came around that corner, (being the corner of Second avenue and Thirty-Eighth street,) and that he meant to be prepared for him. He then asked the witness if he had a pistol, and was told that he had one at home. The defendant asked him to loan it to him; saying that he would give it back to him the next day, or some such expression as that. The witness then went to his home, got the pistol, and came back, having been gone probably two hours. He found the defendant at the saloon when he came back, and gave the pistol to him. At this time there was noticed on the defendant's chin a cut or scratch, described by the witness as not a very deep one, but at the bottom of the chin, plainly visible and seemingly recent. When the defendant received the pistol from the witness, he asked him if it was loaded, and was told that it was not. The witness on the stand swore distinctly and positively that the pistol was not loaded when he gave it to the defendant; that he examined it before handing it to the defendant, and knew it was not loaded. This was in the afternoon, about 4 o'clock, of July 5th. As soon as the defendant received the pistol, he went into the rear of the saloon behind a kind of partition, and was there heard to "click" the pistol a number of times. When he came out, he was accompanied by the same person who came with him when he first entered the

saloon, and they walked down street together, and parted at the corner of Thirty-Sixth street and Fourth avenue, about 4 o'clock in the afternoon. There was time and opportunity to load the pistol when defendant was behind the partition. Just before they parted, defendant said to the witness that he meant to get "square" or "hunk" with the deceased. The witness told the defendant he had better not have any trouble with the deceased; that he was a bigger man than he was; that he had better take the black eye, and have no more trouble, for he was known to be a pretty strong man. In the course of this conversation, defendant told witness that Quinn had threatened to do him up every time he got him on the corner of Thirtieth-Eighth street and Second avenue. About 20 minutes or a quarter of 5 that same afternoon, the defendant was seen on the south-east corner of Thirty-Eighth street and Second avenue, and to walk across that avenue to the other or west side, where he stood a few moments looking towards Thirty-Seventh street. Then he was seen to walk back to the east side of the avenue, where the witness lost sight of him as she was going into a baker's shop near by; and within a very brief time after that the shooting took place on the corner of Thirty-Eighth street and Second avenue, on the east side of the avenue. The defendant's home was in First avenue, and could have been reached by him by going through any of the streets south of Thirty-Eighth or Thirtieth-Ninth street just as well as through Thirty-Ninth street. There is no evidence by any one who heard the conversation that took place between the parties at the time of the shooting. Some of the witnesses were near enough to hear that it was an animated conversation, but could not detect the words. The evidence of one witness was to the effect that he saw a person who turned out to be the defendant raise his hand to fire at the deceased, who almost immediately fell, and the defendant then turned and walked, and subsequently ran away. The person who was talking with the deceased on the corner of Thirty-Eighth street and Second avenue just before the defendant came up, said that the deceased was standing with his back towards the south, or the direction from which the defendant was coming up Second avenue; that they were talking about the assault deceased had made upon the defendant the night before; that, as witness was facing the deceased, he saw the defendant coming up the avenue between Thirty-Seventh and Thirty-Eighth streets; and, when the defendant was near or about to cross Thirty-Eighth street, he said to the deceased, "Here comes Lyon now;" that immediately deceased turned in the direction the defendant was coming, and moved towards the curb-stone, the effect of which was to put himself in front of the defendant, and to intercept his progress. Then there was, as has been stated, animated conversation, followed by the shooting, and without any assault having been seen to have been made by the deceased upon the defendant. The defendant, as is stated, ran away, and went to New Jersey and also to Pittsburgh, and was finally arrested there on the 21st of July, and brought back and lodged in jail in New York. This evidence was substantially uncontradicted, except that the defendant was put upon the stand, and claimed that the killing was done—*First*, in self-defense; *second*, that it was accidental. He testified that he did not believe the pistol was loaded when it was given to him by his friend, who stated to him that it was not loaded, and that he did not himself load it after he got it; that when he met the deceased he was on his way home, and endeavored to go by without meeting him; but that when his presence was discovered by the deceased, and when he stepped forward and intercepted the defendant, some conversation occurred of a threatening nature, and the deceased then assaulted him, and cut his chin with a dagger or some sharp instrument, and was proceeding to further assault him, when he called out to him to stop; that he was armed; and, for the purpose of frightening the deceased, he drew the pistol, and pointed it and fired, not supposing that it was loaded, and with no intention

of injuring the deceased; that he almost fainted as soon as he saw what he had done, and then started and ran away. Various other contradictions of the testimony produced by the people were given by the defendant; and one witness was called by him, who testified that, after the affray or quarrel, he saw the defendant walking away with his pocket handkerchief placed up against his chin, which was bleeding. This evidence the defendant claims was corroborative of his own testimony in regard to the assault having been made by the deceased upon him at the time of the shooting.

From all the evidence in the case, carefully considered, it would seem quite plain that the defendant, instead of seeking his home, was engaged in watching the place where the deceased was accustomed to be, and was crossing the avenue from one side to the other with the evident purpose of awaiting the arrival of the deceased; and, when he appeared, the defendant, with the pistol in his pocket, started up the avenue with the intention of meeting him. The evidence made it plainly a case for the jury to determine as to the intention of the defendant in putting the pistol in his pocket, and starting out for the vicinity where the deceased was accustomed to be. The careful examination which we have given the whole evidence in the case leads us to regard the verdict with entire satisfaction. Aside from the fact that the defendant was on trial for a capital offense, which the jury might consider in weighing his evidence, the further facts appeared upon his examination, which the jury might also consider as bearing upon his credibility, that the defendant had been arrested, when 17 or 18 years of age, for an attempt to commit burglary, had pleaded guilty, and been sent to the Elmira reformatory, where he spent some years; that in 1884 he was convicted of an attempt at burglary, and sent to state prison; that he had been arrested numerous times for disorderly conduct; and during his flight, after the killing in question, he was arrested in Pittsburgh for an attempt at burglary, and was in jail in that city when the officers from New York arrived and identified him. The great weight of evidence upon the trial was with the people. There can be little doubt that the defendant, smarting under the beating which he had received the night previous, procured the pistol, and started out in search of the deceased, with the intention of taking the law into his own hands, and wiping out the insult by the destruction of the person who had been the cause of it.

Some exceptions were taken during the course of the trial which it is proper we should notice. Counsel for the defendant argues that the testimony given in regard to what took place at the picnic, three or four weeks prior to the shooting, was improper, and should have been excluded. We think not. It was the commencement of the history of the relations existing between the defendant and the deceased which finally culminated in the shooting on the 5th of July. A quarrel between the two men began at the picnic, and, being so short a time before the shooting, it was proper to show it.

Counsel for the defendant made several requests of the court to charge the jury, and it would seem that the court substantially complied with them. There are no exceptions to any alleged refusals of the court to charge, and there are no exceptions to the charge as made. It is claimed, however, that the learned recorder erroneously instructed the jury in regard to the right of the defendant to arm himself, and that a new trial ought to be granted on that account. It is claimed he, in substance, charged that the defendant would have no right, after the deceased had threatened him, to come to the place where the deceased might be, or to walk the streets in its vicinity, but that defendant's duty was to apply to the authorities, and obtain the protection of the law. The difficulty with this is that the recorder gave no such charge. He did not state that an individual threatened by another with personal injury had no right to walk the streets or to go where the party making the threats might be, but that he must avoid meeting him, or going through the streets where he might be, and must call upon the law for his protection.

The learned recorder in his charge, when stating what might be regarded as excusable homicide, stated that "if the pistol was fired by the defendant intentionally; if he presented it against the person of the deceased, intending to inflict injury upon him,—then it is manifest it was not an accident. It was not a misfortune within the meaning of the law, and therefore it was not excusable. And, even if it was by accident and misfortune, you must be further satisfied, before you can acquit on the ground that the homicide was excusable, that the prisoner was engaged, at that time, in doing a lawful act by lawful means, and with ordinary caution, and without any unlawful intent." The recorder further stated, in regard to the assault on the 4th of July, that "if any wrong had been done to him; if he had been assaulted, as he claims he was, upon that occasion, and unjustly beaten and ill used,—it was his duty to apply to the public authorities, to resort to the law for redress, if he had an opportunity to do so; but he would have no right to arm himself, and to go to the place where he expected to meet the man who had wronged and ill treated him, and inflict any bodily injury whatever upon him. That would be vengeance, and it is not doing a lawful act in a lawful manner." Counsel for the defendant further argues that this charge holds the defendant guilty, if defendant had unexpectedly and without seeking the deceased met him, even if the pistol at the time had been accidentally discharged. No such construction can be given to it, and that was not the idea expressed. No fault can be found with the law as really laid down by the learned judge. The clear meaning was that no man can, for any affront or insult that has been perpetrated upon him hours before, arm himself with a deadly weapon, and seek out the individual who committed the offense, and then and there proceed to take the law into his own hands, and punish the perpetrator of the wrong; and if, while intent on such purpose, he meets the individual upon whom he designs to wreak his vengeance, and before he is ready to fire the shot, and while the intent still exists, the pistol is accidentally discharged, and his enemy killed, it cannot be said for one moment that the defendant was then engaged in doing "a lawful act by lawful means, and with ordinary caution, and without any unlawful intent," and that, therefore, the homicide was excusable. The whole charge of the learned recorder was an exceedingly fair one. Every right of the defendant was carefully guarded, the law was accurately explained, and the question to be decided by the jury was presented to it in a clear, careful, and able manner. We are satisfied that no exception taken by the defendant upon the trial is of any force, and we think the judgment entered upon the verdict should be affirmed.

All concur.

(110 N. Y. 15)

CARTER v. BROOKLYN LIFE INS. CO.

(*Court of Appeals of New York. June 5, 1888.*)

1. INSURANCE—RENEWAL OF POLICY BY PAYMENT OF ANNUAL PREMIUM.

Payment of an annual premium constitutes a renewal of a policy of insurance within the meaning of Laws N. Y. 1873, c. 341, enacting that no life insurance company shall declare forfeited any policy thereafter issued or renewed for non-payment of any premium, unless written notice of the time of payment shall have been mailed to the insured; and the holder of a policy, issued before passage of the act, who afterwards pays a premium, is entitled to the benefit of the provision.

2. SAME—FORFEITURE FOR NON-PAYMENT OF PREMIUM—NOTICE OF MATURITY.

Where an insurance company is required by statute to give notice to the holders of policies, thereafter issued or renewed, of the time of payment of premiums, and assures the holder of a policy, issued before passage of the act, that the required notices will be given, the holder may rely on such assurance.

3. SAME—MAILING NOTICE TO IMPROPER ADDRESS.

Where an insurance company is required by statute to send to policy-holders, at their last known address, notice of the time of payment of premiums, and sends notices to an address unauthorized by the policy-holder, it takes the risk of delivery.

and assumes the consequence of a failure to perform the duty imposed on it; and that, too, though previous notices sent to that address had been received by the policy-holder, and payments made in accordance therewith.

4. SAME—TENDER OF PREMIUM—APPEAL—WAIVER.

The question as to the sufficiency of a tender by a policy-holder of the annual premium, to prevent forfeiture, cannot be raised on appeal, when the answer admits the receipt by the company of a draft for the money, and makes no question as to the amount thereof, nor as to the mode in which tender was made.

Appeal from general term, superior court, city of New York.

Suit by Thomas M. Carter against the Brooklyn Life Insurance Company to compel it to accept a premium on a policy of insurance, and to reinstate the policy which defendant had assumed to cancel. Judgment for plaintiff. Defendant appeals.

Augustus Ford, (*William H. Ford*, of counsel,) for appellant. *Raphael J. Moses, Jr.*, for respondent.

RUGER, C. J. The plaintiff is a resident of the city of Albany, in the state of Georgia, and the defendant a life insurance company located and doing business in the city and state of New York. In the year 1870 the defendant issued and delivered to the plaintiff an insurance policy upon his life for \$5,000, "in consideration of the representations and agreements contained in the application therefor, and of the sum of twenty-one dollars and ninety-five cents to them in hand paid, * * * and of the annual payment of eighty-two dollars and eighty cents, to be paid on or before the 25th day of October in each and every year during the continuance of the policy;" and providing that "in case the said Thomas M. Carter shall not pay, or cause to be paid, the premiums, as aforesaid, in cash, on or before the day herein mentioned for the payment thereof, * * * then the said company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease, and be null, void, and of no effect." A notice was printed upon the policy, stating, among other things, that "premiums must be paid on or before the day when due; * * * and, if the premiums be not settled when due, a policy becomes forfeited;" that "all premiums are due and payable at the office of the company in the city of New York, but, for the convenience of policy-holders residing at a distance, it may be paid to an agent, but only on the production of a receipt signed by the president or secretary, who are alone authorized to sign receipts on the part of the company. * * * In all cases, notices will be sent as regularly as possible, but solely as a matter of courtesy. As these often miscarry from a variety of causes, it is absolutely necessary that a policy-holder should make particular note of the dates when his premiums come due, for the company will not be responsible for any omission or miscarriage of notice." The annual premiums upon this policy were regularly paid by the insured to the company from the date thereof to October, 1883; and, upon the non-receipt of the premium for that date, the company declared the policy forfeited, and assumed to cancel the same upon its books. The defendant did not give the plaintiff either prior or subsequent notice of the time when such premium became due, or the place where payable, as provided by chapter 341, Laws 1876, and the amendment thereto by chapter 321, Laws 1877. Previous to the year 1878, the defendant, at the request of the plaintiff, was in the habit of sending receipts, in anticipation of the day of payment, to the Central Railroad & Banking Company at Albany, in Georgia, for collection; and the plaintiff regularly paid such premiums to that company, taking up the receipt therefor held by it. In September, 1876, after the passage of chapter 341 of the laws of that year, the defendant sent the plaintiff, to his address at Albany, Ga., a copy of such law, and a notice thereon indorsed, stating that "notices will be sent as required by statute," and that "all premiums are due and payable at the office in New York." These notices were repeated upon all subsequent premium receipts sent to the

plaintiff. After this time the plaintiff was in the habit of remitting premiums directly to the company at New York. In each of the years 1878 and 1879 the defendant transmitted notices of the time for the payment of premiums, addressed to Thomas M. Carter, Albany, Ga. In 1880, however, without any authority from the plaintiff, the company assumed to change the address, upon the notices sent to him, from that theretofore issued, to "Thos. M. Carter, care of the Central Railroad & Banking Co., Albany, Ga." These notices were received by that company, and were regularly delivered by it to the plaintiff for the years 1880, 1881, and 1882, and he regularly paid the annual premiums on the policy at the company's office in New York for those years. The notice for the year 1883 was not, however, delivered to the plaintiff. Upon this state of facts several questions arose upon the trial, among which the material ones are: (1) Whether the law of 1876, requiring notices to be sent to policy-holders, applies to this policy; (2) whether the assurance expressed by the defendant upon its notices thereafter sent to the plaintiff, that it did so apply, authorized him to act in reliance thereon, and estopped the defendant from claiming that it did not apply to such policy; and (3) whether the notice sent by the defendant in 1883 conformed, in respect to the manner of its transmission, to the requirements of such law.

It is contended by the appellant that the act applies only to policies "issued or renewed" after its passage, and that a policy cannot be said to have been renewed unless it has become forfeited or lapsed, and has been afterwards restored or reinstated by the company. The language of the statute, as expressed in the law of 1876, is that "no life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy thereafter issued or renewed, by reason of non-payment of any annual premiums or interest, or any portion thereof, unless a notice in writing, stating the amount of the annual premium or interest due, and when due, on such policy, and the place where said premium or interest may be paid, shall have been duly addressed and mailed by the company issuing such policy to the insured, postage paid, at his or her last known post-office address, not less than thirty nor more than sixty days next before such payment becomes due according to the terms of such policy." This act was amended by chapter 321, Laws 1877, but, so far as this case is concerned, in no respect rendering a particular notice of the amendment necessary. The act should be construed according to the popular signification of the language used, and with the view of securing to the policy-holders in life insurance companies the benefits contemplated by the legislation. That the defendant supposed the law applied to the policy held by the plaintiff plainly appears from the notices indorsed by it upon each receipt thereafter issued and sent to him. The company, instead of sending notices under the clause of the policy which provided for them as an act of courtesy, assumed that he was entitled to them as matter of right, and informed him that the notices required by statute would be sent, and, in case he changed his post-office address, requested notice of such change to be given to it. The defendant must have referred to this statute, as there was no other requiring the service of notice, and the plaintiff has a right to rely upon the assurance that the defendant thus gave him of annual notices for the payment of premiums. *Insurance Co. v. Eggleston*, 96 U. S. 572.

We are also of the opinion that the payment of each annual premium constituted a renewal of the policy within the meaning of the term "renewed" as used in the act. While it was provided by the policy that it should continue for the term of the natural life of the insured, it was expressly provided that this was upon the condition that he should pay the annual premiums as they became due by the terms of the policy. A failure to pay such premiums in any year was declared to render the policy null, void, and of no effect; but, when paid, it continued, by force of such payment, the policy in existence for the period of another year. This process each year revived or renewed the

policy as it approached the period of its agreed termination. It is not according to the popular notion of the meaning of the word "renewal" that it can take place only after the death or expiration of the subject to which it is applied. Thus to renew a note, a lease, or a contract, it is not essential to wait until they have respectively expired; for, after that time, it would be practically impossible to renew them. A new note or lease may be made or contract created, but they would have force and effect from the new creation, and not from the original agreement. To renew, in its popular sense, is to refresh, revive, or rehabilitate an expiring or declining subject; but is not appropriate to describe the making of a new contract, or the creation of a new existence. *Webst. Dict.*; *Worcest. Dict.* It would be at the option of an insurance company to re-execute a forfeited contract of insurance; and, if the act was held applicable to such a policy alone, it would confer no legal right whatever upon a policy-holder. It was the evident object of the act to make it apply to some existing policies, and confer some legal right upon their holders, to avoid a cause of forfeiture; and, if it be held to apply only to lapsed policies, it leaves it entirely optional with the company whether there should be any renewed policies thereafter or not. We are therefore of the opinion that the plaintiff's policy was renewed within the meaning of the act.

We are also of the opinion that no such notice was given to him as the statute required. The law required that the notice should be sent to the assured at his known place of address; and there is no claim but that the defendant knew his place of address at all times subsequent to the year 1880. It would, of course, be competent for him to agree upon some other mode of address; but, in the absence of such an agreement, the defendant was not at liberty to adopt another address, by which the notice might or might not reach him. The plaintiff had never changed his post-office address, or notified the defendant that he intended to do so. It sent the notice to the Central Railroad & Banking Company without authority from him, and thereby made that company its agent to deliver it. It took the risk of its delivery, and assumed the consequences of a failure upon the part of its agent to perform the duty intrusted to it. The plaintiff was under no obligation to object to any mode of sending such notices which was effectual to accomplish their object; for, so long as he actually received the notices in time, he had no cause for complaint. The statute, however, imposed the duty upon the defendant of sending the notices required to the plaintiff in a particular manner; and, when it did so, it acquired the right to declare a policy forfeited for non-payment of the stipulated premiums. It was therefore incumbent upon the defendant to show that it had complied with the terms of the statute, and it did not do this by showing a delivery of a notice to another person than the plaintiff. Such notice gave it no right to declare the policy forfeited, and in doing so it acted illegally.

The criticism made by the defendant upon the sufficiency of the plaintiff's offer to pay the premium due in 1883 is untenable. The answer admits the receipt by the defendant of the draft for that sum remitted by the plaintiff, and makes no question as to the amount thereof, or as to the mode in which the tender was made. It is now quite too late to raise this question.

For the reasons stated we think the judgments of the courts below should be affirmed.

All concur.

(110 N. Y. 43)

DODGE v. ZIMMER.

(*Court of Appeals of New York. June 5, 1883.*)

1. FRAUDS, STATUTE OF—ASSIGNMENT BY WIDOW OF INTEREST IN WILL—PAROL EX-
EMPTION FOR COSTS.

Where the testator's widow, after having offered the will for probate, assigns to plaintiff "all her right, title, and interest, and all her claims of every name and nat

ure, against her husband's estate, by way of legacies, dower, etc., or otherwise," and contracts orally to pay and free the estate from all costs and charges of her attorney, and afterwards a decree for such costs was had, which plaintiff was compelled to pay, he may recover against her for a breach of the contract, though not in writing; the same being a promise to pay her own debt, and not that of another, within the meaning of the statute of frauds.¹

2. JUDGMENT—RES ADJUDICATA—PARTIES.

Where a devisee and proponent of the will assigned all her interest in the testator's estate to plaintiff, agreeing to indemnify him against costs and charges of her attorney, and plaintiff afterwards appeared and objected to her further prosecuting the probate of the will, but which, over his objection, was proceeded with, and plaintiff thereby compelled to pay her attorney's costs taxed therein, he was not a party to the proceeding so as to bar an action against her for breach of contract.

Appeal from general term, superior court, city of Buffalo.

Action by Leonard Dodge against Nancy Zimmer, for breach of a contract to pay certain costs and attorney's fees, chargeable against herself or the estate of her deceased husband, Rudolph Zimmer, in the matter of the probate of his will. In order to settle the litigation as to the decedent's estate, plaintiff bought out the interests of all the next of kin, legatees, etc., and among them all the right, title, interest and claims of the widow, Nancy Zimmer, on the express understanding, though oral, that she should pay "all the costs and charges" of one Beecher, her attorney; the intention being that plaintiff should thereafter have entire control of the proceeding instituted by her to probate the will. Nevertheless, by her procurement, the will was offered for probate, against plaintiff's objection, and rejected; but the proponent's costs were decreed to be paid out of the estate, on the ground that she had instituted the proceeding in good faith, under Code N. Y. § 2558. This decree having been assigned to Mr. Beecher, plaintiff paid the claim, and took an assignment of it. The trial court rendered judgment for plaintiff. Defendant appeals.

F. Brundage, for appellant. *A. Moot*, for respondent.

FINCH, J. Upon the facts of this case there is no doubt of the justice of the plaintiff's claim. The purchase of the interest of Nancy Zimmer was intended to end a lawsuit over the will, and not to prolong it into a bill of costs against the estate, and with the express understanding that out of the purchase money she should pay her attorney and extinguish his claim. The truth of this is not denied by those who could have denied it if it was a falsehood. That fact accords with the tenor and legal effect of the papers executed. They transferred to plaintiff the entire right and interest of Mrs. Zimmer against the estate. Growing out of the contest over the will, she had an inchoate and contingent claim against the assets to be reimbursed for her expenses paid or incurred in the litigation. That claim might or might not be allowed by the surrogate, dependent upon his judgment of her good faith; but, whatever it was or might prove to be, it was covered by the words, "all her right, title, and interest, and all claims of every name and nature, which she has or are known to her, or may exist in her favor, against the estate of Rudolph Zimmer, deceased, * * * by way of legacies, dower, thirds, moiety, or otherwise." If the latter words raise an ambiguity or create a doubt, that is dispelled by the parol proof which shows the construction put upon the instrument by the parties at the time, and the action taken under it. Such proof was admissible if the writing was ambiguous. *Griffiths v. Hardenbergh*, 41 N. Y. 464. It did not contradict or vary the assignment, but showed how the parties understood its terms, and relieves it of all ambiguity. The appellant, however, does not seem to dispute the construction we have asserted. I understand him to concede fully and distinctly that the writing transferred to plaintiff all Mrs. Zimmer's right to reimbursement for

¹See note at end of case.

the charges of her attorney, so far as they had been incurred. It thus became her duty to pay him, and without recourse to the estate. Her transfer extinguished any right to get his pay out of the assets, and left her sole debtor for the amount of his charges. She promised, in substance, to pay that debt. The jury so found upon a submission to them of that single question. The plaintiff required that she should do so, not as an essential term of his purchase, which would be effective between the parties without it, but as a further and collateral guard against an outside claim of the attorney. Beecher, who had conducted the contest in behalf of Mrs. Zimmer, had a lien upon her cause of action, and upon any judgment which might be rendered against the estate. It was not contemplated that one should be, for the writing stipulated that plaintiff might continue the proceedings, and have a decree of probate, or denial of probate, as he pleased. The manifest purpose was to allow him to control the proceedings; but Mrs. Zimmer could not settle so as to cut off Beecher's rights, and the only mode of accomplishing that was for defendant to pay him, and so extinguish his lien, and that she agreed to do. I think that was an independent collateral agreement, and so was valid and admissible, although by parol. *Chapin v. Dobson*, 78 N. Y. 74; *Eighmie v. Taylor*, 98 N. Y. 288. It answers very closely to one of the exceptions conceded to exist in the case last cited, viz., "a stipulation which assumed that agreement precisely as indicated by the writing, but dealt with a possible contingency in the future, as to which a separate or suppletory agreement was made." Assuming the contract of purchase and sale to stand and remain unchanged in all its terms, it looked forward to a possible contingency in the action of a third person which might put in peril the terms as they stood, and by such suppletory parol agreement sought to avert the danger and guard against it. There was no error, therefore, in the admission of the evidence. Nor did the statute of frauds render it invalid because an agreement to pay the debt of another and not in writing. It was a promise by Mrs. Zimmer to pay her own debt to Beecher. It does not answer the plaintiff's claim to say that the promise covered only the counsel fee, which was in fact paid Beecher out of the purchase money. The defendant's agreement was to "take care of Beecher." The money paid was to effect that result, and he, as a disturbing or dangerous element, by reason of his rights, was to be taken out of the case. The payment made to Beecher was not voluntary. As the representative of Mrs. Zimmer, and we must assume with her knowledge and consent, he proceeded with the litigation to a decree which charged the costs of the proponent upon the estate. His lien upon them attached at once, and while as against Mrs. Zimmer the plaintiff could have prevented their collection out of the estate in his hands, yet as against Beecher he could not, and the payment was compulsory, and to relieve the estate from the lien. He was thus compelled to do what was the defendant's duty, and what she agreed to do, and is entitled to recover the amount so paid of Mrs. Zimmer. He was not a party to the proceeding before the surrogate in any such sense as to bar his present right of action. Other objections to the recovery have been examined and considered, but need not be discussed. The judgment should be affirmed, with costs.

All concur, except RUGER, C. J., not voting.

NOTE.

STATUTE OF FRAUDS—DEBT OF ANOTHER. When the main purpose of a promisor is, not to answer for another, but to subvert some pecuniary and business purpose of his own, involving either benefit to himself or damage to the other contracting party, his promise is not within the statute of frauds, although, in form, it is to pay the debt of another, and although the fulfillment of his promise may incidentally have the effect of extinguishing that liability. *Crawford v. Edison*, (Ohio,) 13 N. E. Rep. 80; *Wilson v. Smith*, (Iowa,) 35 N. W. Rep. 506; *Green v. Burton*, (Vt.) 10 Atl. Rep. 575; *Sext v. Geise*, (Ga.) 6 S. E. Rep. 174; *Silsby v. Frost*, (Wash. T.) 17 Pac. Rep. 887; *Railroad Co. v. Houston*, (Tenn.) 2 S. W. Rep. 86, and note. An original undertaking to pay for goods v. 17 N. E. no. 5—26

to be delivered or services to be performed for another is not within the statute. *Maurin v. Fogelberg*, (Minn.) 82 N. W. Rep. 858, and note. Original promises, as distinguished from collateral promises, under the statute of frauds required to be made in writing, are such as are founded on a new consideration, the debt antecedently contracted for still subsisting, moving to the promisor, and beneficial to him, and such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor. *Rintoul v. White*, (N. Y.) 15 N. E. Rep. 818. A promise by an employer to pay for medical services rendered his employee, out of their wages, is not within the statute of frauds, being merely a promise to pay one's own debt in a particular way. *Woodruff v. Scaife*, (Ala.) 8 South. Rep. 311. But the mere fact that an advantage may result incidentally to one who orally promises to pay the debt of another is not sufficient to take it out of the statute of frauds. The resulting advantage must be the consideration upon which the promise was made. *Clapp v. Webb*, (Wis.) 9 N. W. Rep. 796.

(110 N. Y. 33)

LYNCH v. PFEIFFER.¹

PFEIFFER v. LYNCH *et al.*¹

(Court of Appeals of New York. June 5, 1888.)

1. RELIGIOUS SOCIETIES—INCORPORATION—ORGANIZATION—RECITALS IN CERTIFICATE.
A meeting at which the organization of a religious society is perfected is not illegally organized, where it appears from the certificate of incorporation that the meeting was composed of the male members of a congregation, though the female members were entitled to participate in the meeting; it not appearing that the female members were excluded.
2. SAME—CONSTITUTION OF MEETING.
A certificate of incorporation of a religious society, reciting that, there being no minister, elder, or deacon present, two persons were appointed chairman and assistant chairman, is a sufficient compliance with act N. Y. c. 60, Laws 1813, relating to the formation of religious associations, and enacting that, if no elders are present at the election of trustees, two members of the congregation shall preside at the meeting.
3. SAME—NAME OF SOCIETY.
A certificate of incorporation of a religious society, reciting that the society is to be known as the "Manhattanville Presbyterian Society," complies with act N. Y. c. 60, Laws 1813, relating to the formation of religious associations, and requiring the certificate to mention and describe the name by which the trustees shall be called.
4. SAME—DEED—VALIDITY.
A deed from a religious society, made for adequate consideration, and in pursuance of an order of a court having jurisdiction, is duly authorized, and sufficient to pass a good title.
5. MORTGAGES—MERGER.
Where grantees of the fee are the holders of a mortgage on the land, and have no interest in preserving the lien of the mortgage, and there is no intention to keep it on foot, the mortgage is merged in the superior legal title.
6. SAME—RELEASE—OF PRIOR TO SUBSEQUENT MORTGAGE.
In New York a mortgagee has sufficient title to uphold a release made to him of a prior mortgage.
7. SAME—PRESUMPTION FROM LAPSE OF TIME.
A release, though inoperative as such, may, together with a great lapse of time, be evidence that a mortgage is no longer a subsisting incumbrance.

Appeal from general term, supreme court, First department.

On the 14th day of February, 1883, an agreement was made between Oscar Pfeiffer, of the first part, and Anthony McReynolds, of the second part, whereby, in consideration of the sum of \$21,400 to be paid, Pfeiffer agreed to sell to McReynolds certain land situated in the city of New York. One thousand dollars was paid on the execution of the contract, \$12,500 was to be paid by assuming a mortgage for that amount then on the land, and the balance of \$7,900 was to be paid in cash on delivery of the deed. A deed containing the usual full covenants was to be delivered on the 15th day of March, 1883; and on that day Pfeiffer tendered a deed, which McReynolds refused to receive, on the ground that the title was defective, and the property not free from incumbrance. Prior to the 15th day of March, McReynolds assigned his con-

¹Affirming 38 Hun, 608.

tract to John Lynch, and the tender of the conveyance was made to both Lynch and McReynolds. Thereafter Lynch commenced one of these actions against Pfeiffer to compel specific performance of the contract, and soon thereafter Pfeiffer commenced the other action against Lynch and McReynolds to compel specific performance by them. Both actions were tried at the special term, at the same time, and it was there found that Pfeiffer had tendered and was able to give a good title, and in his action specific performance was decreed. The complaint in the action commenced by Lynch was dismissed. The judgments in both actions were affirmed at the general term, and then an appeal in each action was brought to this court.

Matthew Daly, for appellants. *Erastus F. Brown*, for respondent.

EARL, J., (*after stating the facts as above.*) Several objections were made by Lynch and McReynolds to the title tendered them by Pfeiffer, and it is proper that the objections should be examined in detail.

1. The title to the land comes through mesne conveyances from the Manhattanville Presbyterian Society, which purchased and took a conveyance of the land in June, 1882. It is objected that that society was not regularly organized, and that it could not, therefore, hold or convey land. It was organized under the act (chapter 60, Laws 1813) providing for the formation of religious associations. That act specifies particularly how societies of this kind could be organized, and, so far as we can perceive, all of its provisions were complied with. It is recited in the certificate of incorporation that the meeting at which the organization was perfected was composed of the male members of the congregation; and it is objected that the meeting was illegally organized, if confined to the male members, as all the members of the congregation, both male and female, were entitled under the act to take part in the meeting. The organization was perfected the 15th of August, 1851. It is claimed on the part of Pfeiffer that the statute prescribed that none but male members of legal age could participate in the meeting. We are referred to no statute making such a provision. But if we assume that all the members of the congregation of lawful age had the right to participate in the meeting, it is not shown that any were excluded. While it is recited in the certificate that the meeting was composed of the male members of the society, for aught that appears the female members may have absented themselves, and if they did the male members had the right to constitute the meeting. Certainly there is nothing to show that any female member was excluded from the meeting. The statute provides that on the day of the election two of the elders shall preside, and, if there be no such officers, then two members of the congregation shall preside at the election. The certificate recites that, "there being no minister, elders, or deacons present at said meeting, David Stevens was appointed its chairman, R. C. Andrews, assistant chairman, and William R. Dunshee, secretary." There is no implication from this language that there were any elders, and there is no proof that there were any. Hence it was perfectly proper for the members of the congregation present to select two of their number to preside at the election of trustees. The certificate further recites that, "by general consent, the society is to continue to be known as the 'Manhattanville Presbyterian Society.'" That is a perfect compliance with the provision of the statute, which requires that in the certificate of the incorporation "the name or title by which the said trustees and their successors shall forever thereafter be called and known shall be particularly mentioned and described." We are satisfied, therefore, that the Manhattanville Presbyterian Society was legally organized.

2. It appears that the Manhattanville Presbyterian Society made a conveyance of this land by deed dated May 15, 1875, to the Presbytery of New York, a corporation authorized to take and hold real estate. But it is claimed that the society was not authorized to make that conveyance, and hence that it

was void, and no title passed to the presbytery. It was provided in the act of 1813 that the chancellor, to whose powers the supreme court has succeeded, in case he should deem it proper, could make an order for the sale of real estate belonging to a religious corporation, and to direct the application of moneys arising therefrom by the corporation. In pursuance of that provision, in May, 1875, the trustees presented a petition to the supreme court, in which they represented that the Manhattanville Presbyterian Society was seized in fee of the land in question; that in 1857, by virtue of an order of the court, the trustees executed a mortgage to one Van Allen, upon which there was then due and unpaid the principal sum of \$1,500, and interest from June, 1871; that that mortgage, through several mesne assignments, was then held by the trustees of the Presbytery of New York; that there were unpaid assessments upon the land for improvements, bearing interest at the rate of 12 per cent. from the date of confirmation; that the church membership of the society and congregation was so reduced in numbers as to make it impossible to meet the current expenses of sustaining their church property and religious worship therein; that they had no income except from the rental of pews, and that that was wholly insufficient for the purposes aforesaid; that they had no means of paying the incumbrances except by a sale of the premises; that besides a floating debt of about \$300, the church building required expensive repairs, which they were unable to make; that the location of the property was such as to expose it from time to time to other assessments for street openings or other objects; that at a meeting of the congregation, regularly called, it was resolved to transfer the church property to the trustees of the Presbytery of New York, and that the trustees of the church be authorized to take all measures necessary for a legal transfer of the same. And they prayed that an order might be entered authorizing them to execute and deliver to the trustees of the Presbytery of New York a deed in fee-simple, conveying to them and their successors and assigns the premises described, subject to all existing incumbrances, the amount of which, together with the floating debt, should constitute the consideration to be expressed therein. The court thereupon made an order that the trustees of the society be authorized to execute and deliver to the trustees of the Presbytery of New York a deed in fee-simple of the land described in the petition; that such deed be subject to all existing incumbrances; and that the amount thereof, together with the floating debt of \$300, constitute the consideration to be expressed in the deed. In pursuance of that order, on the 18th day of May, 1875, the society executed a deed to the trustees of the presbytery of the premises described, reciting a consideration of \$3,736, "lawful money of the United States of America, to it in hand paid by the party of the second part." The deed contained the usual full covenants, and was made in terms subject to the Van Allen mortgage. Thereafter on the 7th day of November, 1881, the trustees of the Presbytery of New York, by a deed containing no covenants, conveyed the same land to Pfeiffer, and Pfeiffer, to secure a portion of the purchase price, executed to them a mortgage for \$12,500. We see no reason to doubt that the deed from the Manhattanville Presbyterian Society to the trustees of the Presbytery of New York was duly authorized, and in all respects adequate and sufficient to convey a good title to the premises. The petition was sufficient to give the court jurisdiction to make the order, and, although the deed recites that the consideration was the sum of \$3,766, in hand paid, yet it would not be invalid if the consideration had not in fact been paid, but had been agreed to be paid. In reaching the conclusion as to the validity of that conveyance, we come in conflict with nothing decided in *Baptist Church v. Baptist Church*, 46 N. Y. 131, 73 N. Y. 82. In that case this court held upon the facts there appearing, which were very unlike those in this case, that no sale of the property was intended; that the whole scheme was to effect a union of the two churches, and a dissolution of the grantor as a re-

ligious corporation, which was to reap no benefit whatever from the conveyance, and hence that it could not be regarded as a sale. Here the grantor survived as a corporation, and was to be benefited by the payment of its debts, and there was a transmission of property from one party to another for an adequate consideration, and hence in every sense there was a sale.

3. The Van Allen mortgage did not, after the conveyance, continue to be an incumbrance upon the premises, but became merged in the superior legal title which the trustees of the presbytery took by the deed. In order to prevent a merger in such a case, the grantee should have some interest to keep the mortgage on foot, and there must be an intent that the merger should not take place. *James v. Morey*, 2 Cow. 246; *Champney v. Coope*, 32 N. Y. 543; *Bascom v. Smith*, 34 N. Y. 320. Here, after the conveyance to the presbytery, so far as it appears, it had no interest whatever in preserving the lien of the mortgage, and there was clearly no intention on the part of the presbytery to keep the mortgage on foot. All the facts show that it was the intention of the parties that the presbytery should pay the mortgage as a part of the consideration for the purchase of the property, and therefore the Van Allen mortgage ceased to be an incumbrance upon the property.

4. It is further objected that the property was incumbered by a mortgage made by the Manhattanville Presbyterian Society to William G. Bull, John L. Mason, William P. Cook, and Jesse W. Benedict, on the 30th day of April, 1857, nearly 26 years before the contract of sale between Pfeiffer and McKeynolds. That mortgage was payable on demand, and hence has long since apparently been barred by the statute of limitations. After the conveyance by the trustees of the presbytery to Pfeiffer, all the mortgagees named in that mortgage, or their representatives, executed releases thereof to the trustees of the Presbytery of New York. It is claimed, however, that those releases were ineffectual, because the presbytery did not at the time hold any title to the premises. But it was at that time a mortgagee of the premises, and that was sufficient to uphold a release of a prior mortgage. The facts show sufficiently that it was the intention of the presbytery, by obtaining the releases, to perfect the title which it had conveyed to Pfeiffer. But if the releases were otherwise ineffectual, they furnish strong evidence, together with the great lapse of time and the omission to mention the mortgage in the proceeding for the sale of the land by the Manhattan Society, that the mortgage is no longer a subsisting incumbrance or obligation, and the same, if not paid or otherwise discharged, is barred by the statute of limitations. We have therefore reached the conclusion that the title tendered by Pfeiffer in performance of his contract was reasonably clear from any defect. The alleged defects, if any exist, are merely fanciful, and not substantial, and are not sufficient to defeat an action for specific performance. The judgment should therefore be affirmed, with costs.

All concur.

(110 N. Y. 1)

BARRY v. HAMBURG-BREMEN FIRE INS. CO.

(Court of Appeals of New York. June 5, 1883.)

INSURANCE—CONDITIONS OF POLICY—CHANGE IN POSSESSION OR TITLE—DEEDS ABSOLUTE AS SECURITY FOR DEBT.

Deeds given to secure an indebtedness, though absolute in terms, and each purporting to convey the property, though no change of possession took place, do not constitute such sale or transfer, or change in title or possession, as are made a condition of forfeiture in a policy of insurance; but that the grantor remained the legal owner may be shown by parol.

Action on a policy of insurance by Anna Barry against the Hamburg-Bremen Fire Insurance Company. From an order granting a nonsuit plaintiff appeals.

W. E. Osborn, for appellant. Edward Salomon, for respondent.

RUGER, C. J. It was assumed upon the trial that the property described in the insurance policy, upon which this action was brought, had been destroyed by fire, and the policy had become payable by its terms to the plaintiff, except for the alleged breach of a condition of the policy set up as an affirmative defense by the answer. The condition referred to was a clause reciting, substantially, that "if the property shall be sold or transferred, or any change take place in the title or possession, whether by legal process, judicial decree, or voluntary transfer or conveyance, * * * without the consent of this company written hereon, * * * then * * * this policy shall be void." The property referred to consisted of real estate, and it was admitted on the trial that no change of possession thereof had taken place within the meaning of the above condition. It was alleged, however, that the property had been sold or transferred, and a change of title had been effected, which it was claimed avoided the policy. To support this issue, the defendant gave in evidence two deeds, both absolute in terms, and each purporting to convey the property,—one from Maria Sleight, the owner, to one Michael McLoughney, Jr., and another from McLoughney to John H. Corwin,—which were each executed subsequent to the date of the policy, and were respectively duly recorded in the clerk's office of the county where the property was situated. This evidence established a *prima facie* case for the defendant. To obviate the effect of this evidence, the plaintiff offered to prove that the deed to McLoughney was given under a parol agreement to secure an existing indebtedness from Mrs. Sleight to McLoughney, and that a subsequent agreement was made between Mrs. Sleight and McLoughney whereby McLoughney relinquished his security, and conveyed the property to Corwin as security for a debt owing by Mrs. Sleight to the latter. The defendant's counsel, for the purposes of the motion, admitted the truth of the facts stated in the plaintiff's offer, and thereupon moved the court to nonsuit the plaintiff, and the court granted the motion; to which ruling the plaintiff duly excepted. The general term, upon appeal to that court, affirmed the judgment, and the plaintiff appeals to this court. For the purpose of our decision, it must therefore be assumed that the deeds in question were given as security. We are of the opinion that the courts below have erred in their views of this case, and that the question presented by the exception has been repeatedly adjudged in favor of the plaintiff by the courts of this state. There is no ambiguity in the terms of the condition of the policy, and no question of construction arises over the true meaning and intent of the provision. If the property has in fact been sold or transferred, or any change has taken place in the title or possession, then the policy by its terms becomes void. In determining this question, we can only inquire whether any transfer has been made which in law transferred the title of the property. The parties must be assumed to have contracted with full knowledge of the law, and to have used the terms employed in the policy with reference to the character which the law attaches to them. It is not contended by the defendant that the giving of a mortgage by Mrs. Sleight upon the property would have effected a sale or transfer thereof, or a change of title, within the meaning of the condition; but it is claimed that, because the defeasance was not written in the deeds put in evidence, they operated as a legal transfer of the title so far as the defendant was concerned, and thus came within the terms of the policy.

The precise and only question in the case is, what effect does the law give to a deed, absolute in form, but which in fact is given as security for a debt? Is it a conveyance of title, or simply a chattel interest incapable of affecting title except through legal proceedings to enforce the collection of a debt? It seems to us that the courts below have failed to appreciate the effect produced by the abolition of the distinction between law and equity, and the more recent decisions in this state depriving a mortgage of the characteristics of a conveyance. The cases are very numerous in our reports, and so familiar

to the profession that we are surprised at the necessity at this date of referring to them at all. We will, however, cite a few of the cases showing that it has been the settled law for many years that a deed, though absolute in form, if given as security for a debt, is to all intents and purposes, both at law and in equity, a mortgage only. The case of *Murray v. Walker*, 31 N. Y. 399, was in ejectment by one holding a patent from the state, acquired under a certificate of purchase assigned to him by the purchaser from the state as security for a loan, against a tenant of one who had acquired the rights remaining in such assignor after the assignment. It was held that the patent, although absolute in form, was received by the patentee as security only, and that the action could not be maintained; WRIGHT, J., saying: "A deed or conveyance, absolute on its face, if really only intended to secure a debt, is deemed, in equity and at law, a mortgage, though the defeasance be by parol." In *Horn v. Keteltas*, 46 N. Y. 605, ALLEN, J., said: "It is now too late to controvert the proposition that a deed, absolute upon its face, may, in equity, be shown, by parol or other extrinsic evidence, to have been intended as a mortgage. * * * The courts of this state are fully committed to the doctrine; and, whatever may be the rule in other states, here, in passing upon the question, we have only to stand upon the safe maxim of *stare decisis*." The same learned judge, in *Carr v. Carr*, 52 N. Y. 260, says "that whatever property is transferred, no matter in what form or by what conveyance, as a security for debt, the transferee takes merely as mortgagee, and has no other rights or remedies than those the law accords to mortgagees." It was held by this court in the case of *Shattuck v. Bascom*, 105 N. Y. 40, 12 N. E. Rep. 283, that a judgment rendered in an action of ejectment between one Coleman, as plaintiff, claiming title under an absolute deed from Bascom, and an adverse claimant, upon a verdict for the defendant, was not an adjudication which barred Bascom in a subsequent action between him and such adverse claimant, if it was shown that such deed was given as security for a debt; EARL, J., saying: "Although the conveyance from the defendant to Coleman was in form a deed, it was in fact a mortgage, and had all the incidents of a mortgage. Coleman could not upon that deed have maintained an action of ejectment against his grantor or any other person. All he acquired by the deed was a lien upon the land for the security of his debt; and upon payment of his debt his interest in the land, and his lien thereon, would absolutely cease. Reconveyance by him to this defendant was not necessary to reinvest him with the absolute title, and was necessary only to clear up the record title. Therefore the defendant did not in any sense take his title from Coleman, but his title was anterior to any interest which Coleman had in the land, and the legal title was in him at the time of the pendency of the action of *Coleman v. Shattuck*." We think, also, that the case of *Hodges v. Insurance Co.*, 8 N. Y. 416, is in point in this case. The defendant contended in that case, as in this, that although the deed then in question, as between the parties, might be construed as a mortgage, yet, as to the defendant, it was an absolute conveyance. But the court held otherwise, and decided that, as the deed was given as security for a debt, the title of the property did not pass, the grantor therein remaining the legal owner of the property, and that this fact might be shown by parol. It follows from these authorities that the legal position of Mrs. Sleight, as the owner of the property, was not changed or affected by the deeds referred to, and that such instruments did not bring the transaction within either the letter or the spirit of the contract. The interest of Mrs. Sleight in the property remained the same after as before the delivery. It is true that, through a course of legal proceedings, the title to the property might finally be acquired by some one, if the debt was not paid; but this would be equally true if Mrs. Sleight had given to McLoughney her note of hand for the debt, and it had been followed by judgment, and a sale of the land under execution. The circum-

stance that McLoughney or Corwin might, by a conveyance to a *bona fide* purchaser, have given a good title under the recording acts, does not affect the question as to whether Mrs. Sleight was the legal owner of the property at the time of the trial. She could, of course, estop herself by her conduct, as against certain persons, from proving the truth as to her title; but this does not show that she is not the holder of the legal title, and there is nothing in this case to bar her from controverting the truth of the defendant's evidence tending to show that she had transferred the title of the property.

We think the judgments of the courts below should be reversed, and a new trial ordered, with costs to abide the event.

All concur.

(109 N. Y. 512)

PEOPLE'S BANK OF CITY OF NEW YORK v. ST. ANTHONY'S ROMAN CATHOLIC CHURCH OF BROOKLYN.¹

(Court of Appeals of New York. June 5, 1888.)

1. RELIGIOUS SOCIETIES—CONTRACTS—AUTHORITY OF OFFICERS.

In an action against a religious corporation on certain promissory notes signed, not as a board, but separately, by the president, the secretary, and the treasurer, who constitute a majority of the trustees, but are not shown to have had authority to make the notes, their signatures as officers do not raise the presumption of their authority; and in the absence of a showing of such authority, or of previous similar dealings, or of any adoption or ratification by the corporation of the instruments, they are not binding upon it.

2. SAME—ROMAN CATHOLIC CHURCH—POWERS OF TRUSTEES.

Under act N. Y. 1863, amendatory of the act of 1813, providing that upon the making and filing a certificate of incorporation by the bishop, the vicar general, and a pastor of a Catholic church, together with two others selected by them, the persons signing the certificate, and their successors, shall be a body corporate; and providing, further, that "such church or congregation shall be a body corporate by the name and title expressed in such certificate, and said persons signing the same shall be trustees thereof,"—does not constitute the trustees the corporation in place of the congregation, so as to make the acts of a majority of the trustees binding on the congregation, in the absence of proof of their authority.

Appeal from general term, supreme court, First department.

Action by the People's Bank of the City of New York against St. Anthony's Roman Catholic Church of the City of Brooklyn upon a promissory note. Judgment for defendant was entered upon the report of a referee in the supreme court, and plaintiff appeals.

Edward C. Perkins, for appellant. *Roger A. Pryor*, for respondent.

ANDREWS, J. The answer put in issue the allegation in the complaint that the notes sued upon were made by the corporation defendant. It became necessary, therefore, for the plaintiff in the first instance to show, or to give evidence which legitimately raised a presumption, that the notes were the corporate obligations of the defendant. Neither party entered into any investigation of the question whether the execution of the notes was in fact authorized by the corporation. The fact that the defendant was a body corporate was admitted in the pleadings, and it was shown that it was organized under the "Act for the incorporation of religious societies," passed April 5, 1813, and the amendatory act, chapter 45 of the Laws of 1863. The plaintiff further proved that the notes were signed by the persons whose names are affixed thereto, and that they were, respectively, the president, secretary, and treasurer of the defendant, and constituted three of the five members composing its board of trustees. The plaintiff also proved title to the notes by transfer from the administrators of the payee in consideration of an indebtedness of the estate of the decedent to the plaintiff. The notes were offered and received in evidence, and upon the admissions and proofs thus made the plaintiff rested

¹ Affirming 33 Hun, 496.

its case. The defendant, on its part, proved, upon cross-examination of the witnesses for the plaintiff, the single additional fact that the notes were signed by the officers of the defendant acting separately, and not at the same time or place, or while assembled as a board of trustees.

The defendant, for one of its defenses, asserts the incapacity of a religious corporation organized under the act of 1813 to borrow money, and issue negotiable paper therefor, even although the money may have been borrowed for a corporate purpose, and one for which the corporation might lawfully create a debt binding its property and assets, and enforceable in the ordinary course of judicial proceedings. The distinction made is between a debt created directly for a legitimate corporate purpose, as for the purchase of property, the building of a church, salary of minister, etc., and a loaning of money to be applied to the same purpose. We need not enter upon the inquiry so pressed upon our attention, or consider whether the range of incidental powers which appertain to ordinary corporations, giving them a choice of means among those usual and appropriate for carrying out the express powers granted, is so greatly restricted in case of religious corporations as the argument made suggests. We think the case is with the defendant on a much plainer ground, and that is that the plaintiff failed to establish, or to give evidence which raised a presumption, that the notes in question were the authorized obligations of the defendant. The act of 1863, amendatory of the act of 1813, prescribes a different method for the organization of religious societies of the Roman Catholic Church from that provided in the case of other religious societies. In the case of Roman Catholic churches, the first section of the act of 1863 provides that the Roman Catholic bishop or archbishop, the vicar general, and the pastor of a church, together with two other persons to be selected by them, may make and file a certificate of incorporation, and therein designate the title of the church; and declares that the persons signing the certificate and their successors shall be a body corporate, by the name designated therein. The trustees are a self-perpetuating body, and the members of the church or congregation have no voice in their selection, differing in that respect from the general plan provided in the original act of 1813. It was decided in *Robertson v. Bullions*, 11 N. Y. 243, that the members of the church and congregation of a religious society organized under the act of 1813 were the corporators, and that the trustees were simply the governing body of the corporation. The act of 1863, while it changes, as to Roman Catholic churches, the mode of the selection of trustees, and vests in them exclusive power of management and control, does not constitute the trustees the corporation in place of the congregation. Substantially the same language found in the act of 1863, viz., that the trustees named in the certificate shall be a corporation, is found in the act of 1813, and was relied upon by counsel in *Robertson v. Bullions*, as indicating that the trustees, and not the congregation, were the constituent body. There is still less ground for this contention in respect to Roman Catholic churches organized under the act of 1863, in view of the explicit provision in the first section, not found in the act of 1813, that, upon making and filing the certificate prescribed, "such church or congregation shall be a body corporate by the name and title expressed in such certificate, and said persons signing the same shall be trustees thereof."

It is elementary that the powers vested in a corporation aggregate having a board of trustees, reside, for all purposes of practical administration, in the board as the governing body. The corporation, being a legal entity merely, can only act through instrumentalities and by delegation. The statute creating it may prescribe its mode of action; and, when the methods and agencies by which it may act are designated, that designation operates as a limitation, and excludes other modes of action. *Landers v. Church*, 97 N. Y. 119. The general powers of religious corporations are enumerated in the fourth section of the act of 1813. They are in form conferred upon the trus-

tees. The section authorizes and empowers the "trustees" to exercise the powers specified, and, by the closing paragraph, empowers them to regulate and order "all other matters and things relating to the temporal concerns and revenues of such church." The trustees of the defendant were therefore the only legal representatives of the corporation in exercising its corporate franchises and powers. Whatever powers were conferred on the corporation may be exercised in its behalf by the trustees. They, acting as a board, can make or authorize acts binding on the corporation, and they alone. Their sanction or authority is essential to a valid corporate act. The qualification that the collective authority of the trustees, acting as a board, is essential in order to bind the corporation by the action of its trustees, is a recognized doctrine of the law of corporations. The trustees of a corporation have no separate or individual authority to bind the corporation; and this, although the majority or the whole number, acting singly and not collectively as a board, should assent to the particular transaction. *Cammeyer v. Churches*, 2 Sandf. Ch. 186; *D'Arcy v. Railway Co.*, L. R. 2 Exch. 158; *Constant v. Rector*, 4 Daly, 305; 1 Wat. Corp. § 70; 1 Mor. Priv. Corp. § 531. This principle is recognized by statute, and expressly applied to the action of trustees of religious corporations by the act of 1813, which declares that "a majority of the trustees, being lawfully convened, shall be competent to do and perform all matters and things which such trustees are authorized or required to do or perform; and all questions arising at such meetings shall be determined by a majority of the trustees present, and, in case of an equal division, the presiding trustee shall have a casting vote." Act 1813, § 5; Act 1863, § 2. But the plaintiff asserts that the facts proved raised a presumption that the notes were executed pursuant to the authority of the board of trustees. The notes on their face purport to be obligations of the corporation. They recite that they were given for loans made by the payee to the corporation, and they are signed by its president, secretary, and treasurer in their official character. It was not shown, as matter of fact, that they were issued in pursuance of any vote, action, or resolution of the board of trustees, or that they were given for a corporate debt, or that the corporation received the benefit of the consideration, or, indeed, that any consideration existed. These material facts, it is insisted, are presumptively established by the instruments themselves, and the proof that they were executed by the executive officers of the defendant. In an action against a corporation, where the act or contract which is the foundation of the suit is shown to be a corporate act which the corporation had power to perform, but upon certain conditions, the doctrine of presumption is sometimes applied in favor of the plaintiff. This doctrine is stated by STORY, J., in his opinion in the case of *Bank v. Dandridge*, 12 Wheat. 70, in language which has been frequently quoted, as follows: "Acts which presuppose the existence of other acts to make them legally operative are presumptive evidence of the latter." The same principle was asserted in *Nelson v. Eaton*, 26 N. Y. 410, in answer to the claim that the notes sued upon in that case, to which the plaintiff claimed title through a bank, had been transferred by a banking corporation to the plaintiff without authority of a resolution of the board of directors, as required by statute. It appeared by the complaint, and was admitted by the demurrer, that the notes sued upon were duly indorsed by the corporation by an authorized officer. The court said that it "would not presume that the transfer had been made in violation of the statute." In the cases referred to a corporate act was proved, and a presumption was indulged in favor of its regularity. In the present case there is no proof of a corporate act except by the declaration of the officers of the defendant on the face of the instruments; and there is no proof whatever that they were authorized either to make the notes, or to make any representations binding upon the defendant. They assumed to act as agents, but the only proof of their agency to make the notes is their own declaration; and it is familiar

doctrine that an agency can neither be created nor proved by the acts or declarations of the assumed agent alone. *Marvin v. Wilber*, 52 N. Y. 270. It is true that the persons who signed the notes were officers of the defendant, and that they constituted a majority of the trustees of the defendant. But proof that a promissory note purporting to be made by a corporation was signed by its president and secretary, does not show that it is the note of the corporation, without proof that it was made by its authority. *McCullough v. Moss*, 5 Denio, 567; *Bridge Co. v. Bachman*, 66 N. Y. 262; *Bank v. Clements*, 3 Bosw. 600. In *Packard v. Society*, 10 Metc. 427, the court, referring to this subject, and speaking of the treasurer of a religious corporation, said: "There is nothing in the nature of the business to be done, or the duties which devolve upon the treasurer of such a corporation, that can require or justify the giving of negotiable instruments binding the society, without being authorized by a special vote to that effect." The name of an officer of a corporation may be descriptive of his authority, and authorize him, as to third persons, to bind the corporation in respect to matters which, according to usage and the common understanding, are within the authority of such an officer, although in the particular case such authority has been withheld. The case of a cashier or teller of a bank is an illustration. Story, Ag. § 114. But it is not the common usage or understanding that the president, secretary, and treasurer of a religious corporation possess power, by virtue of their offices, to borrow money for or issue notes of the corporation. They may be the agents usually designated to issue such obligations when their issuance is determined upon by the trustees. But they are special and not general agents of the corporation, and can only act, in such transaction, by virtue of a special authority; and their authority must be shown by those claiming to bind the corporation upon obligations issued by them. The fact that the three persons who signed the notes, being a majority of the trustees, might, acting as a board, have authorized the issuing of the notes, does not show, or tend to show, that this had been done. The other circumstances shown rather tend to repel the inference of authority by resolution of the board of trustees. The notes do not purport to have been executed by the signers acting as a board, and it is shown that in fact they acted separately in signing them. It does not follow that their joint action in a meeting with their associates as a board would be the same as their separate action outside of the board. The presumption that officers have done their duty does not stand for proof of authority in an action against the principal in a matter outside of their official duties, and where special authority must have been conferred to justify the act. See *U. S. v. Ross*, 92 U. S. 281. There is an ancient rule of the common law, founded on technical reasons, that a contract under the seal of a corporation, attested by the signature of its executive officers, is, *prima facie* at least, the contract of the corporation. *Lovett v. Association*, 6 Paige, 60; *Bowen v. Congregation*, 6 Bosw. 263; *Trustees, etc., v. McKechnie*, 90 N. Y. 618. The seal of a corporation was its signature. The fact that it was affixed to an instrument purporting to be the deed of a corporation, was evidence that its custody had been committed to the person signing it. It was regarded as a transaction of such solemn import that the corporation was deemed to be present at the doing of the very act which the seal authenticated. Now, that it is no longer necessary for a corporation to contract under seal, it does not follow that the same presumption should attend an unsealed contract purporting to have been made by the officers of a corporation. Such a presumption has never been indulged, so far as we have been able to find, to sustain an allegation that an unsealed contract, executed by officers of a corporation in its name, was a corporate obligation, unless authority was implied from the nature of the office, or from previous similar dealings recognized by the corporation, or a ratification was shown. When an agency is once lawfully constituted, the agent may in some cases bind the

principal by a false representation that a particular transaction of the same general nature with that authorized, is within the power conferred, when in fact it has never been authorized, and was a fraud upon the power. The case of *Bank v. Aymar*, 3 Hill, 262, the principle of which has been reaffirmed in subsequent cases, is an illustration. These cases have no application. The very fact to be proved by the plaintiff, and without proving which he could not advance a step, was whether an agency to make notes had been constituted at all. This could not be proved by the declarations of the assumed agent, or by his representations. No original authority to make the notes was shown, nor any adoption or ratification of the instruments by the corporation. The plaintiff failed on the vital issue of authority. The case of *Bank v. Turquand*, 6 El. & Bl. 327, is not, we think, in point.

For the reasons stated we are of opinion that the order of the general term should be affirmed.

All concur, except EARL, J., not voting, and GRAY, J., not sitting.

(109 N. Y. 495)

BROOKS v. ACKERLY et al.¹

(Court of Appeals of New York. June 5, 1888.)

1. PARTITION—BY JUDICIAL PROCEEDINGS—RIGHTS OF PURCHASER—*LIS PENDENS*.

Where the defendants in partition proceedings, after notice of *lis pendens* is duly filed against them, execute a mortgage upon the land in dispute, the title of the purchaser under the partition proceedings is to be deemed good against an assignee of the mortgage, under Code Civil Proc. N. Y. §§ 1670, 1671, 1557, sub. 2, providing that judgment in partition proceedings shall be conclusive as to every person claiming through a party thereto "by title accruing after the filing * * * of a notice of the pendency of the action."

2. SAME—POWER OF COURT TO ORDER SALE.

It is discretionary with the court in partition proceedings to direct a sale or actual partition under Code Civil Proc. N. Y. § 1547, providing: "Where it * * * appears to the court * * * that the property, or any part thereof, is so circumstanced that a partition thereof cannot be made without great prejudice to the owners, the interlocutory judgment, except as otherwise specially prescribed in this article, must direct that the property, or the part thereof which is so circumstanced, be sold at public auction."

Appeal from general term, supreme court, Second department.

This action was to foreclose a mortgage of \$500, executed May 21, 1884, upon premises in Brooklyn, by Emma and Samuel S. Ackerly to Maria Moss, and by her assigned to the plaintiff, Alma L. Brooks. A sale of the premises, with other relief customary in such actions, was sought for. Davey was made defendant as one acquiring an interest in the mortgaged premises subsequent "to the lien of the mortgage." He answered, setting up title acquired upon partition of premises (of which those mortgaged form a part) in an action commenced prior to July 26, 1883, to which the said Emma and Samuel S. Ackerly were parties, and against each of whom a *lis pendens* in said partition suit was on that day filed and indexed. He claimed that, as to him, the complaint in the foreclosure action should be dismissed. Upon trial the court at special term so held, and its judgment to that effect was affirmed by the general term. The plaintiff appeals. Section 1546 of the New York Code of Civil Procedure provides: "The interlocutory judgment must declare what is the right, share, or interest of each party in the property, as far as the same has been ascertained, and must determine the rights of the parties therein. When it is found by the verdict, report, or decision, or where it appears to the court, upon an application for judgment in favor of the plaintiff, that the property, or any part thereof, is so circumstanced that a partition thereof cannot be made without great prejudice to the owners, the interlocutory judgment, except as otherwise specially prescribed in this article, must

¹Affirming 39 Hun, 657, *mem.*

direct that the property, or the part thereof which is so circumstanced, be sold at public auction. Otherwise an interlocutory judgment in favor of the plaintiff must direct that partition be made between the parties, according to their respective rights, shares, and interests." Section 1557, sub. 2, provides that final judgment shall be conclusive as to (1) each party; and "(2) each person claiming, from, through, or under such a party, by title accruing after the filing of the judgment roll, or after the filing, in the proper county clerk's office, of a notice of the pendency of the action, as prescribed in article ninth of this title." Section 1670 authorizes the filing of notice of *lis pendens* in actions affecting the title to real estate, and section 1671 provides what the effect of such notice shall be.

Mr. Johnson, for appellant. *Mr. Stearns*, for respondents.

DANFORTH, J. The findings of the trial court sustain the defense. It was within the discretion of the court before whom the partition proceedings were pending to direct a sale or actual partition of the premises involved, (Code, § 1546; *Scott v. Guernsey*, 48 N. Y. 106;) and, a sale having been ordered, the title of the purchaser is to be deemed good, not only as against the parties to the action and their representatives, but against any person claiming from or under such party by title accruing after the filing of a proper notice of the pendency of the action. Code, § 1557, sub. 2; Id. §§ 1670, 1671. Such was the plaintiff's position. The mortgagor was a party to the partition suit, and the mortgage under which the plaintiff's claims were made was subsequent to the effective filing and indexing of the *lis pendens* in that suit, and in regard to which the statute was complied with. It was the duty of the court below to give effect to its provisions, and, having done so, its judgment should be affirmed. The judgment appealed from is therefore affirmed.

All concur.

(109 N. Y. 564)

PEOPLE *ex rel.* KILLEEN v. ANGLE *et al.*¹

(Court of Appeals of New York. June 5, 1888.)

1. OFFICE AND OFFICER—ELIGIBILITY—NEW YORK CIVIL SERVICE—CANAL EMPLOYEES.

Laws N. Y. 1883, c. 354, which provides for the appointment of a civil service commission, with authority to provide for competitive examinations for testing the fitness of applicants for the public service according to a certain classification, and that all appointive offices, etc., shall be filled by selection from among those graded highest as the result of such competitive examinations, does not apply to the appointment of persons employed in the care and management of the canals; Const. N. Y. art. 5, § 3, creating the office of superintendent of public works, giving that officer exclusive power to select and appoint his subordinates.

2. SAME—CONSTITUTIONAL LAW—CONSTRUCTION OF AMENDMENT.

Const. N. Y. art. 5, § 3, an amendment adopted in 1876, which creates the office of superintendent of public works, and providing that all persons employed in the care and management of the canals shall be appointed and be subject to supervision or removal by him, is not to be construed in connection with article 5, § 6, of the original constitution, which provides that "the powers and duties of the respective boards, and of the several officers in this article mentioned, shall be such as now are or hereafter may be prescribed by law," as that would make the amendment ineffectual, while each provision has some office to perform; and, where there is any repugnancy between an amended statute or constitution and the original, the latter must be regarded as repealed.

Appeal from general term, supreme court, First department.

Thomas J. Killeen made application to the supreme court for an order directing that a peremptory writ of *mandamus* issue, requiring Clarence B. Angle, secretary of the New York state civil service commission, and John Jay and Henry A. Richmond, composing the New York civil service commission, to admit relator to examination as to his fitness for the office of collector of canal statistics. From an order refusing the *mandamus* relator appeals.

¹Affirming 47 Hun, 183.

Everett P. Wheeler, for appellant. *D. O'Brien*, for respondents.

RUGER, C. J. This appeal brings before us for review an order of the general term of the supreme court denying an application by the relator for a *mandamus* to compel the New York civil service commission to admit him to examination as to his fitness to perform the duties of the office of clerk to the collector of canal statistics. It is claimed that the relator became entitled to the writ by virtue of the provisions of chapter 354 of the Laws of 1883, creating a civil service commission for the state, and the rules issued in pursuance of authority thereby conferred. It must be conceded that this claim is well founded, provided these statutes and rules are to be enforced according to the plain meaning and intent of the statute. It is, however, contended by the respondent that, so far as such statutes and rules intrench upon the power and authority to manage and control the business of the canal department, and appoint, remove, and suspend his subordinates at pleasure, conferred upon the superintendent of public works by the constitution, they are unconstitutional and void, and therefore neither impose the duty nor confer authority upon the commission to make the examination applied for. This contention brings before the court one of the most important and delicate duties it is ever called upon to perform, viz., to pronounce upon the constitutionality of an act of the legislature; and, within settled rules, it requires a case to be made showing clearly that the statute, when fairly and reasonably construed, is brought into conflict with some provision of the constitution, before the court can be justified in pronouncing it an unauthorized expression of legislative will. If the act and the constitution can be so construed as to enable both to stand, and each can be given a legitimate office to perform, it is the duty of the court to give them such construction; but if this cannot be done it is equally our duty to declare the supremacy of the constitutional provision, and the nullity of the statute. While every presumption is in favor of the constitutionality of the law, if, nevertheless, it appears that its enforcement must necessarily produce a conflict with the letter or spirit of the constitution, it is the duty of the court to condemn the law.

There is but little dispute between the parties as to the rules governing the interpretation of statutes, and that subject may be disposed of by reference to the rule stated in the head-note of *People v. Potter*, 47 N. Y. 375, which reads as follows: "The established canons of construction applicable to statutes, to-wit, that the intent of the law-maker is to be sought for, and, when discovered, is to prevail over the literal meaning of the words of any part of the law, and that this intent is to be discovered, not alone by considering the words of any part, but by ascertaining the general purposes of the whole, and by considering the evil which existed calling for the new enactment, and the remedy which was sought to be applied, apply as well to the construction of a constitution as to that of a statute law."

It will be convenient, then, at the outset, to refer briefly to the history of the constitutional amendment of 1876, and the causes which led to its adoption, and thus obtain a view of the object which its framers designed to accomplish thereby. Previous to its adoption, for many years, the management and control of the canals of the state had been mainly intrusted to the supervision of three canal commissioners, each one having special charge of a separate division of the canal, and to a board of canal commissioners, and the canal board, each having functions to perform, with sometimes joint and sometimes divided responsibility therefor. Under such an administration of canal affairs, great complaint had been made of the waste, extravagance, and inefficiency of the system, and the facilities for fraudulent practices which it afforded to the public speculators, and the difficulty of determining, in the multiplicity of the officers having authority over the subject, who was justly responsible therefor. It was therefore considered desirable that a change

should be made in the method of conducting that department of the public business. Appl. Cyc. Mech. for 1875, tit. "New York." After a lengthy and continued discussion of the subject before the people, it was, by very general consent, determined that a system by which the duties theretofore performed by the various boards and officers having charge thereof should be devolved upon a single officer, who should give security, and be held solely responsible for the faithful performance of such duties, would effect the reforms deemed desirable, and the amendment to the constitution was therefore adopted. So far as it is material to the questions here involved, it reads as follows: "A superintendent of public works shall be appointed by the governor. * * * He shall be required by law to give security for the faithful execution of his office before entering upon the duties thereof. He shall be charged with the execution of all laws relating to the care and navigation of the canals," and, "subject to the control of the legislature, he shall make the rules and regulations for the navigation or use of the canals. * * * The superintendent of public works shall appoint not more than three assistant superintendents, whose duties shall be prescribed by him subject to modification by the legislature. * * * All other persons employed in the care and management of the canals, except collectors of tolls and those in the department of the state engineer and surveyor, shall be appointed by the superintendent of public works, and shall be subject to suspension and removal by him." It is apparent from these provisions that it was intended thereby to create a new scheme for the management of the canal affairs of the state; the principal feature of which was to give large authority to the superintendent in their management and control, and to hold him to personal accountability for any failure to exercise such powers in the interest and for the benefit and advantage of the people. As an incident of this scheme the superintendent was given power, subject only to his sense of duty and the obligations of his oath of office, to select and appoint his subordinates, and was to be made personally responsible for the faithful performance of the duties assigned to them. It was plainly intended thereby to leave to the superintendent exclusively the determination of the propriety of such appointments, and the sufficiency of the qualifications possessed by proposed appointees, and to hold him responsible for the faithful exercise of his intelligence, judgment, and discretion in the performance of that duty. The broad grant of power excludes the idea that it was intended that he should be hampered, restricted, or regulated in its exercise by any extraneous authority whatever, except such as might be authorized by other constitutional limitations expressly applicable thereto. When this amendment was adopted, the people had plainly before them the question as to the mode which should thereafter be pursued in appointing subordinate officers to have charge and control of the canals, and they decided to confide their selection to the superintendent, and trust to his judgment for the faithful performance of that duty. This decision cannot now be reversed or disregarded without overthrowing the fundamental law, although it may be thought that a better method of performing such duties has since been discovered. Any provision of law, therefore, which materially interferes with the freedom of selection conferred upon the superintendent, and the uncontrolled exercise of his judgment in investigating and determining the fitness and propriety of any contemplated appointment, seems to us not only to conflict with the terms of the constitution, but plainly to violate its spirit and intent. *Menges v. City of Albany*, 56 N. Y. 374.

A very brief summary of the provisions of chapter 354 of the laws of 1883, and the rules adopted thereunder, so far as they are material to this discussion, will show to what extent, if any, the choice of the superintendent in the appointment of his subordinates has been affected by the so-called civil service legislation. The act provides for the appointment by the governor, with

the advice and consent of the senate, of three persons to constitute the New York civil service commission. This commission is charged with the duty of aiding the governor in preparing rules to carry into effect the act, and, among other things, to provide for competitive examinations for testing the fitness of applicants for the public service now classified, or to be classified hereafter. It was further provided that "all the offices, places, and employments so arranged, or to be arranged, in classes, shall be filled by selections from among those graded highest as the results of such competitive examinations." Section 7 then enacts that, "after the termination of eight months from the expiration of the present session of the legislature, no officer or clerk shall be appointed to or promoted in either of the said classes now existing, or that may be arranged hereafter pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination, in conformity herewith." It was conceded that the office sought by the relator is classified in such rules under Schedule B, as an office subject to the provisions of the act. By Rule 17 it was further provided: "Whenever any officer, having the power of appointment to or employment in any grade or subdivision in this schedule, shall so request, the commission shall certify to him the names of three eligible persons who are graded highest on the proper register, indicating such of them (if any) as have been honorably discharged from the military or naval service of the United States in the late war. From the three persons whose names are so certified the officers shall make a selection to fill the vacant place, subject, however, to the provisions of rule 44." This rule requires such appointment to be filled by a person honorably discharged from the army or navy in the late war, though graded lower than the others so examined, provided there be such persons on the list furnished. It thus appears that the superintendent is absolutely prohibited from making any appointment to a place authorized by the constitution to be filled by him, unless such person has passed the examination required by the act. He is further restricted to a selection from among the names of three persons certified to him by the commission, unless one of such persons shall be a soldier or sailor honorably discharged from the service of the United States in the late war, in which case he is required to appoint such soldier or sailor, whatever his grade may be upon such list, to the exclusion of all other applicants. We are not at all disposed to question the merits of the scheme of civil service administration which has been inaugurated under these laws, but we believe that one which more effectually annuls and overthrows the system of canal management provided by the constitution could scarcely be devised. Under this law the superintendent is absolutely deprived of the exercise of any judgment, choice, or discretion in the matter, and is required in some cases to appoint the single individual whose name is presented to him by the commission, and in all other cases his choice is limited to a selection from among three persons whose names may or may not be all submitted to him by the same body. Under the constitution, the superintendent is at liberty to select any person for appointment from among the million or more citizens of the state eligible to such office, while under the statute he can, at the best, only select from the three names furnished to him by a tribunal over whom he has no control, and the efficiency of whose tests he may entirely disapprove. Whether this mode of selecting the officers in question is a wise and better one than that provided by the constitution cannot affect the decision of this appeal; for the sole question here is whether, in its practical operation, the statutory scheme takes away a power otherwise bestowed by the organic law. It is also quite immaterial that the board authorized to present names for the superintendent's choice determine such names by arbitrary rules which exclude the idea of any discretion or personal preference on its part in the selection of such names; for the question is whether the mode provided materially impairs or destroys the scheme provided by the constitution. If it does, then it is re-

pugnant to the constitution, and must be condemned; for the law imputes to the legislature an intention to effect those results which are the necessary and natural consequences of the execution and enforcement of the laws enacted by it.

It seems to us that this law leaves to the superintendent only the barren office of issuing a commission to a person whom others have selected for his adoption, whereas the constitution provides that he shall be the exclusive actor in determining the wisdom and propriety of the proposed appointment. *Menges v. City of Albany*, 56 N. Y. 379. It cannot be reasonably contended that the superintendent has, under this system, any such freedom of action and choice as is implied in the power to appoint his subordinates, and perform the duties charged upon him by the constitution. Such power embraces in its exercise not only perfect liberty of choice as to the person to be appointed, but the duty of personally investigating the character and qualifications of the proposed appointee, and determining his fitness to discharge the services required of him. This was a duty which the constitution required him personally to perform, and which he could not lawfully delegate to any other. *Menges v. City of Albany, supra*. Any legislation which relieves him from the obligation to exercise his judgment and skill in the service of the people deprives them of the contemplated benefits arising therefrom, and effects a radical change in the scheme inaugurated by the constitutional provisions. The great impropriety of such a construction is made apparent by the consequences which would follow from taking away the selection and appointment of his subordinates, and at the same time holding him criminally and pecuniarily responsible for the effects of their misconduct and inefficiency in the performance of their duties. How far the legislature may circumscribe, by general laws, the eligibility of the citizen to fill offices in the civil service of the state, by declaring disqualifications therefor arising out of special circumstances or inconsistent employments, it is unnecessary and would now be unprofitable to consider; but we think it entirely clear that it has no power to impose restrictions directly upon one who possesses constitutional authority which practically destroys or impairs the exercise of such authority. The vice of this legislation is that it is directed at the appointing power alone, and enjoins it in imperative terms to refrain from the exercise of that power, except under conditions and restrictions imposed by the legislative will alone.

It is further contended by the relator that section 6 of article 5 of the constitution gives some support to the legislation under consideration. That section provides, in general terms, that "the powers and duties of the several boards and of the several officers in this article mentioned shall be such as now are or may be hereafter prescribed by law." This section was contained in original article 5 of the constitution of 1846, and applied to a large number of state officers and boards besides those of canal commissioners, and the board of canal commissioners which were abrogated by the amendment of 1876. The section has therefore a wide operation, even though it be held not to apply to the offices created by the amendment. Under well-settled rules of construction, we think that there is the most conclusive reason to be drawn from the language of the amendment itself for holding that it was not intended that the section quoted should apply to the superintendent of public works; while in the act of framing this amendment the question was presented to its authors how far the powers therein attempted to be conferred should be limited by the supervision of the legislature, and with reference to that subject they expressed themselves in clear and explicit terms. Thus the superintendent was authorized to prescribe the duties of the assistant superintendents, subject to modification by the legislature, and also to make rules and regulations for the use and management of the canals subject to the same regulations. These provisions were entirely unnecessary, if it were supposed that the offices provided for by the amendment were subject to the operation of section 6 of ar-

ticle 5. Under established rules of construction, these express provisions for the supervision by the legislature over the cases referred to afford the strongest implication that in other respects it was not intended to leave the powers conferred by the amendment to such control or supervision. *Expressio unius personal vel rei est exclusio alterius*. We, however, yield our fullest sanction to the doctrine that an amended constitution "must be read as a whole, and as if every part had been adopted at the same time and as one law, and effect must be given to every part of it, each clause explained and qualified by every other part." *Railroad Co. v. Anderson*, 3 Abb. N. C. 452. But, when this is done, the question remains whether the framers of the amendment intended that a general provision contained in the original instrument should be applicable to the subject of such amendment. It would be quite absurd to suppose that they, while framing an elaborate scheme of public policy to be incorporated in the fundamental law of the state, intended to subject it to the operation of general provisions of the same instrument which might, when applied thereto, not only annul the express grants of power therein contained, but also authorize each successive legislature to overthrow and destroy the whole object and effect of the amendment adopted. To hold that this was the intention of the authors of the amendment would require us not only to stultify them, but would stamp their work as an idle ceremony of no practical importance whatever. It is a primary rule of construction that, statutes must be so interpreted as to give effect to every part thereof, and leave each part some office to perform; and any construction which deprives any part of a statute of effect and meaning, and leaves it ineffectual, when it is susceptible of another interpretation, is wholly without support from any authority. It is also a familiar rule of construction that if there be any repugnancy between an amended statute or law and the original, which cannot be so construed as to leave them both to stand and each have a legitimate office to perform, the original enactment must be deemed to have been repealed by the later expression of the legislative will. *Railroad Co. v. Anderson*, 3 Abb. N. C. 453; *Harrington v. Trustees*, 10 Wend. 547. These rules apply, as well to the interpretation of constitutions as of statutes. In *People v. Potter*, *supra*, it was said that "when provisions are made for contingencies apprehended, or for occasional and temporary needs, they cannot be so interpreted as to clash with the general design, but should be in harmonious subservience thereto, and if their terms conflict with those provisions which are made part of the essential frame-work of the general plan, and are of usual continuous and imperious operation, the former must yield and adapt themselves to the latter." We are therefore of the opinion that section 6 of article 5 does not apply to the superintendent of public works so far as the constitution confers express power upon him to perform the duties of that office, and that his subordinates do not come under the operation of the act creating the civil service commission. It follows that the order of the court below should be affirmed.

All concur.

(109 N. Y. 659)

REED J. HAYT.¹

(Court of Appeals of New York. June 5, 1888.)

1. CONTRACT—ACTION FOR BREACH—PLEADING—GENERAL AND SPECIFIC DENIAL.

In an action for breach of contract, the complaint averred that plaintiff had performed all conditions precedent of defendant's liability, and the answer denied each allegation of the complaint not therein admitted, and then proceeded to enumerate certain particular breaches of specified conditions. *Held*, that in spite of the general denial therein, the answer raised issues only as to the breaches specifically named.

¹ Affirming 51 N. Y. Super. Ct. 121.

2. SAME—TENDER OF PERFORMANCE—NECESSITY.

In an action on a contract for the sale of stock, providing that the vendor should deposit it with a trust company to be delivered to vendee upon payment therefor, a complaint by vendor for the purchase money, which avers such deposit, need not make a tender of the stock.

3. SAME—PARTIES—NON-JOINDER—WAIVER.

In an action upon a tripartite agreement between plaintiff, defendant, and a corporation for the sale of stock of said company, in which the company had covenanted with defendant that plaintiff was the owner of the stock sold to defendant, the answer not alleging that the corporation should have been joined as defendant, the non-joinder will not defeat plaintiff's right to recover; it not appearing but that the rights of all parties could be definitely determined without such joinder.

4. CORPORATIONS—OFFICERS—PRESIDENT—SALARY AND ADVANCES—PAYMENT BY STOCK.

Where the president of a corporation has served as such for many years without salary, and advanced to the company considerable sums of money, which it still owes him, the directors have the right to compensate him for said services and advances by issuing to him in satisfaction thereof, in good faith, all the shares of stock remaining in the treasury.

5. SAME—MEETINGS OF DIRECTORS—VALIDITY—ESTOPPEL—BY ACQUIESCENCE.

A president of a corporation, to whom stock had been issued for services and advances, sold his stock, including the shares so issued, to defendant, who refused to pay the purchase money on the ground of defect of title, because only three of the five directors (of whom the president was one) were present at the meeting which ordered the issuing of said stock. Neither the company, as then constituted, nor after the resignation of said president and the election of defendant as his successor, nor any stockholder, made any objection to said issue; and defendant, with full knowledge of the facts, used the other stock purchased of plaintiff, the former president, took an extension of time for the performance of the contract of sale, and neither as president nor stockholder made any attempt to annul or avoid the acts of said board. *Held*, that the facts amounted to a ratification thereof by the company, and that defendant, by his conduct, was estopped from denying plaintiff's title to said stock.

6. SAME.

The stockholders and interested parties having full knowledge also of the fact that the directors not present had no notice of said meeting, and countenancing plaintiff's dealing with the shares as his own, and taking no steps to disaffirm the action of the board in issuing said stock, will be presumed to have ratified said action, and the title of plaintiff to the stock will be validated thereby.

7. SAME—STOCK—CONTRACT TO CONVEY—AGREEMENT TO PAY INDEBTEDNESS.

The contract of sale of corporation stock contained a provision that, if any debts or liabilities of the company existed, they should be paid by the company, or by the plaintiff, before February next. *Held*, that this stipulation did not apply to debts created after the date of said contract, and after the resignation of plaintiff, and the election of defendant, as president of the company.

8. SAME—ABANDONMENT—OPTION.

After failure of defendant to pay the purchase money for the stock as provided by the contract of sale, plaintiff, at defendant's request, gave him an option, in writing, to take the shares undelivered under the contract, upon payment to the trust company of the money defendant had promised to pay by the contract; and also, by like request, gave an option to a third party to take those shares, with others, upon payment of a sum to be applied to defendant's indebtedness under the contract. *Held*, that these options did not amount to an abandonment of the contract by mutual consent.

9. SAME—DAMAGES FOR BREACH—MEASURE.

In action for breach of said contract, the measure of damages is the amount of the unpaid purchase money named in the agreement, and not the difference between the agreed price and the market value of the stock, plaintiff not having held and appropriated the stock to his own use.

Appeal from general term, superior court, city of New York.

Action by Samuel C. Reed against Ezra A. Hayt upon a contract for the sale of certain shares of stock.

The issues of fact in this action were tried at a trial term of the superior court of the city of New York, on the 8th and 11th of February, 1884, before the Honorable GEORGE L. INGRAHAM and a jury. The court directed a verdict for the plaintiff for \$29,483.69, subject to the opinion of the general term. After argument before the general term, judgment for the plaintiff was ordered for the amount of the verdict and costs. Thereupon, pursuant to section 1339 of the Code of Civil Procedure, a statement of facts was made.

The action is upon a sealed contract, dated August 16, 1880, by which the plaintiff covenanted and agreed to sell to the defendant, and he covenanted to purchase from the plaintiff, 4,550 shares of the capital stock of the "United States Ice & Refrigerating Company of the City of New York," for \$45,000, payable as follows: \$5,000 in cash on the 27th August, 1880; \$15,000 payable to Central Trust Company on the 1st October, 1880; and the remaining \$25,000 payable to the said trust company at any time prior to 15th February, 1881; which \$25,000 were to be held by the trust company for six months as security for the performance of the plaintiff's covenants contained in the contract. The plaintiff covenanted to deposit with the trust company the certificates for the stock, duly assigned in blank, and the answer of the defendant admits that the contract in that respect was performed. The plaintiff alleged in his complaint full performance on his part of all the conditions and requirements of the contract; and the defendant in his answer made a general and certain specific denials. It was provided in the sealed contract that, if any debts or liabilities of the company or incumbrances on its patents existed, they should be paid by the company, or by the plaintiff, before the 1st day of February, 1881. One of the defenses set up by the defendant was that a debt was due to Oscar Stearns of about \$3,500, and a judgment record was put in evidence showing that a judgment was recovered by Stearns against the company in March, 1881, for \$3,580.65; but it appeared that the suit was founded on a contract made by the defendant company after the agreement or sealed contract between the parties to this action was made. The balance due plaintiff on the contract, of \$25,000, has never been paid, but was payable February 15, 1881, and this action was brought to recover it. The sealed contract was a tripartite agreement between plaintiff, defendant, and the corporation; and by it the corporation covenanted that plaintiff was the owner of 4,550 shares of its stock, full paid and unassessable. The other facts sufficiently appear in the opinion of the superior court, general term, which is as follows:

"SEDGWICK, C. J. The propositions which have been argued must of necessity be confined to the issues raised by the answer. The complaint averred that the plaintiff had performed all conditions precedent of defendant's liability. The answer denied each and every allegation in the complaint not herein admitted. This, if left by itself, might have made an issue as to each condition precedent in the contract. Such was not its intention, for the answer proceeds: 'That the plaintiff has not duly performed all the conditions of said agreement on his part, but, on the contrary, although said agreements contained' conditions, etc.; and then it enumerates certain things, which it specifically alleges show that the conditions had not all been performed. The issue is thus confined to the particular breaches of condition specifically referred to. These matters will have further attention in considering the reasons urged by the learned counsel for defendant for setting aside the verdict.

"In the absence of an allegation in the answer that the corporation should have been made a defendant, the plaintiff should not be prevented from recovering, as it does not appear that, without the corporation as a defendant, the rights of the present parties cannot be definitely determined. A tender of the shares was not necessary, as the contract provided that they should be placed with the trust company, and that while there the defendant should pay as provided. The answer does not defend on the ground that the plaintiff had not deposited the resignations of their directors, as required by the contract. It has already been shown in what manner the defendant pleaded the breaches of conditions. The answer makes no reference to this subject. But the testimony shows that the plaintiff performed in this respect.

"The counsel for the defendant relies on the correctness of the following propositions maintained by him: (1) That the plaintiff was not the owner of 1,622 of the 4,550 shares which he contracted to sell to the defendant; and (2)

that these 1,622 shares were not full paid and unassessable shares. The contract provided that 'the party hereto of the first part [that is, the plaintiff] is the owner of the 4,550 shares of the said stock, full paid and unassessable as aforesaid.' The defense in the answer, as to this subject-matter, is that 'the plaintiff was not, and never was, the owner in good faith of about 1,622 shares of the said stock, so deposited by him, and could not lawfully transfer the same to the defendant, so as to create an absolute and unimpeachable title thereto in this defendant, for the reason that said shares of stock were the property of the said company, and had been at a meeting of the board of directors of said company, held without notice to all of said directors, at which meeting were present only the plaintiff and two others of said company, unlawfully voted to the plaintiff, without consideration therefor, and thereupon transferred to him, in fraud of the rights of said company, and of the stockholders therein.' The proof that certificates for such shares had been issued to the plaintiff made it necessary for the defendant to show that the facts existed which would invalidate the shares in the hands of the defendant. He proved the following facts: About a year before making the contract in question there was held a special meeting of the board of directors. Three directors, including the plaintiff, were present. The following resolution was adopted: 'That whereas, the president [the present plaintiff] had filled that office since the organization of the company in January, 1869, without the receipt of any salary, and had also advanced to the company considerable sums of money which have not been repaid him, resolved, that all the shares of stock now remaining in the treasury, as well as all that may now be due to it, held as collateral, be, and hereby is, donated and given to the said Reed, the same to be in full payment for such services and such advances as aforesaid.' The certificate for the 1,622 shares was thereupon issued to the plaintiff, he himself signing the certificate as president. There was no proof that the shares held as collateral amounted to any particular sum, or that any such shares had been issued to the plaintiff. It was proved that one of the five directors had not received notice of the intended meeting. The plaintiff testified that he had given one to a boy, to be delivered to that director. He further testified that, before the meeting, he had advanced in money to the corporation \$20,000; that he had received no compensation for his services as president, and had never claimed any; and that the offer of compensation was made by the other directors present at the meeting.

"The answer, it will have been noticed, does not rest a defense upon the stock not being full paid, and being "unassessable." Such a defense would imply that the plaintiff might be the owner, although liable to respond to creditors, on certain conditions. The defense is that the corporation was the owner of the shares, and the plaintiff was not the owner, because the transaction by which they were issued was void, or might be avoided, as against the defendant, who took with notice of the facts; for the reasons (1) there was no consideration for the transfer; (2) it was invalid, because the plaintiff, being a trustee of the company, could not make a quorum, when without him there would be no quorum competent to transact business in the interest of himself personally; (3) the meeting was invalid for want of notice to all the trustees.

"The first position is against the fact. The consideration was the satisfaction of a debt due by the company to the plaintiff. In *Barnes v. Brown*, 80 N. Y. 527, the plaintiff took broader ground than is occupied by the plaintiff here, and alleged that the stock which had been transferred to him 'was not full-paid stock, but the certificates were unlawfully issued, without any consideration, for the purpose of making up stock to be delivered under the contract.' The action was for damages for the fraud in delivering to him the stock under a contract which called for full-paid capital stock. The complaint did not allege that the company had not issued or transferred the

shares, or that the defendants were not the owners thereof. The case has some bearing upon this appeal, because it referred to the consideration for which the company issued the certificates of shares. The court in the opinion says that the plaintiff proved, by the minutes of the company, that the shares were issued by the defendants ostensibly for moneys advanced and services rendered. Thereupon the plaintiff offered to prove that the stock was issued without any valid consideration of payment, and for the purpose of making up stock to be delivered to the plaintiff under the contract in action. It is there said: 'The obligation to bind the plaintiff for such stock could not be discharged by delivering to him worthless, spurious stock, wrongfully issued by the company, without any consideration received therefor. It is not claimed, and could not be claimed, that the corporation, or its directors, could create any valid stock by issuing the same, without any consideration.' 'The proof thus offered was very material, and, if received, would have gone far towards completing the proof requisite to sustain the action.' The court did not hold that the proof given of the minutes showed that issuing of stock for moneys advanced was no consideration, but did hold that the plaintiff was entitled to show that, in fact, there was no consideration; in other words, that the consideration appearing on the minutes did not exist in fact. In the present case, there was no dispute that the plaintiff had made the advances as testified by him, and took the shares in satisfaction of that demand. The fact of the advances, and that good faith were not denied, it seems to me, makes the issuing of the shares the equivalent of a money subscription, offset, as it might be, by the amount due to the plaintiff. There was intrinsically no fraud upon the company, stockholders, or creditors; for each of these were placed in a better relation to their interests in the property of the company by the plaintiff relinquishing his place of preference as creditor, for a right to share after payment of debts. The first position should be held not to be valid.

"As to the second position, its merits rest upon the fact that the plaintiff, as a trustee, could not act for the company in a transaction in which he received a benefit. This, however, is to be limited by further saying that his beneficiaries could, if they thought it to their interest, ratify his act, or, at their option, avoid it. The company was a party to the agreement in this case, and would be held to have ratified the issuing of the certificate of the shares, if it were not that their execution of the agreement was made by the plaintiff himself. The company, as appears by the plaintiff's testimony, forthwith went into the control of other persons; the plaintiff resigning, and the defendant taking, the office of president. There was no avoidance of the issuing of the shares, and the assent and tacit ratification by the company was guided by the defendant himself. The other beneficiaries were stockholders. None of these have in fact assailed the issuing of the certificate. Whether they might do so in a proper action should be considered in view of the fact that the defendant was to become a stockholder upon performance of the agreement. He did, upon part performance, receive some of the shares of another kind, as to which there was no dispute. At the end of nine months from the making of the contract, he learned the facts of the issuing of the stock, and after that he took the benefit of an extension of time of performance, for such, substantially, was the option that will be hereafter referred to, until the 7th of June. The plaintiff's position, in the mean time, was that he could not enforce his claims against the company for the advances. This made it necessary for the defendant, as stockholder, to avoid at once the action of his trustee, the plaintiff, unless he wished to affirm the validity of the shares. No steps were taken towards disaffirmance, and he consequently, in effect, affirmed. If he did not disaffirm, there is no reason for supporting a defense that some other stockholder might therefore disaf-

firm. Such a possibility cannot be entertained in favor of the defendant, in view of his own acts.

"Similar considerations apply to the third position, that the meeting of directors was invalid for want of notice to them. Besides the mere resolution at the meeting, the transaction had been executed, the plaintiff had received the certificate, and had satisfied his demand against the company. This executed transaction could not be opened by any one, except through the action of a court of equitable jurisdiction, and it would require that the plaintiff be placed in his original position. So far as the proof of the defendant discloses, every one interested had countenanced or ratified the plaintiff's dealing with the stock as owner, with a knowledge of the facts, and the action referred to would not lie.

"Another defense was that, before the time for the delivery of the shares in question, the company had become indebted to Mr. Stearns in the sum of \$3,000. If this indebtedness was within the intention of the agreement, it was to be provided for by being paid out of the \$25,000, which the defendant was to pay, and perhaps the defendant might have, on that account, reduced the recovery directed below. This was not requested by him. There are many phrases in the contract which refer to the matter of the company's indebtedness. It is impracticable to state them all. I will have to be content with giving my opinion that, in view of the whole contract, it did not intend that the indebtedness of the company it referred to should be a debt contracted by the company, after the defendant had become its president, according to the purposes of the contract.

"Another defense was that the contract was abandoned by mutual consent, and agreement of the parties. There was no express agreement of that kind. The facts that were relevant to the defense were that, after a breach by defendant, the plaintiff, at defendant's request, gave, in writing, an option to defendant to take the shares undelivered under the contract, upon payment to the Central Trust Company of the money that the defendant had promised to pay by the contract. Also, at the request of defendant, the plaintiff had given a third person an option to take these shares, and another 1,000 shares, upon payment of a sum which was to be applied to the defendant's indebtedness under the present contract. Neither of these options was carried out. The evidence showed that it was not the intention of the parties that the giving of the options should annul the present contract, but that, if money should be paid upon them, that money should go in liquidation of the amount due upon the contract, which it was intended should be kept alive. In fact, the option given to the defendant was nothing more than an extension of time, for the purpose of his performing the contract.

"The last position to be noticed is that the true measure of damage was the difference between the market value of the stock and the price named in the agreement. This implies that the plaintiff, upon breach of the contract, had taken the stock, and appropriated it to himself, and did not hold it for the defendant. The facts do not show such an implication. The testimony did not prove that the plaintiff held the stock otherwise than for the defendant. Motion for judgment for plaintiff in the amount of the verdict granted, with costs.

"VAN VORST and FREEDMAN, JJ., concurred."

N. C. Moak, for appellant. *Sam'l C. Reed*, for respondent.

PER CURIAM. So far as the questions raised on this appeal are material, they were fully discussed by the learned court whose judgment is complained of. 51 N. Y. Super. Ct. 121. The appellant fails to show any error in the steps by which the conclusion of that court was reached, and with it we fully concur. The judgment should be affirmed.

All concur.

(109 N. Y. 500)

*MEE et al. v. McNIDER.*¹

(Court of Appeals of New York. June 5, 1883.)

1. SALE—WHEN TITLE PASSES—RISKS OF SHIPMENT.

The agreement between the parties was in these words: "New York, January 8, 1882. Sold for account of Mee, Billings & Co., London, to James McNider, five hundred (500) bags prime fermented Bahia cocoa, at 59s. per cwt., C., F. & I., by steamer to N. Y.; buyers to furnish cable credit, or pay banker's commission. ARTHUR R. KYTE, Broker,"—it being admitted that the letters "C., F. & I." meant, "to include cost, freight, and insurance." *Held*, that upon shipment by the vendor the obligation of the purchaser attached, and injury to the cocoa during the voyage is no excuse for non-performance.

2. SAME—ACTION FOR PRICE—PROVINCE OF JURY.

Where the amount due, if anything, is conceded, and the liability depends upon the construction of a written agreement, a submission of the case to a jury is unnecessary.

3. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

Where, at the trial, the only contention upon the facts was that the goods were not in prime condition—were not merchantable—when they came, and a contention upon the law that in consequence of that defect defendant was relieved from liability, the appellate court will not consider an assignment of error that the court erred in overlooking the circumstance that "no bill of lading and no policy of insurance had been delivered to defendant."

Appeal from general term, supreme court, First department.

Action by George B. Mee *et al.* against James McNider for price of 500 bags cocoa. Judgment for plaintiffs, and defendant appeals.

Adolph L. Sanger, for appellant. *Wheeler H. Peckham*, for respondents.

DANFORTH, J. The agreement between the parties was in these words: "NEW YORK, January 8, 1882. Sold for account of Mee, Billings & Co., London, to James McNider, five hundred (500) bags prime fermented Bahia cocoa, at 59s. per cwt., C., F. & I., by steamer to N. Y.; buyers to furnish cable credit, or pay banker's commission. ARTHUR R. KYTE, Broker." The answer admits that the letters "C., F. & I." mean, "to include cost, freight, and insurance;" and the question is, who, under the contract, took the risk of the voyage? The relation between the parties was that of vendor and vendee. The former, residing in London, undertook to sell, and the latter, residing in New York, undertook to buy, the article named. The price is fixed at 59 shillings per cwt., and this is made up of the cost, the freight, and the premium of insurance. Thus the purchaser deals with the matter in gross, and not in detail; transacts the various branches of the business with one person, instead of three; fixes his liability at a lump sum; and, in case of loss, will recover the amount of his interest under the policy. On the other hand, the vendor is to be reimbursed for his advances at the same time, and in the same manner, that he receives payment for the goods. Only one condition is to be performed, that of shipment by steamer. The case differs in that respect from *Ireland v. Livingston*, L. R. 2 Q. B. 99, cited by the appellant from Benj. Sales, (Ed. 1875,) § 590, where payment of freight was postponed until the arrival of the goods and the balance of the price, "on having handed to him the charter-party, bill of lading, and policy of insurance," which might well happen before the arrival of the vessel. But even that case throws the risk of damage at sea upon the buyer; for he engaged to pay a fixed price in consideration of the shipment in a prescribed manner, and excepted the freight, without reference to its actual delivery. In the case before us, there seems no ambiguity. On the part of the vendor, the shipment by steamer was an effectual appropriation of the cocoa to the buyer, and at that moment the agreement on the vendor's part was executed. The plain obligation of the purchaser, as defined by the written contract, then attached, and he was

¹ Affirming 39 Hun, 345.

bound to accept and pay for the cargo at the price named, and in the manner specified. It necessarily follows that injury to the cocoa during the voyage was no excuse for non-performance; and as the amount due, if anything, was conceded, there was no evidence which required the submission of the case to the jury.

It is, however, argued by the appellant that the trial court erred in overlooking the circumstance that "no bill of lading and no policy of insurance had been delivered to the defendant." If there was default in that respect, the point was not taken at the trial; the only contention upon the facts being "that the goods were not in prime condition—were not merchantable—when they came," and a contention upon the law that in consequence of that defect the defendant was relieved from liability. The judgment appealed from should be affirmed.

All concur, except PECKHAM, J., not sitting.

(110 N. Y. 7)

DEWITT v. VAN SCHOYK *et al.*¹

(Court of Appeals of New York. June 5, 1888.)

HIGHWAYS—OBSTRUCTIONS—RIGHTS OF ADJOINERS—SPECIAL DAMAGES.

Where two co-tenants of land agree upon a division, and adopt an existing highway, which passes through the land, as the division line, a purchaser of one of the parts has no right to close the highway, and construct a new road on the other part; and a purchaser of the latter, in addition to the public damage, has a special damage, and may have an injunction to restrain such acts, and to compel removal of the obstructions.*

Appeal from general term, supreme court, Fourth department.

Complaint by Eliza E. Dewitt against Cornelius Van Schoyk and Charles Flint, to restrain defendants from interfering with a public highway, and to compel removal of obstructions therefrom. Relief granted, and defendants appeal.

Arthur More, for appellants. E. H. Hanford, for respondent.

DANFORTH, J. It is a sufficient statement of the case to say that the premises now owned by the parties hereto were originally the property of Freeman, who held the same as one farm. He conveyed to Rickard and Borrill, and on the 10th of January, 1874, they were divided between Borrill and Rickard, —Borrill taking the part lying "east of a public highway, running north and south, leading from Scut's to Merrill's," and Rickard taking west of the highway; and their lands were described as so bounded. The plaintiff succeeded to the title of Rickard, and the defendant to that of Borrill. In 1882, the defendant, without right, closed up this highway, and began the construction of a new road upon the plaintiff's land. If continued, its effect will be to change or confuse the identity of the boundary between the two farms, render its location doubtful, subject the plaintiff to additional travel on her own land to reach the highway, and open over that land a road through which the public will be led to travel. These acts were found, not only to constitute a public nuisance, but to cause special damage to the plaintiff. The trial court, therefore, sustained the complaint, and awarded equitable relief, as that to which the plaintiff was entitled.

¹Affirming 85 Hun, 108.

*Respecting the rights of individuals in regard to nuisances which are public in their nature, see *Clark v. Railway Co.*, (Wis.) 36 N. W. Rep. 826, and note; *Holmes v. Corthell*, (Mo.) 12 Atl. Rep. 731, and note; *Sunderland v. Martin*, (Ind.) 15 N. E. Rep. 689, and note; *Appeal of Campbell*, (Pa.) 12 Atl. Rep. 848; *Platt v. Railroad Co.*, (Iowa,) 87 N. W. Rep. 107; *Railway Co. v. Nave*, (Kan.) 17 Pac. Rep. 587; *Price v. Grantz*, (Pa.) 11 Atl. Rep. 794; *City of San Antonio v. Stumburg*, (Tex.) 7 S. W. Rep. 754; *Atwood v. Partree*, (Conn.) 14 Atl. Rep. 85.

In some reasonable view, the evidence sustains the findings of the trial judge; and upon the facts found we entertain no doubt that the conclusion of law on which judgment was given properly follows. It might be that the damage sustained or apprehended could be satisfied by a pecuniary award, but the plaintiff is entitled to have the land as she acquired it; nor should she be driven to repeated actions to maintain her right. Moreover, the acts of the defendant are in derogation of the plaintiff's title, and, being calculated to injure her in that respect, would sustain an injunction, although no damage had actually happened. To remove a cloud upon title is a well-recognized head of equity jurisdiction, and the court will in like manner interfere to restrain a defendant from proceeding in an illegal act, which, if completed, will necessarily cast a cloud upon that title, and naturally diminish its value. *Oakley v. Trustees*, 6 Paige, 262. The opinion of the general term discusses with much fullness the points presented by the defendant, and repeated upon this appeal. With the conclusion reached by the special term, and with the approval of that conclusion by the general term, we concur. The judgment appealed from should therefore be affirmed.

All concur.

(109 N. Y. 526)

KENNEDY v. PORTER *et al.*¹

(Court of Appeals of New York. June 5, 1883.)

1. PARTNERSHIP—FOR DEALING IN STOCK—DISSOLUTION—RIGHT OF PARTNER TO PURCHASE PARTNERSHIP STOCK.

Certain persons formed a copartnership for "the purchase and sale and general dealing in the common and preferred stocks of the W. W. Ry. Co.," the business to be exclusively managed by P., one of the partners; said partnership "to continue until dissolved by the written agreement of persons representing a majority of the partnership stock." Having gained control of said company, they conveyed one-half their interest therein to trustees for the N. W. Ry. Co., with an obligation that vendees should receive one-half of all profits thereafter derived from the common enterprise. The copartnership then divided the remaining shares of stock, and the purchase money received, according to their *pro rata* interest in the speculation, and held it as their individual property. Afterwards P. purchased the interest conveyed to said trustees. Held that, by such division of assets, the copartnership was dissolved, and the members of the firm acquired no interest in the subsequent purchase by P. of the interest held by the trustees for the N. W. Ry. Co.

2. APPEAL—REVIEW—SPECIAL FINDINGS OF FACT.

Where special findings of fact on the material questions in the case are requested and refused, and exceptions are duly taken to such refusal, and the requests are based on uncontradicted evidence, or legitimate and necessary deductions from the facts proved or found, the refusal to make such findings is error in law, and reviewable.

3. CONTRACT—INTERPRETATION—PROPOSAL AND ACCEPTANCE.

It is error for a court making findings of fact to determine the meaning of a contract of sale by excluding the language of the offer from consideration, and examining only the resolutions accepting said offer of sale.

DANFORTH, J., dissenting.

Appeal from general term, supreme court, First department.

Action by Harvey Kennedy against Henry H. Porter, Henry H. Porter as trustee, Charles Tracy and Daniel D. Tracy, executors of John D. Tracy, deceased, A. B. Baylis and William Baylis, executors of Abraham Baylis, deceased, and others, to compel said Porter to account in respect to certain partnership transactions. From the judgment of the general term reversing the judgment of the special term in favor of Tracy's executors, the plaintiff and the defendants Charles and Daniel Tracy, executors of John D. Tracy, appeal.

Robinson & Scribner and *Burton N. Harrison*, (*Edmund Randolph Robinson*, of counsel,) for plaintiff Kennedy. *Jas. C. Carter*, for Tracy's executors. *Adrian Van Sinderen*, for Baylis' executors, defendants and ap-

¹ Affirming 85 Hun, 669, *mem.*

pellants. *Delos McCurdy, Joseph H. Choate, and John C. Spooner*, for Porter and others.

RUGER, C. J. On the 6th day of June, 1878, the defendant Porter purchased of the defendant the Chicago & Northwestern Railway Company certain shares of stock in the West Wisconsin Railway Company, and took a transfer of certificates therefor from trustees, who held them for such vendors. So far as appears, he paid the full value thereof, at the time of the purchase, from his own funds, and negotiated for the purchase in his own name and for his individual benefit. This action was brought by the plaintiff against the defendant Porter and certain other defendants, in 1880, upon a written agreement of partnership, made in 1875, to obtain an accounting in respect to partnership transactions, and raises the question as to how far a member of such firm was restrained from dealings on his individual account by the terms of the partnership agreement. The property dealt in consisted of shares of the stock of the West Wisconsin Railway Company, and the issue in the case is whether the firm acquired any interest in the stock so purchased by the defendant Porter. In the course of the trial and argument, all other questions have been eliminated from the case, and the only dispute is now between the defendant Porter and his co-defendants, the executors of Tracy, and is presented by the appeal of said executors from the judgment of the general term reversing a judgment of the special term which awarded a proportionate share of such stock to Tracy's executors, and holding that the same belonged to the defendant Porter.

It is claimed by such executors that the order of reversal, not specifying that it was made upon the facts, must be assumed to have been made upon the law alone, and therefore that the findings made by the trial court are not open to review here, and must be assumed to state the facts upon which this appeal is to be determined. If this were all there is of this branch of the case, the contention would undoubtedly be correct, but it is subject to the further consideration that special findings of fact on the material questions in the case were requested to be made by the defendant Porter, which were generally refused by the trial court, and to each of which refusals the defendant Porter duly excepted. Wherever such requests were based upon uncontradicted evidence, or constituted legitimate and necessary deductions from the facts proved or found, the refusal by the trial court to make such findings was error in law, and is reviewable in this court. There is no conflicting evidence upon any material fact in the case, and the main cause of difference between the special and general terms seems to grow out of the different views entertained by those tribunals respecting the legal effect of the several transactions established by the evidence. A brief history of those transactions will bring us naturally to the special questions in the case, which require a more particular examination of the evidence upon which the findings were predicated.

Prior to January 6, 1875, the West Wisconsin Railway Company was a corporation organized under the laws of the state of Wisconsin, and owning and controlling a line of railway extending from Hudson to Elroy, in said state, and there forming a junction with a line of railway owned and operated by the Chicago & Northwestern Railway Company, and extending to Chicago. The capital stock of the road consisted of 50,000 shares, of the par value of \$100 each; 10,000 shares being classed as preferred stock, and 40,000 as common stock. This stock had all been transferred by the company to one Baldwin in payment of a claim held by him under a contract with said company for building and equipping its road. The company was, at the time of the transactions hereafter referred to, subject to mortgages for about \$6,000,000, and was owing, in addition thereto, a floating debt of about \$1,800,000. The interest on such mortgages had become due and payable; and the holders, as

well as the creditors of the floating debt, threatened legal proceedings for the collection of their claims, and the company had no funds to meet their demands. The West Wisconsin Railroad had theretofore, to some extent, been a feeder for the Chicago & Northwestern Railroad, and was susceptible of being made more valuable in that respect, and therefore certain directors and stockholders of the latter railroad company conceived the idea of getting control of the Wisconsin Company, for the purpose, among other things, of making it subserve more largely the interest of the latter road. For the purpose of accomplishing this object, the defendants Porter, Howe, Flower, Scott, Dows, Tracy, and the plaintiff, Kennedy, all being directors in the Chicago & Northwestern Company, and one Emma A. Schley, the sister of said Flower, entered into a partnership agreement, which, so far as its material parts are concerned, was substantially as follows: (1) The persons whose names are hereunder written hereby agree to form themselves into a copartnership, to commence at the date hereof, and continue until the same shall be dissolved by the written agreement of persons representing a majority in amount of the sums hereunder subscribed. (2) The business of this copartnership shall be the purchase and sale of and general dealing in the common and preferred stocks of the West Wisconsin Railway Company, and no other. (3) the business and affairs of this copartnership shall be exclusively managed by Henry H. Porter, "who is hereby invested with full power and authority to act for and bind this copartnership in all matters pertaining to the copartnership business." (5) The said Porter is required to keep accounts of all his transactions in the business of the copartnership, and the final account in the closing of the partnership dealings is to be open to the inspection of each partner. (6) In case of the decease of any subscriber hereto, the interest of the decedent shall not cease, but the same shall continue under the direction of his legal representatives. The several parties named subscribed and paid in to said Porter, in the aggregate, the sum of \$100,000 as the capital of such copartnership, of which sum Porter subscribed \$35,000; Kennedy, the plaintiff, \$10,000; Scott, \$10,000; Howe, \$5,000; Flower, \$7,500; Dows, \$10,000; Baylis, \$5,000; Mrs. Schley, \$7,500; Way, \$10,000. Immediately after the execution of the agreement, the said Porter, as attorney for the copartnership, paid to said Baldwin the said sum of \$100,000, and received a transfer from him of certificates therefor to the amount of 10,000 shares of preferred stock and 36,850 shares of common stock in the West Wisconsin Railway Company; the balance of said Wisconsin stock, consisting of 3,150 shares, being retained by said Baldwin for the benefit of certain members of his family, to whom he had transferred it. This constituted the only purchase of stock made by Porter under said copartnership agreement. In April, 1875, Scott, one of said partners, sold and transferred his interest therein to one P. L. Cable, and Cable thereafter, in October, 1876, sold and transferred one-half thereof to the defendant Porter. So, also, the defendant Howe, in October, 1875, sold and transferred his whole interest in said partnership to the defendant Flower, who, also in October, 1876, transferred said interest to the defendant Porter. Thus Porter became possessed, in October, 1876, of an interest equal to \$45,000 in the capital of said copartnership. Prior to the 9th day of October, 1875, Porter, in furtherance of the objects of said copartnership, and with the view of enabling the West Wisconsin Railway Company to raise funds for the purpose of meeting its floating and bonded debt, and avoiding a sale of its property, and the destruction of the value of its common stock, surrendered to such company the certificate for 10,000 shares of preferred stock held by him for said firm, and the same was accepted by said company, and canceled on its books. By a resolution of the directors of said company adopted March, 1876, the president thereof was authorized to reissue preferred stock to the amount of 10,000 shares, or so much thereof as might be necessary, at a restricted rate of dividend, for the purpose of paying the unfunded and floating debt of

said company; and this resolution was the only authority ever conferred by said company for the reissue of any of such preferred stock. Thereafter, and until the latter part of the year 1877, the preferred stock of said company was issued by its president, to some extent, for the purpose of paying, or postponing the period of payment of, its floating debt. On or about the 9th day of October, 1875, the copartnership, represented by Dows and Howe, effected an executory contract of sale of one-half of its whole copartnership assets to the Chicago & Northwestern Railway Company for the sum of \$100,000, payable at specified periods thereafter to the said Dows. This purchase money was fully paid by said company before October 5, 1876, to said Dows; and, as it was from time to time received by him, it was distributed and paid over to the several members of the copartnership firm, and their assignees, according to their respective proportions in its capital.

Immediately after the completion of the payment of the purchase price to said Dows, the said Porter, in further execution of the contract of sale, caused a certificate for 18,425 shares of the common stock, held by said copartnership, to be surrendered to said West Wisconsin Railway Company, and canceled upon their books, and in lieu thereof caused a new certificate to be issued for 18,425 shares to Dows and Flower as trustees, and delivered the same to them. Contemporaneously with the distribution of the final payment made to said Dows of said purchase money, said Porter also caused the remaining 18,425 shares of common stock belonging to said copartnership to be divided into lots corresponding to the *pro rata* interest of each copartner therein, and distributed the same among them and their assigns, each receiving and receipting for his *pro rata* share thereof. This distribution of money and assets embraced all the visible and known property of the said copartnership, and everything which its members then had reason to suppose would ever accrue to it. During the year 1877 it became evident that the West Wisconsin Company would be unable to pay its debts, as its creditors required, or preserve its property from sale, and it was therefore considered desirable by its directors to reorganize the company, and establish it on some different basis. It was therefore proposed that its property and franchises should be sold under a foreclosure of the mortgages thereon, and that a committee on behalf of the stock and bondholders should purchase the same, and organize a new company, which should take a transfer of the property of the former road from such committee. It is unnecessary to state in detail the plan of reorganization, further than to say that, in pursuance thereof, the Chicago, St. Paul & Minneapolis Railroad Company was organized under the laws of Wisconsin, with a capital of five millions of dollars, represented by 10,000 shares of preferred stock, and 40,000 shares of common stock, of the par value of \$100 each. The plan of reorganization contemplated the execution of a new mortgage to replace the one foreclosed, and the division of its preferred stock among the holders of preferred stock in the West Wisconsin road for even amounts, and of the common stock at the rate of 90 shares in the new company for 100 shares of the stock of the original company. At this time the preferred stock was all held by Porter, as president, for the purposes contemplated in the resolution authorizing its reissue, and by certain creditors to whom it had been issued as collateral security for loans, or in payment of debts of the West Wisconsin Company. This scheme was carried out and perfected in March, 1878, and the stock of the West Wisconsin Railroad thereafter ceased to have any legal existence as stock of an existing corporation, and the new company took possession of the property formerly belonging to the West Wisconsin Company, and issued and delivered its certificates of shares of common stock to each of the corporators according to their respective claims therefor. In February, 1878, before the consummation of the reorganization, John F. Tracy died, having by his will appointed the defendants Charles and Daniel D. Tracy executors thereof, and such will having

been duly proved in March, 1878. On the 16th of June, 1879, the defendant Porter delivered to said Tracy's executors certificates of preferred stock in the Chicago, St. Paul & Minneapolis Railroad Company, the successor to the said West Wisconsin Railway company, to an amount equivalent to Tracy's *pro rata* share in the capital stock of said copartnership.

It will be seen that although the copartnership agreement was couched in broad and general terms, and authorized and apparently contemplated speculative dealings in the stock of the West Wisconsin Railroad generally, the business of the firm, as shown by its actual transactions, was of the most natural and legitimate character, and contemplated a profit originating only from the ownership of the railroad, and such increase in its business and value as might be produced by the exercise of industry, skill, and prudence in its legitimate management and operation. For the purpose of accomplishing this purpose, the most extreme powers were conferred upon Mr. Porter; and no complaint is or can justly be made that he exhibited any want of skill, sagacity, or good faith in the management of the affairs of said copartnership, and in the conduct of its operations to its termination. Within two years he had not only preserved the road from dissolution, but had caused to be returned to each partner the entire amount of his capital, and also certificates of shares in the railroad whose stock was the subject of the venture, amounting, at its par value, to upward of 18 times the amount of such capital. While such stock was, at the time of its distribution, and for some time thereafter, of but little value, it was proved at the time of the trial in 1882, that the stock into which it was made exchangeable had largely appreciated, and this result was due, in a large measure, to the energy, skill, and sagacity displayed by the defendant Porter in its management.

The surrender by Porter to the West Wisconsin Company of the preferred stock was, if made in good faith and for the interest of the copartnership firm, within the scope of the power conferred upon him, and effected a valid transfer of title to that company. As we shall see hereafter, this transfer was subsequently approved and ratified by the several members of the partnership firm, and they were not at liberty on the trial to question either the validity of the transfer, or the exercise of the powers granted to Porter. Some complaint was made upon the trial that Porter had not kept an account of the partnership dealings, as required by the articles of copartnership. It does not appear that any members of the firm had ever inquired for such an account, or had ever desired information of firm transactions which he did not obtain, or professed any ignorance of the situation of the partnership dealings until about the time this litigation commenced. It does appear affirmatively that Porter never made but one purchase of stock for the copartnership, and that he exhausted in such purchase the entire capital of the firm. It also appears that he never individually made any sale of copartnership property, or received any funds from sales of such property, or otherwise, on behalf of such firm; the only sale of such property that ever took place having been made by the members themselves, acting through a committee selected by themselves, and receiving and distributing, through an agent duly appointed by them, the purchase price received upon such sale. The complaint that a book-account of the transactions was not kept by Porter seems to be without any reasonable foundation, as there were no accounts which he could keep. The duties of Porter, under the partnership articles, consisted of the devotion of his time to the management and operation of the West Wisconsin Railroad, and taking care of its financial affairs; and no complaint is made but that the books of that company exhibited a faithful record of its transactions.

We come now to a more particular consideration of the evidence upon which Tracy's executors base their present claim. On the 6th day of June, 1878, Flower and Dows, being authorized by the Chicago & Northwestern Company so to do, transferred to Porter the certificate for 18,425 shares of

the stock of the West Wisconsin Railway Company held by them as trustees, and it was claimed on the trial by the plaintiff, Kennedy, and the defendants Tracy's executors, that Porter could not purchase or acquire such stock individually by reason of his obligations to his associates growing out of the provisions of the copartnership agreement. They therefore claimed their proportionate share of such stock under the partnership agreement. All of the remaining copartners acquiesce in the claim made by the defendant Porter that, by the transfer of the shares held by the trustees to him, with the assent of the *cestui que trust*, he acquired an absolute title thereto, free from any claim on the part of the members to participate therein. In view of the question thus raised, it is important to consider more particularly the contract under which the Chicago & Northwestern Company acquired an interest in such stock, and see whether thereby the copartners had divested themselves of all interest therein. This contract was formed by written negotiations, consisting of an offer of sale on behalf of the copartners, and resolutions of acceptance on behalf of the Chicago & Northwestern Railway Company. The evidence shows that on the 5th day of October, 1875, Messrs. Dows and Flower addressed and delivered to the board of directors of the Chicago & Northwestern Railway Company a letter which, so far as its material parts are concerned, was substantially as follows: "At the solicitation of John F. Tracy, H. H. Porter, Genl. Manager, and several other directors in the Northwest road, we were induced to take an interest in the West Wisconsin Railway, learning that they were to default on their interest, January 1, 1875, in order to control its business in the interest of the N. W. Ry. We were told that it would not do, at that time, for the N. West. to purchase it, for the reason that they had no money, but that it was very important that the Northwest. should not lose its connection with Saint Paul city; that it would do it if this road was allowed to escape us; and we would lose \$500,000 of our earnings now received yearly from that source. A party was formed to purchase the West. Wis. Ry., which succeeded in doing it. * * * Up to this time we have controlled the road in the interest of the N. W. Ry., * * * and we feel that it would be better now for the Northwestern to make some arrangements to either purchase the whole of our stock or half of it, or to provide for the purchase of it now, and paying for it at some future time. We desire to submit to you the following propositions: *First*, that you pay to David Dows, monthly, ten per cent. of the amount you earn from the joint business of the West Wisconsin Railway until you have paid one hundred thousand dollars, at seven per cent. interest from January 1, 1875; that you pay him now ten per cent. of the earnings you have received from the joint business of the West Wisconsin Railway from January 1, 1875, which shall entitle you to one-half the profits on the stock of the West Wisconsin Railway held by us. * * * We would prefer that the Northwestern Railway provide for laying aside of its joint earnings two hundred thousand dollars, and interest from January 1, 1875, in which event we will give you the profits on the whole of our stock in the West Wisconsin Company. * * * On this or a similar basis, we hereby agree for the owners of the West Wisconsin Railway stock to execute the proper papers for the purpose of carrying out this proposition." At a meeting of the directors of the Chicago & Northwestern Company, held October 9, 1875, at which every continuing member of the copartnership firm, except Mrs. Schley, who was represented by R. P. Flower, was present, and constituting a majority of such board of directors, this proposition was taken up and discussed, and the following resolutions were thereupon unanimously adopted: "*First*, those gentlemen shall give to the Chicago & Northwestern Railway Company all the unconsigned business to and from their road to the points reached by the lines of that company, so far as they can legally control the same, and will use their influence and exertions in that direction; *second*, in consideration of

above, the Chicago & Northwestern Railway Company shall pay each month, to the order of Mr. Dows, fifteen per cent. of all the earnings of the Chicago & Northwestern Railway Company from the business going to or coming from the West Wisconsin Railway Company, until the payments amount to one hundred thousand dollars, and interest thereon at the rate of seven per cent. per annum, interest to begin from June 1, 1875, and the payment to be made from that time; *third*, when the \$100,000 shall be paid in full, and interest, Messrs. Dows and Flower to execute a declaration in trust, in writing, that they will pay over to the Chicago & Northwestern Railway Company one-half of all the profits at any time made by them on the stock of the West Wisconsin Railway Company, held by them for an association which they represent, holding \$3,685,000 of said stock." These resolutions were received and acted upon by the copartnership firm as an acceptance of their offer to sell a one-half interest in their partnership venture. Whatever view might be taken of the propriety of this transaction by the stockholders of the Chicago & Northwestern Railroad, who were alone entitled to raise objections thereto, it is unnecessary to inquire, as they not only have never challenged it, but, on the contrary, have sanctioned and approved it. It certainly does not lie in the mouth of any member of the partnership firm to question the validity of this transaction, or the existence of the facts upon which it was based; for they each and all participated therein, not only as the proposed vendors, but also as representatives of the proposed vendees, and sanctioned and approved all that was said or done in their behalf. This contract must, in accordance with settled rules of construction, be interpreted so as to carry out and effectuate the intention of the parties making it. We must seek for that intention, first, in the language used in forming their agreement, and the object which that language discloses as the occasion and design of the contract. It is also proper, in searching for the intention of the parties, to consider the circumstances surrounding the transaction, with a view of arriving at the true meaning and intent of the language employed, if its significance is in any respect doubtful or obscure. Extrinsic evidence is not available to interpret the meaning of a contract unless technical terms are used, or a latent ambiguity is developed upon the trial, which requires such evidence to make the application of the language to the subject-matter of the contract intelligible and certain. Subject to these qualifications, the interpretation of written agreements presents a question of law alone, and belongs to the courts to determine. The learned judge who made the findings of fact on the trial seems, in arriving at the terms and meaning of the contract of sale, to have excluded the language used in the offer from consideration, and determined the language and meaning of the instrument by an examination of the resolutions of acceptance alone. In this we think he erred. The offer was an essential part of the contract, and cannot be divorced from it in determining the question of intent. It is expressly referred to in the resolutions of acceptance, and a court would willfully shut its eyes to needed light, which refused to examine legitimate sources of information for its aid and guidance.

Viewed in the light of the rules stated, there would seem to be no reasonable doubt of the true meaning and intent of this contract. The object of the copartners in purchasing the stock originally was said to be to control the West Wisconsin road in the interest of the proposed vendees, and the object of selling was to relieve the corporation from further responsibility, either wholly or partially, in the management of the stock, and throw it upon those for whose benefit it was originally undertaken. It was the evident intention of the vendors to convey such an interest in the stock as would enable the vendees to control the future management of the West Wisconsin Railroad. Stripped of unnecessary verbiage, it was a proposition to sell to the Northwestern Company the entire interest of the copartnership in the West Wisconsin

sin road for the sum of \$200,000; and, in case the proposed vendees did not desire to take the whole, then to sell them one-half thereof for \$100,000. The latter proposition was the one accepted, and thereby the Northwestern Company became, upon payment of the purchase price, the owners, as tenants in common with the copartners, of one-half of the copartnership property, whatever that might be. It was clearly the intention of all parties to hold and operate the whole copartnership interest together in unison for the benefit of the Northwestern Railroad Company until other arrangements should be made; and that, whatever should ultimately be realized from such assets, called "profits" in the acceptance, from whatever source they might be derived, should be equally divided between the partners on one side, and the Northwestern Railway Company on the other. To hold otherwise would involve the absurdity of supposing that a vendee has voluntarily accepted a lesser interest for the same price than was offered to him, and preferred to have the profits to accrue from the use of property rather than the property together with the profits. It is obvious that the word "profits" was used by the vendors in the sense in which they were related to the speculation, and as representing the assets of the firm after it had been reimbursed its original outlay; and it is equally clear that the vendees understood the language in the same sense as they required that their trustees should be obligated to pay to them one-half of all the profits at any time made on the stock of the West Wisconsin Railway Company held by such trustees for an association which they represent, holding \$3,650,000 of said stock. The parties were then speaking of a speculation being prosecuted by the vendors, and provided for an obligation that such vendors should pay to the vendees one-half the profits made by them upon their investment. The assets were then in the hands of the agent of the firm, and it was clearly contemplated that he should continue in their possession, and use them for the purpose originally designed,—of making them profitable to its owners, and useful to the Chicago & Northwestern Railroad. The profits thus anticipated were those referred to in the agreement. In the offer, the vendors obviously used the terms "their interest in the West Wisconsin Ry. Co.," "their stock," and "the profits," as synonymous terms, and their offer was accepted in a similar sense. Any other construction would involve the absurdity of supposing that as vendors they meant one thing, and as vendees intended to put a different meaning upon the same language. The mode provided for carrying out the contract did not, it is true, in terms require a direct transfer of the shares to the vendees, but did what was equivalent thereto in requiring a transfer to be made to trustees of their selection, under an obligation on the part of such trustees to pay over to the vendees one-half of all profits thereafter to be derived from the common enterprise. They thus secured the entire beneficial interest in one-half of such property, and became, in equity as well as in law, the owners thereof. *Adamson v. Armitage*, 19 Ves. 418; *Page v. Leapingwell*, 18 Ves. 463; *Fox v Carr*, 16 Hun, 566. This view of the contract is confirmed by the subsequent action of the vendors in distributing the copartnership assets among its several owners as hereinbefore stated. They thereby transferred the legal title of the stock to trustees for the vendees, and subjected it to their management, control, and ownership. 2 Perry, Trusts, § 920. But, whatever view may be taken of the meaning of the original contract, it was entirely competent for the contracting parties, in performing it, to put their own construction upon its terms, and agree upon any mode of performance which might be mutually satisfactory to them. The vendors, in fact, did, upon the payment of the purchase price, divide what was before a common venture into two equal shares, one of which they divided among themselves according to their *pro rata* interest in the speculation, and took and held as their individual property, and the other half they conveyed to trustees for the vendees as the lawful owners of such share. They had thus disabled themselves from continuing the speculation jointly with

their vendees, as they had agreed to do, and withdrew their entire share of the partnership assets from the ventures. They certainly could not have expected that the further prosecution of the adventure was to be conducted for their benefit, or subject to their control, in the absence of their share of the capital. After such division, the members of the copartnership firm ceased to have any interest in or title to any of the common stock formerly owned by the firm. By the terms of the contract, when the whole purchase price of the stock was paid to the copartners, it was provided that Messrs. Dows and Flower should execute a declaration of trust. Such declaration was entirely unnecessary to constitute a valid trust of personal property. Neither was it necessary that it should be evidenced by any formal or written agreement declaring the trust. A declaration or admission of the trust made by the trustees, if upon sufficient consideration, would establish a valid trust. *Day v. Roth*, 13 N Y 448. The requirement that a declaration should be made was for the benefit of the vendees, and it was competent for them to waive its performance without hazard to their rights. In view, however, of the accomplishment of the purposes of the corporation, effected by the transfer of stock to persons holding it in the interest of the Northwestern road, and the evident determination of all parties interested to abandon the copartnership enterprise in October, 1876, the execution of such declaration was deemed unnecessary; but for the obvious reason that it was necessary for some persons to represent the Northwestern Company in the direction of the West Wisconsin Railway Company, and as that could not properly be done by another corporation, it was by mutual consent agreed that the certificate for 18,425 shares should be delivered to Messrs. Dows and Flower as trustees for said vendees, and the remainder of the common fund of 36,850 shares should be distributed among the several copartners according to their respective interests in the copartnership assets. A complete disposition of the entire assets of the copartnership was thus made, and a severance of the interests of the various owners was thereby effected, and each party thereafter took and held his and its stock in severalty, relieved from any obligation to use it for the purposes of the copartnership firm. This division of assets was utterly inconsistent with an intention to continue such partnership business, and it must be held that a dissolution of the copartnership firm was thereby intended to be effected. *Story*, Partn. § 280; *Parson*, Partn. 384. In the contract of sale it was assumed by all parties thereto that the preferred stock was canceled and extinguished, and that their interest in the copartnership was wholly represented by the 36,850 shares of common stock referred to therein.

It is, however, contended by the appellant that inasmuch as the partnership agreement provided that it should be dissolved only by a "written agreement of persons representing a majority in amount of the sums hereunder subscribed," that it necessarily continued as a binding obligation upon its members until the execution of such written agreement. It is not disputed but that, whatever time may be fixed by partnership articles for the existence of a copartnership, it may nevertheless be sooner dissolved by the happening of any of the events which in law are held to effect that result. Elementary writers quite uniformly agree as to the causes which effect the dissolution of partnerships. Among other things, it is said that when the further prosecution of the enterprise becomes illegal or impossible, or when its object has been fully accomplished, it has arrived at the period which was necessarily contemplated for its dissolution. Among other causes which effect such dissolution, it is said that, in the absence of an express agreement to the contrary, a partnership is *ipso facto* dissolved by the assignment by one partner of his share under a *fi. fa.*; by the transfer of such share by death, bankruptcy, or insolvency. 1 *Lindl.* Partn. 187. It is stated by *Parsons*, (Partn. 407:) "We suppose the truth to be that if a partner retires, whether by voluntary act, bankruptcy, expulsion, or death, or if a new partner comes in by

any means whatever, in either of these cases the old partnership ceases to exist." And, further, at page 438: "What was said of the necessary dissolution of a partnership when any change was made in it is true of the change caused by the death of a partner. Dissolution follows immediately and inevitably. This rule has been distinctly declared only of late years; for it was in 1808, or about that time, that Lord ELDON declared in several cases that the death of any one in any number of partners dissolves the partnership. And even then that chancellor put in the qualification that the death of a partner operates a dissolution of the partnership unless provision is expressly made to the contrary. We doubt very much whether this qualification be necessary or accurate; for we do not believe that any provisions made beforehand in reference to the death of a partner, or any agreements or arrangements made subsequently to his death, can prevent this dissolution. We have, perhaps, sufficiently indicated our reasons for this view in another place. Here we need only add that, as the partner who has died cannot by possibility continue a member of the firm, so any firm of which he is not a member, whether it contains his executors or his children, cannot be the same firm as that of which he was a member. What is inaccurately called provision against the dissolution of the partnership is an agreement that, if either party dies, his property shall remain in the firm and in the business, for the benefit of his children, or that his children, or some one of them, or some other person, shall, immediately on his death, take his place in the firm, and become partner in his stead. All these agreements and arrangements, and all that can be made for a similar purpose, are in fact only bargains for the creation of a new partnership when the old one ceases to exist." Story says, in section 317 of his work on Partnerships: "There is no doubt that, by the principles of the common law, the death of any one partner will operate as a dissolution of the partnership, however numerous the association may be, not only as to the deceased partner, but as between all the survivors." He also says, in section 307, that "it seems now well established at the common law that, if one partner does make * * * a voluntary assignment of all right, title, and interest in the partnership property and effects, that will at once dissolve the partnership, and convert the assignee or purchaser into a tenant in common with the other partners." It was said by Judge HOGEBOM, in *Savage v. Putnam*, 32 Barb. 420, affirmed 32 N. Y. 501: "The ordinary effect of the death of one of the members of a partnership is to work its dissolution. The partnership is ended. The connection has been dissolved, and the future relations of the surviving partners to each other must be determined by some new agreement between them, or by the results which the law pronounces upon their acts and proceedings when no new agreement is in fact made. And so of a change in the concern effected by the transfer of stock." See *Marquand v. Manufacturing Co.*, 17 Johns. 525; *Menagh v. Whitwell*, 52 N. Y. 147; *Morss v. Gleason*, 64 N. Y. 204; *Tarbell v. West*, 86 N. Y. 280. Whenever a dissolution of a partnership is once effected, it is not competent for the survivors to enter into any new enterprises, or contract any new obligations, on behalf of the original firm. In such case the survivors take the partnership assets for the purpose only of discharging its obligations, completing its unfinished business, and winding up the affairs of the concern; and, if they make use of such assets in new enterprises, it usually is at the option of the representatives of the retiring partner to claim a proportionate share of the profits in such enterprises or not. *King v. Leighton*, 100 N. Y. 386, 3 N. E. Rep. 594. A majority of the court are of the opinion, however, that inasmuch as the questions relating to a dissolution of this copartnership arising from death, transfers of interest, and the introduction of new members therein, were not especially referred to upon the trial or argued before us, that our decision should be placed upon the ground of dissolution effected by the severance of the partnership interests, the distribution of its assets, and the

actual abandonment of the enterprise, evidenced by the unmistakable action of the respective members of the firm. We are therefore of the opinion that, by the return of the original capital to its several members, and the final distribution of its assets, the partnership ceased to exist, and its members had no power thereafter to contract new obligations, or enter into new speculations, by virtue of its original contract.

How far the old or new members of a copartnership may bind themselves, through acquiescence or implied consent, to further operations under the original articles, it is unnecessary here to inquire; for no such transactions were undertaken, and all that was subsequently done here was in pursuance of the rights of the survivors to realize upon the assets, and settle up the outstanding obligations of the original firm. It is, however, claimed by the appellants that the distribution by the defendant Porter, in 1879, of the preferred stock acquired by him, upon the reorganization, in the Chicago, St. Paul & Minneapolis Railroad Company, among the several copartners according to their *pro rata* interest, furnishes conclusive evidence that said copartnership was then an existing organization for all of its original purposes. We are of opinion that this claim cannot be maintained. If Porter had, after the dissolution of the firm, made new purchases, and entered into new engagements, in the name of the firm, or had used its funds in such new enterprises, there might have been some foundation for such a claim. This, however, was not the case. As one of the committee for the bondholders and stockholders of the West Wisconsin Railway Company, Porter had, in 1878, secured from the Chicago, St. Paul & Minneapolis Railway Company an obligation to have the preferred stock of the former recognized in the purchase by the latter company. The terms upon which this reorganization was to be effected were the subject of negotiation up to the spring of 1878, and it was not until that time that any such property came into existence which could be the subject of ownership by the old firm. The copartnership had, long prior thereto, surrendered their preferred stock to the old company upon terms which contemplated its consumption and use for the benefit of such company, and no longer had any legal right to its return. Stock, however, which represented this preferred stock, did thereafter come into the hands of the old company, and Porter secured its distribution among the members of the copartnership firm, upon the assumption that they were its equitable owners. It was, at the best, an apparently uncollectable asset, which, through a fortunate combination of circumstances, had proved collectible, and, coming into the hands of one of the original partners, was, upon principles of equity, distributed by him among his associates. This action was not at all inconsistent with the theory that the firm had been previously dissolved; for a firm always continues to exist for the purpose of collecting, settling up, and distributing its assets, and performing its antecedent engagements. *Griswold v. Waddington*, 16 Johns. 438; *Hubbard v. Matthews*, 54 N. Y. 43; *King v. Leighton*, *supra*. It was said by the chancellor in the first-cited case: "A dissolution of partnership only has respect to the future; the parties remain bound for all antecedent engagements. The partnership may be said to continue as to everything that is past, and until all pre-existing matters are wound up and settled." Whether the members of the original firm were actually entitled to any participation in this stock, and, if so, to what extent, would, we think, be a serious question if critically examined; but it seems to be quite unnecessary to go into it, for we understand it is not now involved in the case.

There remains but a few words to say with reference to the criticisms made by the appellant upon the contract made between the Chicago & Northwestern Company and Porter for the sale to him, in June, 1878, of the stock in question. There is no doubt but that a bargain was made for its purchase by Porter, and that it was in fact caused to be transferred by that company to Porter, with intent to vest the title in him for a consideration agreed upon be-

tween them. The court below so found. There is no claim that Porter used the assets of the copartnership firm in its purchase, and the legality of that transfer is now recognized and affirmed by both its legal as well as its equitable owners. We know of no ground upon which Tracy's executors can question the validity of that transfer, or now claim that Porter should account to them for the stock, or its value, while asserting the invalidity of the contract by which its title was acquired. We have heretofore discussed the case upon the assumption that, if the firm had continued to do business as an active, existing organization, neither its individual members nor its general agent could lawfully purchase in their own names, and hold for their individual benefit, property similar to that which was the subject of the partnership dealing. But we do not understand that there is any invariable rule which leads to such a conclusion. Whenever fiduciary relations exist between parties which render a course of conduct on the part of one a violation of some contractual duty which he owes to his associates, or where a member of a partnership engages in secret and clandestine dealings with others which must result to the injury or detriment of the general business of the firm, such person has generally been held responsible to his associates for profits made in such enterprises. But it cannot be doubted but that such individual has, with the consent of his associates or copartners, the right to make individual purchases of property, and to engage in individual speculations therein; and most certainly he could properly make such purchases of his copartners, and hold the property so purchased, and enjoy its profits, free from any claims by his associates. It furnishes a striking commentary upon the merits of the appellants' argument that they make no claim to share in the profits made by Porter upon the purchase of stock formerly owned by Scott and Howe and Flower, and which seem to us to be quite as susceptible to such claim as the stock purchased by the Chicago & Northwestern Company. If it were necessary to examine this question, we are by no means clear that the purchase in question is justly subject to the criticisms made upon it by the appellants; but, in view of the conclusions reached on the other branches of the case, we refrain from discussing the subject.

We are therefore of the opinion that the judgment, so far as appealed from by the defendant Tracy, should be affirmed.

All concur, except DANFORTH, J., dissenting.

(125 Ill. 53)

HECKLE v. GREWE.

(*Supreme Court of Illinois*. May 9, 1888.)

EXEMPTIONS—PROPERTY EXEMPT—UNDIVIDED INTEREST AS TENANT IN COMMON.

Under the exemption laws of Illinois, (Starr & C. St. Ill. c. 52, § 18,) providing that "the following personal property owned by the debtor shall be exempt from execution," etc., "and in addition, when the debtor is the head of a family and resides with the same, three hundred dollars' worth of other property, to be selected by the debtor," such debtor may hold as exempt an undivided interest in such personal property owned jointly with another as tenants in common.

Appeal from appellate court, Third district.

George W. Fogg, for appellant. *Carter & Govert*, for appellee.

MULKEY, J. Henry C. Mulligan having recovered a judgment in the Adams circuit court for \$139.65 against the appellee, William Grewe, who was the head of a family, and residing with the same, caused a writ of *fieri facias* to be issued thereon, and placed it in the hands of the appellant Benjamin Heckle, the sheriff of the county, for execution. On being notified thereof, the appellee made out and delivered to the sheriff, in strict conformity with the statute, a schedule of all his property, amounting in value to about

\$300, and claimed the same as exempt from execution. Most all of the property scheduled consisted of three mules, two coal wagons, four sprinkling wagons, and five sets of double harness, in which the appellee had an undivided half interest as tenant in common with one A. H. Wissmann. The sheriff, under the instructions of the plaintiff's attorney, proceeded to levy upon the defendant's interest in the property, notwithstanding it had been scheduled and claimed by him as exempt under the statute, and subsequently, after the usual notice, sold the same under the execution for \$183.50. The defendant in the execution thereupon brought an action of trespass against the sheriff to recover double the value of the property sold. The action is founded on the thirteenth, fourteenth, and seventeenth sections of chapter 52, Rev. St., (Starr & C. Ed.) entitled "Exemptions," the last section of which provides as follows: "If any officers, by virtue of any execution or other process, or any other person by any right of distress, shall take or seize any of the articles of property exempted, as herein provided, from levy and sale, such officer or person shall be liable to the party injured for double the value of the property so illegally taken or seized, to be recovered by action of trespass, with costs of suit." The cause was tried before the Adams circuit court and a jury, resulting in a judgment of \$600 for the plaintiff, which was subsequently affirmed by the appellate court for the Third district, whence the case is certified under the statute to this court for review. The undisputed facts are, as already indicated, that the property levied upon and sold by the sheriff belonged to appellee as tenant in common with Wissmann; that the same was properly scheduled and claimed by the defendant in the execution before it was taken and sold by the sheriff; that appellee's one-half interest therein did not exceed \$300 in value; and that at the time the property was so taken and sold appellee was the head of a family, and residing with the same. It therefore follows that if, as a matter of law, the interest of a tenant in common in personal property is in any case exempt, under our statute, from levy and forced sale, it clearly was in this. The lower courts both held that such interests in personal property stand upon the same footing, in respect to the exemption laws, as like interests in other property, where the possession as well as the title is several. That the lower courts ruled correctly on this question we have no doubt. Being of this opinion, it would be a useless consumption of time to consider the other questions discussed in the briefs; for, accepting this as the law of the case, as upon the admitted facts we must, there was clearly no error in affirming the judgment of the trial court, even though some of its rulings may have been improper, about which we express no opinion. Courts of review reverse only for such errors as may have been prejudicial to the complaining party, and certainly no error or number of errors can, with any propriety, be said to prejudice a party when it is clear, as it is here, that the judgment upon the conceded facts is the only one that could properly be rendered, and that another trial would therefore necessarily result the same way. It is supposed by counsel that the view taken by the courts below on this question, and in which we fully concur, is not to be reconciled in principle with the case of *Trowbridge v. Cross*, 117 Ill. 109, 7 N. E. Rep. 847. We are unable to perceive anything in that case which justifies the claim of counsel. The question there decided was "whether one member of a firm can hold a homestead estate in the real estate of the firm as against a copartnership debt, and without the consent of the copartner," and it was held that he could not. If the articles levied upon in this case were partnership property, and the claim sought to be collected were a partnership debt, then there would be a striking analogy between that and the present case; but, as it is, there is scarcely any. Indeed, the differences between the ownership of property by a tenant in common and the ownership of like property by a partner are so many and elementary in their character, and withal so clearly defined in the law, that it would be useless to name them, or point out

the legal consequences that respectively attach to them. Being fully satisfied with the conclusion reached by the appellate court, its judgment will be affirmed.

(123 Ill. 585)

BUTTENUTH et al. v. St. Louis Bridge Co.

(*Supreme Court of Illinois.* January 20, 1888.)

1. TAXATION—ERRONEOUS ASSESSMENT—FAILURE TO MAKE APPLICATION BEFORE TOWNSHIP BOARD.

Revenue law Ill. § 86, (1874,) enacts that the town board shall meet on the fourth Monday in June, annually, to correct tax assessments on the application of any person considering himself aggrieved thereby, and that property assessed after that time shall be subject to complaint to the county board, which is required, by section 97 of the law, to meet on the second Monday in July annually. On a bill to set aside an assessment, it appeared that the town board met at the regular time in the year of the assessment complained of, and the only evidence that the assessment had not then been made was that the assessor had so stated to complainant casually, and not while engaged in any official act. *Held* that, by failing to apply to the town board, complainant lost all claim to relief under the statute, and the county board properly refused to take jurisdiction.

2. SAME—EXCESSIVE ASSESSMENT—WHAT CONSTITUTES.

A bill in equity to set aside a tax assessment on the ground that it is so excessive and disproportionate as to be fraudulent will not lie where it appears that such assessment is less than the average assessment of the same property for the preceding 10 years, and the value of the property is not shown, and the only evidence that the assessment is disproportionate is the opinion of witnesses that it is proportionately much higher than that on other property in the same town; and it is immaterial that the assessor failed to fulfill his promise to visit complainant's office to hear suggestions in regard to the property, before making the assessment.

3. SAME—TAXABLE PROPERTY—BOUNDARY LINE BETWEEN ILLINOIS AND MISSOURI—MIDDLE OF RIVER.

Act Cong. April 18, 1818, to enable the people of the territory of Illinois to form a state government, fixed the western boundary at the "middle of the Mississippi river;" which boundary was subsequently ratified by the state constitutions. *Held*, that the taxing power of the state extends to all that portion of a bridge across the Mississippi river which lies east of the middle line of the main channel of that river.

Appeal from circuit court, St. Clair county; WILLIAM H. SNYDER, Judge.

The facts sufficiently appear from the opinion. The sections of the statute cited in the opinion, and necessary to an understanding thereof, are as follows: "Sec. 86. In counties under township organization, the assessor, clerk, and supervisor of the town shall meet on the fourth Monday of June, for the purpose of reviewing the assessment of property in such town; and, on the application of any person considering himself aggrieved, * * * they shall review the assessment, and correct the same, as shall appear to them just. * * * Property assessed after the fourth Monday of June shall be subject to complaint to the county board. * * *" Section 97 requires the county board to meet for the purpose of correcting assessments, etc., on the second Monday of July, annually.

R. D. W. Holder, State's Atty., *Robert A. Halbert*, *L. D. Turner*, *C. R. Davis*, and *C. W. Thomas*, for appellants. *G. & G. Koerner*, for appellee.

SCOTT, J. It is alleged that complainant, the "St. Louis Bridge Company," is the legal successor of the "Illinois & St. Louis Bridge Company," which was incorporated in 1868, and which constructed a bridge over the Mississippi river from East St. Louis to St. Louis. The work was completed on the 4th day of July, 1874, and from that time on the bridge was operated by the original corporation until September 20, 1878, when it was sold under a decree of court, and passed to complainant, and has since been operated and controlled by it. Only two persons are named as defendants. One is William Buttenuth, the assessor for the year 1885 for the town in which the property is situated, and the other is Philip Rhein, who was then county clerk of the county in which the property is situated. Two principal grounds of relief

are relied upon: (1) That complainant's property was assessed so high, in proportion to other property in the town, that it was a fraud on its rights, and was oppressive; and (2) that a portion of the bridge that was in fact within the state of Missouri was assessed to complainant by the local assessor as property situated in this state. The bill contains other matters of complaint of a less serious nature, some of which may be noticed further on. The specific prayer of the bill is that the assessment may be set aside, and that defendant Rhein, the county clerk, be enjoined and restrained from extending any taxes on the assessment made on complainant's property. Although the answers of defendants are not under oath, they make the distinct issue that complainant's remedy for alleged grievances, if any existed, was at law, and not in chancery. It is alleged the town board was in session on the fourth Monday of June, 1885, and that, although the assessment was completed before that time, no one appeared, on behalf of complainant, to complain that its property was assessed too high, or otherwise wrongfully assessed. It is also alleged that complainant did appear before the county board, and claimed that its property was assessed too high. The complaint was not considered, perhaps for the reason it was not made to appear that the assessment was made after the fourth Monday of June, 1885. On the final hearing the court found the assessment complained of was so grossly disproportionate to the valuation of other property in the township, and so excessive, as to amount to a fraud on complainant; and the court further found that part of the bridge structure, that is to say, all of that part that lies west of the easternmost pier of the bridge, is outside of the limits of the state of Illinois, and was illegally assessed and included in the assessment with that part of the bridge which is within the limits of the state of Illinois. It was therefore ordered and decreed by the court that the assessment of complainant's property so made by defendant Buttenuth be set aside, and declared null and void; and that the temporary injunction previously granted, enjoining the defendant Rhein "from extending the said taxes against said property, and from certifying the said taxes to be collected [to the collector] of the township, or issuing his warrant for the said taxes to be collected upon said assessment, be made perpetual, and that the said defendant Buttenuth pay the costs of said suit."

It is so obvious the proposition needs no discussion, where the excessive valuation complained of is the result of a mere honest error in judgment on the part of the assessor making the assessment, chancery has no jurisdiction to afford the party aggrieved any relief. This court has expressly decided in *English v. People*, 96 Ill. 566, the statute affords the party aggrieved the only remedy for the correction of an excessive valuation of his property for the purposes of taxation, unless it is fraudulently assessed too high. When the assessment is completed before that time, the application must be made to the town board, under the provisions of the eighty-sixth section of the revenue law, (Rev. St. 1874,) on the fourth Monday of June. In this case it appears the town board was in session on the fourth Monday of June in the year complainant's property was assessed, but no complaint was made to it, on behalf of complainant, that its property was assessed too high, or otherwise illegally assessed. It is said complainant was misled by the answer of the assessor in response to an inquiry concerning the assessment, made about the time the town board would meet, that he had not completed the assessment, and for that reason no application was made to the town board. Conceding that to be so, then the application for relief should have been made to the county board, under the ninety-seventh section of the revenue law. Application was made to the county board, under the latter section of the statute. Counsel for the bridge company was heard before the county board, and the matter was referred to an appropriate committee. That committee reported: "It is claimed by the attorneys of said bridge company that the Illinois side of said bridge was assessed after the fourth Monday of June, but, no further

evidence having been produced, your committee does not recommend any action in the matter." It seems counsel for the bridge company was again heard in regard to the assessment of its property for the year 1885; but the report was adopted. Conceding, as it is thought must be done, there was no satisfactory evidence that the assessment was made after the fourth Monday of June, the county board very properly refused to take jurisdiction of the matter. There should have been explicit proof that the assessment was made after the fourth Monday of June, and it seems the assessor himself would be the proper party by whom to prove that jurisdictional fact. Proof of his statement as to that fact, made in a casual conversation, when he was not engaged in any official act in relation to such assessment, is not competent evidence to prove when the assessment was in fact made or completed, and did not excuse complainant from making application to the town board when in session, as it was at the time designated in the statute. Omitting to make application, then, to the town board at its regular session at the appointed time, complainant lost all remedy under the statute for relief against the alleged excessive valuation of its property for taxation.

But it is alleged in the bill the assessment was fraudulent, and it is upon that ground it is suggested the jurisdiction of a court of chancery rests to afford the relief demanded. Should it be made to appear that the assessment was fraudulent in fact or in law, no doubt a court of equity would set it aside, on the principle that fraud vitiates everything it touches, and equity will permit nothing to stand that is tainted with fraud, either in private or public transactions. But is it shown the assessment is fraudulent, either in fact or in law? It is thought it is not. No misconduct is imputed to the assessor in connection with the assessment, except that he promised to visit the office of the company before making it, to hear the suggestions of the company's officers as to facts that would materially affect the amount of the assessment; but it is alleged he failed to keep his promise in that regard. The assessor was under no legal obligation to call upon the officers of the company for information in regard to his duty in making the assessment of its property; nor is it insisted he was. The office of the company was located in St. Louis, out of this state; and it would seem, if its officers had any facts to communicate to the assessor that would be at all likely to affect the assessment favorably for the company, it was their privilege to go to his office, and there lay them before him for his consideration. Because the assessor did not call at the company's office affords no just grounds for complaint, and the charge that he omitted to do so does not aid in the slightest degree complainant's demand for equitable relief. The court found, by its decree, the assessment complained of was so grossly disproportionate to the assessment of other property in the town, and was so excessive in amount, as to be a fraud upon complainant. Is this finding of the court sustained by the evidence submitted at the hearing? It can hardly be said it is. On this branch of the case the evidence is very unsatisfactory. There are witnesses who state, in a general way, it is their opinion the bridge property is assessed, proportionately, much higher than other property in the town; but upon what facts their judgments in that respect are based do not appear with any distinctness. As compared with the valuation placed by the assessor upon all other property within the town, it was their judgment the valuation of the bridge property was much too high. It should not be forgotten, the local assessor does not assess railroad property, of which there is a very large amount in that town; and, when the value of all railroad property is added to that fixed by the assessor on other property, no witness ventures to state that the valuation of the bridge property would be disproportionate to the aggregate valuation of the entire property of the town. It is shown, the valuation placed on the property of complainant is less than the average valuation since 1875, including that year. In some years it was much higher, and in others less. In 1875 the assessed value was

\$1,900,000, and in 1876 it was the same; while in 1885, of which complaint is made, the assessed value was \$1,100,000. On the whole evidence considered, it does not appear that the valuation placed upon complainant's property is so much higher in proportion to that placed on other property in the town that it is fraudulent for that reason. Nor does it appear from anything contained in this record that the assessment is excessive in itself. There is no evidence of the value of that part of the bridge and its approaches subject to taxation in this state; and without evidence of its value it cannot be declared, as a matter of fact, that the present valuation is excessive to that degree that it is fraudulent in law.

The remaining ground of relief insisted upon is that part of the bridge structure which lies west of its easternmost pier is outside of the state of Illinois, and was illegally assessed and included in the assessment with that part which is confessedly within the limits of the state. On this branch of the case, some evidence was offered, and some discussion has been had, as to the boundary line between the states of Missouri and Illinois at the point where the bridge structure spans the Mississippi river. That question is certainly one of great gravity, and one this court will hardly undertake to determine definitely on the meager evidence to be found in this record, and in a case where neither state is represented, and where there are no defendants other than private citizens, neither of whom have the slightest personal interest in the matter. The utmost this court will assume to decide is what part of complainant's bridge is to be regarded as within the state of Illinois for the purposes of taxation; or, what is the same thing, does the valuation of complainant's property, as made by the assessor for 1885, include any portion of the bridge not subject to taxation in this state? It is certain, no part of that portion of the bridge structure assessed by the local assessor for taxation in this state is in the state of Missouri; nor does it appear that it was ever subject to taxation in that state. The act of congress March 6, 1820, (3 U. S. St. at Large, p. 545,) to enable the territory of Missouri to form a constitution, in fixing the boundaries, declared: "Thence due east to the middle of the main channel of the Mississippi river; thence down and following the course of the Mississippi river, in the middle of the main channel thereof." The state of Missouri, by its constitution of 1820, ratified the boundaries as fixed by the enabling act of congress, and we are not aware the eastern boundary of the state has since been changed. The constitution of 1875 of that state simply ratified and confirmed the boundaries of the state as established by law. Notwithstanding the fact the main channel of the river might be changed by imperceptible natural wear on one side, or by the gradual formation of alluvions, still "the middle of the main channel," when ascertained, would be the boundary of the state. It might be a slightly shifted line, hardly perceptible; still it would be a well-known and easily-ascertainable boundary line. The rule of law is, when a stream dividing coterminous states, being a boundary line, alters its channel by a gradual or imperceptible process of wear or of alluvions, the boundary shifts with the channel. No matter what conclusion might be reached as to the western boundary of Illinois, it cannot be maintained the eastern boundary of the state of Missouri is further east than the "middle of the main channel" of the Mississippi at the point where the bridge structure spans that river. It is not alleged in the bill, nor claimed in argument, any portion of the bridge assessed by the local assessor in this state lies west of the "middle of the main channel" of the river. It would seem to follow, therefore, if that portion of the bridge included in the assessment that lies between the eastern pier of the bridge and the "middle of the main channel" of the river is not within the limits of the state of Illinois, it is not included within the defined boundaries of any state. That conclusion will hardly be adopted, unless the question will admit of no other solution. The act of congress of April 18, 1818, to enable the people of the territory of Illinois to form

a state constitution, fixed the western boundary at the "middle of the Mississippi river," and declared the state should have concurrent "jurisdiction on the Mississippi river with any state or states to be formed west thereof, so far as said river shall form a common boundary to both." By the constitution of 1818, the people ratified the boundaries fixed for the state by the enabling act of congress; and in the constitutions of 1848 and of 1870 the same boundaries and jurisdiction are declared, except in the two last constitutions it is provided: "This state shall exercise such jurisdiction upon the Ohio river as she is now entitled to, or such as may be agreed upon by this state and the state of Kentucky." It seems clear, from all legislation and ordinances on this subject, it was intended the Mississippi river should constitute "a common boundary" between the state of Illinois and any state or states that might be formed to the west and next to that river. That intention is more definitely declared than it was in regard to the Ohio river; for in fixing the boundary of Illinois, when the line down along the middle of the Mississippi river should reach the confluence of that river with the Ohio, the boundary should be from thence up the latter river, "along its north-western shore;" and yet it has been held the river is the boundary between states divided by the Ohio river, although the original proprietor, in granting the territory, retained the river within its domain. The law as stated by law writers, and in the adjudged cases, seems to be that where a river is declared to be the boundary between states, although it may change imperceptibly from natural causes, the river "as it runs continues to be the boundary." But if the river should suddenly change its course, or desert the original channel, the rule of law is, the boundary remains in the middle of the deserted river-bed. Where a river is a boundary between states, as is the Mississippi between Illinois and Missouri, it is the main, the permanent, river which constitutes the boundary, and not that part which flows in seasons of high water, and is dry at other times. *Handly's Lessee v. Anthony*, 5 Wheat. 374. In no other way would a river be a permanent fixed boundary, at all times readily ascertainable. There are many cogent reasons why the boundary lines between states should be permanent; otherwise, territory in one state at one time, sooner or later might be in another state. It must be in one state all the time, or else the state would lose jurisdiction over it. Treating, then, as must be done, the Mississippi river as a common boundary between the states of Illinois and Missouri, what meaning is to be given to the terms, "middle of the Mississippi river," used in the enabling act of congress, and in the constitution defining the boundaries of the state of Illinois? Whether, when mere private rights are involved, the phrases, the "middle of the river," and the "middle of the main channel," or, what is the same thing, the "thread of the stream," mean the same thing, and may be interchangeably used, there are many considerations affecting the public welfare why it should be held the "middle of the channel" of a river between independent states or countries should be regarded as the boundary line between them, in the absence of express agreement to the contrary. When applied to rivers as boundaries between states, the phrases, "middle of the river," and "middle of the main channel," are equivalent expressions, and both mean the center line of the main channel, or, as it is most frequently expressed, the "thread of the stream." Should the expression, "middle of the river," be construed to mean a line midway of the water surface, that would give no permanent boundary that could be ascertained. It would be at one point at one time, and some distance away at another. Had the boundaries of Illinois been fixed at the time of the high water in 1844, and the middle of the river opposite St. Louis held to be a line midway of the surface of the water, that line would then have been far east of the present city of East St. Louis, and, on the waters receding, it would have shifted back towards the west, nearer the city of St. Louis. So unsatisfactory a proposition as that will not be adopted; it would lead to insurmountable difficulties.

Some light will be cast upon the subject of inquiry by first ascertaining, as near as may be, the meaning of the words "main channel," "mid-channel," "middle of the current," as those terms are used in the adjudged cases and in the text books that shall be examined. The definition of the word "channel" given in the most recent edition of Webster's Dictionary is: "The bed of a stream of water; especially the deeper part of a river or bay where the main current flows." The case of *Dunlieth v. Dubuque*, 55 Iowa, 553, 8 N. W. Rep. 443, while this court does not approve the decision of the case, contains a very accurate definition of the word "channel," as commonly used by river-men. It is: "The word 'channel,' when employed in treating subjects connected with the navigation of rivers, indicates the line of the deep water which vessels follow." In *Rowe v. Smith*, 51 Conn. 266, it is said: "The expression, 'middle of the channel of the bay or harbor,' does not refer to the thread of deepest water, but to that space within which ships can and usually do pass." It is apprehended it is in this sense the expressions, "middle of the river," "middle of the main channel," "mid-channel," "middle thread of the channel," are used in enabling acts of congress and in state constitutions establishing state boundaries. It is the free navigation of the river, when such river constitutes a common boundary, that part on which boats can and do pass, sometimes called "Nature's Pathway," that states demand shall be secured to them. When a river, navigable in fact, is taken or agreed upon as the boundary between two nations or states, the utility of the main channel, or, what is the same thing, the navigable part of the river, is too great to admit a supposition that either state intended to surrender to the state or nation occupying the opposite shore the whole of the principal channel or highway for vessels, and thus debar its own vessels the right of passing to and fro for purposes of defense or commerce. That would be to surrender all, or at least the most valuable part, of such river boundary, for the purpose of commerce, or other purposes deemed of great value to independent states or nations. Construing, then, the phrases, "middle of the Mississippi river," and the "middle of the main channel of the Mississippi river," to mean the same thing, both acts of congress fixing the boundaries of Illinois and Missouri declare the middle of the main channel of the Mississippi river to be the boundary line between the states, and that is the thread of the main stream. In *Thomas v. Hatch*, 3 Sum. 170, STORY, J., said: "I consider the law to be clearly settled that a boundary on a stream, on or by a stream or to a stream, includes the flats, at least to low-water mark, and in many cases to the middle thread of the river." A valuable case on this subject is *Morgan v. Reading*, 3 Smedes & M. 366. The opinion is by Chief Justice SHARKEY. Although not directly involved, the discussion, in part, had relation to the boundary line of the state of Mississippi. The facts as stated in the opinion are that, by various treaties and cessions, the United States had succeeded to all the territory east of a line drawn along the middle of the Mississippi above the thirty-first degree of latitude. Louisiana was then bounded on the east by the same line, the middle of the river above the river Iberville, as it had been established by the treaty of 1763. In 1798, while the middle of the river was still the boundary line between the province of Louisiana and the United States, congress established the Mississippi territory, bounding it on the west "by the Mississippi." It was in reference to that line the court said: "We have said that congress omitted to mention the middle of the river, but bounded the territory 'by the Mississippi.' The common law, by construction, extends grants bounded 'by' or 'on' or 'along' a fresh-water stream to the thread of the stream. The Mississippi territory, by this rule, extended to the middle of the river." In *Handly's Lessee v. Anthony*, *supra*, it was said by the court: "Where a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream." Mr. Field, in his work entitled "Outlines of an International

Code," (2d Ed. § 30,) in speaking of boundary by stream or channel, says: "The limits of national territory bounded by a river or stream, or by a strait or sound, or arm of the sea, the other shore of which is the territory of another nation, extend outward to a point equidistant from the territory of the nation occupying the opposite shore; or, if there be a stream or a navigable channel, to the thread of the stream, that is, to the mid-channel; or, if there be several channels, to the principal one." In his work on the Law of Nations, (page 31,) Mr. Polson says: "If the river divides two states, the middle channel is considered as the boundary line, unless prior occupation has given to the one or the other the right of possession to the whole." There are cases in this and other courts, although the discussion had reference directly to riparian rights, and not to boundaries between states, that illustrate this same doctrine. In *Fletcher v. Boom Co.*, 51 Mich. 277, 16 N. W. Rep. 645, it was held that the riparian rights of defendant in the case being considered, extended to the thread of the stream, to the center of the main channel of the river. It was said by this court in *Middleton v. Pritchard*, 3 Scam. 510, "that all grants bounded upon a river not navigable by the common law entitled the grantee to all islands lying between the main-land and the center thread of the current." In *Cobb v. La Valle*, 89 Ill. 331, it was said: "It seems to be the settled law of this country that the owner of land bordering upon a river not navigable at common law, such as the Mississippi river, will be entitled to claim to the center of the current of the stream." The same doctrine was restated in *Piper v. Connelly*, 108 Ill. 646, where it is said: "The general doctrine that grants of land bounded upon rivers, or the margins above tide-water, carry the exclusive right and title of the grantee to the center thread of the current, unless the terms of the grant clearly denote the intention to stop at the margin of the river, has been too long established, and too firmly adhered to by this court, to be now questioned." No reason is perceived why the principles here stated should not control of the case being considered. As before remarked, it is manifest it was the intention of congress that the Mississippi river should constitute a "common boundary" between the states of Illinois and Missouri; and had the words, the "middle of the Mississippi river," and the "middle of the main channel," been omitted in both enabling acts of congress, still the river itself would be the boundary, and each state would hold to the "middle of the stream,"—that is to say, the middle thread of the stream. The intention in this respect is made most manifest by the fact it must have been, and was, known to congress when it passed the enabling act for Missouri, and fixed the boundary at the "middle of the main channel of the Mississippi river," that the western boundary of Illinois had been fixed "at the middle of the Mississippi river;" and certainly it was not intended to fix two distinct or different boundary lines. That would have left a space not in either state, and no such absurd intention should be imputed to congress. It was most appropriately said by the court in *Morgan v. Reading*, *supra*, in respect to the boundary line as fixed by the act of congress organizing the territory of Mississippi, which established the "Mississippi river" as the western boundary, "all west of that line"—that is, the middle of the river—"was owned by a foreign power; and we cannot suppose congress, under the circumstances, designed to limit the jurisdiction of the territory by the bank of the river." The suggestion that congress, by its enabling acts, may have established one line in the Mississippi river for the eastern boundary for Missouri, and another line further east for the western boundary of Illinois, has nothing, in law or in fact, upon which to rest. The whole legislation on this subject shows, as before remarked, it was the intention of congress to make the river a "common boundary" between these states; and the expressions used in both enabling acts, although the words used may not be the same, make the middle of the main channel of the permanent river the boundary line. In such cases the principle is as stated by Mr. Woolsey, in

his work on International Law, (section 58:) "Where a navigable river forms the boundary between states, both are presumed to have free use of it, and the dividing line will run in the middle of the channel, unless the contrary is shown by long occupancy or agreement of parties."

Commercial considerations make it imperative, where states or nations are divided by a navigable river, each should hold to the center thread of the main channel or current along which vessels in the carrying trade pass,—that is, the "channel of commerce;" not the shallow water of the stream, which at some seasons of the year may be impossible of navigation,—upon which each nation or state demands the right to move its products without any interference from the state or nation occupying the opposite shore. So important has this right ever been deemed, it is thought to be embraced in all treaties, cessions, ordinances, statutes, and constitutions made, enacted, or adopted in regard to the Mississippi river since the federal government was organized. It was the great desire to secure this important privilege that gave rise to all the efforts on the part of the general government to obtain the control of the Mississippi river from its source to that point where it empties into the gulf and connects with the sea. It has been often ruled, the intention in such great matters as state boundaries, when clearly manifested by cessions, grants, or legislative acts, should control. It is a fact so well known it is not called in question that so far back as can be known, either from history or tradition, the main channel of the Mississippi river, at the point where complainant's bridge is constructed, was always west of "Bloody Island,"—that is, between that island and the Missouri shore. Both states have always recognized this fact; and for that reason "Bloody Island," although the river east of it was in fact at one time navigable for shallow-draught vessels,—certainly in seasons of high water,—was always regarded as being within the limits of the state of Illinois. At one time grave apprehensions were entertained that the main channel of the river might change to the east side of "Bloody Island," and thus leave the Missouri side; but by the consent of Illinois, expressed by the general assembly, dykes and other structures were erected at the upper end of the island to keep the main channel on the Missouri side, where it had previously been. Those structures proved efficient, and the main channel of the river now flows where it did since before the boundaries of either state divided by it were established by congress, or declared by the state constitutions.

It is not claimed, either by the bill or in the evidence, that any part of complainant's bridge that was assessed by the local assessor lies west of the middle of what has always been the main channel of the river since the states were organized under the acts of congress; and this court has no hesitation in coming to the conclusion that all of that part of the bridge, with its approaches, that lies east of the middle line of the main channel of the river, is within the jurisdiction of the state of Illinois for the purposes of state and local taxation. Only that part of the bridge east of the middle of the main channel of the river, as appears from the plat used in making the assessment, was assessed in this case; and that was warranted by law. The case of *Missouri v. Kentucky*, 11 Wall. 395, cited by counsel for complainant as being conclusive of the case in hand, has been examined, and it is not perceived it contains anything in conflict with the general views here expressed. Indeed, some of the reasoning in that case has been adopted in this opinion.

The judgment of the circuit court will be reversed, and the cause will be remanded, with directions to that court to dismiss the bill.

(124 Ill. 655)

CITY OF EAST ST. LOUIS v. PEOPLE *ex rel.* GUNDLACH.

(Supreme Court of Illinois. May 9, 1888.)

1. MUNICIPAL CORPORATIONS—TAXATION—LIMITATION IN CHARTER—REPEAL—BY CONSTITUTION.

The limitations upon the power of the city of East St. Louis to levy taxes by charter, art. 3, § 1, and 1 Priv. Laws Ill. 1869, p. 887, art. 3, § 4, providing that such tax shall not exceed 7 per cent. on the taxable property of said city for all purposes, of which not more than three mills upon the dollar shall be for the purpose of paying the interest and providing for a sinking fund to discharge the principal of the bonds of said city, are repealed by, so far as inconsistent with, Const. Ill. 1870, art. 9, § 12, enacting that any municipal corporation becoming indebted shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest thereon as it becomes due, and the principal thereof within 20 years, which is self-executing, and has the effect to authorize the levy of taxes sufficient to meet indebtedness of the city lawfully incurred since its adoption.

2. SAME—MANDAMUS—TO COMPEL LEVY.

The city having failed to levy such tax in accordance with said constitutional requirement, it is in the power of the court by *mandamus* to compel the levy of a single tax sufficient in amount to pay a judgment rendered upon the principal and arrears of interest of one of such bonds issued since the adoption of said constitution. *City of East St. Louis v. U. S.*, 7 Sup. Ct. Rep. 739, followed.

Appeal from circuit court, St. Clair county; GEORGE W. WALL, Judge.

Robert A. Halbert, Jesse M. Freels, and F. G. Cockrell, for appellant.
Franklin A. McConaughy and Sanders & Bowers, for appellee.

MAGRUDER, J. This is a *mandamus* proceeding brought to compel the city of East St. Louis to levy upon the real and personal property, subject to taxation within the jurisdiction of the city, a special tax sufficient to pay a judgment recovered by the relator against said city at the September term, 1886, of the circuit court of St. Clair county, and to see that the tax so levied, when collected, be set apart and applied exclusively to the payment of such judgment, and the costs of suit. The judgment, which was for \$1,074.94, was recovered upon a bond of said city for \$500, and eight annual interest coupons thereto attached for \$50 each, issued by said city on July 26, 1873, and payable to John B. Livingston or bearer 10 years after date. The bond and coupons were issued in pursuance of an act of the legislature of Illinois approved and in force March 26, 1869, entitled "An act to reduce the charter of East St. Louis, and the several acts amendatory thereto, into one act, and revise the same;" and also in pursuance of an ordinance passed by the city council of said city entitled "An ordinance to fund the floating debt of the city of East St. Louis," approved and in force June 6, A. D. 1872. The petition for *mandamus* was answered by the defendant, the city of East St. Louis. The petitioner filed a general demurrer to the answer. The circuit court sustained the demurrer, and the defendant elected to stand by its answer. Thereupon judgment was entered in accordance with the prayer of the petition, and an appeal taken to this court.

The main question presented by the pleadings, and in the arguments of counsel, is whether the constitution of this state, adopted in 1870, removed from the charter of the city of East St. Louis the limitations therein contained as to the amount and rate of taxation to be imposed by the city council for the payment of bonded indebtedness incurred after the adoption of the constitution of 1870. So much of section 12 of article 9 of the constitution of 1870 as is applicable to the question involved is as follows: "No county, city, township, school-district, or other municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such

indebtedness. Any county, city, school-district, or other municipal corporation, incurring any indebtedness as aforesaid, shall, before or at the time of doing so, provide for the collection of a direct annual tax, sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same." The sections of the charter bearing on the question in controversy are: *First*. Article 3, § 1: "The city council shall have power to collect an annual tax, not exceeding one per centum per annum, upon all property, real and personal, within the jurisdiction of the city, upon the assessed value thereof, in such manner as may be prescribed by ordinance, not inconsistent with the constitution of this state," etc. 1 Priv. Laws 1869, p. 887. *Second*. Section 4, Id.: "The city council shall have power to appropriate money and provide for the payment of the debt and expenses of the city; to borrow on the credit of the city a sum of money not exceeding one hundred thousand dollars, (\$100,000); to issue bonds, scrip, or certificates of indebtedness therefor," etc. *Third*. Article 7, § 22: "A registry shall be kept of all bonds, scrip, or certificates of indebtedness issued, showing a full exhibit of all material facts in relation thereto; and the city council shall levy and collect a tax not exceeding three mills on the dollar upon each annual assessment made for general purposes, for the purpose of paying the interest on such bonds, scrip, or certificates of indebtedness, and to provide a sinking fund to liquidate the same." 1 Priv. Laws 1869, pp. 904, 905.

The question in this case is not whether the prohibition, which forbids a municipal corporation from becoming indebted to an amount exceeding 5 per cent. of the assessed value of its taxable property, repeals or abrogates a provision in the charter limiting the indebtedness of the city to an amount less than such 5 per cent. It is not claimed that a city may incur an indebtedness greater than that to which it is limited in its charter, provided only such indebtedness does not exceed 5 per cent. of the assessed value of its taxable property. The constitutional provision that no municipal corporation shall be allowed to become indebted to an amount exceeding 5 per cent., etc., is a limitation upon the power of the legislature to authorize cities of the state to contract indebtedness. Therefore such constitutional provision could not operate as a repeal of a clause in a city charter which prohibited the city from contracting an indebtedness in excess of an amount less than 5 per cent. It was not intended to authorize a city to become indebted to the full amount of the 5 per cent., without regard to the limitations of its charter as to the extent of its indebtedness. We have been referred to no provision in the charter of East St. Louis which limits the power of that city to incur indebtedness to any particular amount. Section 4 of article 3 of its charter permits it to borrow, on the credit of the city, a sum not exceeding \$100,000, and to issue bonds therefor; but it is not contended that bonds have been issued to a greater amount than \$100,000. Section 1 of article 3 of the charter gives the city council the power to collect an annual tax, not exceeding 1 per centum per annum, upon all property, real and personal, within the jurisdiction of the city, upon the assessed value thereof, in such manner as may be prescribed by ordinance, etc. Section 22 of article 7 provides that the council shall levy and collect a tax not exceeding three mills on the dollar upon each annual assessment made for general purposes, for the purpose of paying the interest on such bonds, etc., and to provide a sinking fund to liquidate the same. The charter containing these provisions was passed in March, 1869. Afterwards, in the summer of 1870, the constitution of 1870 was adopted, which provides, in section 12 of article 9, as above quoted, that any municipal corporation, incurring any indebtedness under authority of law not exceeding the 5 per cent. above named, shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within

20 years from the time of contracting the same. Evidently there is here a direct conflict between the language of the charter and the language of the constitution as to the amount and percentage of the annual tax to be collected. The charter says that the council shall collect an annual tax, not exceeding 1 per cent. per annum, on all property, etc., and that of this 1 per cent. it shall collect not more than three-tenths, or three mills on the dollar, for the purpose of paying the interest on the bonds and providing a sinking fund, etc. On the other hand, the constitution says that the council shall, before or at the time of incurring the indebtedness, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay the principal within 20 years, etc. By the terms of the constitution the annual tax must be sufficient to pay the interest as it becomes due, and the principal in 20 years. By the terms of the charter the annual tax must not be more than 1 per cent. for all purposes, and not more than three-tenths of 1 per cent. for the purpose of paying the interest on the bonds and providing a sinking fund to liquidate the indebtedness. If the city council levies and collects an annual tax of only three-tenths of 1 per cent. to pay interest and provide a sinking fund, and such amount is not sufficient to pay the interest as it falls due, and to discharge the principal in 20 years, then the council fails to do what the constitution requires to be done.

It is very clear that the charter of East St. Louis prescribes one rate of annual taxation for the payment of the corporate indebtedness, and the constitution prescribes another and different rate. The indebtedness represented by the bond sued on in this case was incurred after the constitution of 1870 was adopted, as the bond was not issued until July, 1873. The constitutional provision now under consideration is self-executing. "It supplies a sufficient rule by means of which * * * the duty imposed may be enforced." Cooley, Const. Lim. (5th Ed.) 100. No supplemental legislation is necessary in order to make it effectual. *People v. Bradley*, 60 Ill. 390; *Kins v. Defenbaugh*, 64 Ill. 291; *Mitchell v. Railroad Co.*, 68 Ill. 286; *Law v. People*, 87 Ill. 385. This provision is also in conflict with those portions of the charter of East St. Louis which limit the rate of annual taxation to any other percentage than that which is sufficient to pay the interest as it falls due, etc. Consequently it repeals and abrogates such portions of the charter, and must be substituted for them in the charter itself. Its effects began with the life of the constitution, and annulled all previous charter limitations inconsistent with it in relation to indebtedness incurred after the adoption of the constitution. *Hills v. City of Chicago*, 60 Ill. 86; *People v. McRoberts*, 62 Ill. 38; *Mitchell v. Railroad Co.*, *supra*. A law cannot be in force in the state, no matter when passed, which contravenes the provisions of the constitution of the state. *State v. Maynard*, 14 Ill. 419. The precise question now under discussion has been recently decided by the supreme court of the United States in the case of *East St. Louis v. Amy*, 120 U. S. 600, 7 Sup. Ct. Rep. 789, where it is held that the limitations in the charter of the city of East St. Louis, as to the rate and amount of annual taxation, are repealed by section 12 of article 9 of our constitution. In that case the federal court says: "Under this provision of the constitution no municipal corporation could incur a debt without legislative authority, express or implied; but the grant of authority carried with it the constitutional obligation to levy and collect a sufficient annual tax to pay the interest as it matured,—and the principal within 20 years. This provision for the tax was written by the constitution into every law passed thereafter by the legislature allowing a debt to be incurred; and, in our opinion, it took the place in existing laws of all provisions for taxation to pay debts thereafter incurred under old authority which were inconsistent with its requirements. It was made by the people a part of the fundamental law of the state that every debt incurred thereafter by a municipal corporation, under authority of law, should carry with it the con-

v.17N.E.no.5—29

stitutional obligation of the municipality to levy and collect all the necessary taxes required for its payment."

We concur in the views expressed in the *Amy Case* upon the main question here stated, and also upon the further question as to the power of the court below to order a tax to be levied sufficient in amount to pay the entire judgment at once. The judgment of the circuit court is affirmed.

(126 Ill. 262)

MOYER *et al.* v. SWYGART.

(Supreme Court of Illinois. June 16, 1888.)

1. WILLS—CONTEST—EVIDENCE.

An alleged will disposing of a third only of decedent's estate—a farm and horse and carriage—to a son, making no mention of his other children, was made in decedent's eighty-seventh year, and in his last illness, when very feeble in mind and body. Decedent made no directions as to the disposition of his property except as his attention was called to particular matters. When the devise was written, further writing was postponed because decedent had not decided upon the disposition of his personalty, and when the will was signed he refused to bequeath his personalty, saying he would do so at another time. There was testimony of the devisee's declarations that decedent was "off his head," and that "there was an effort to make a will, and the old gentleman was along so far, and could not go further,—was struck by weakness." Decedent had had great affection for his family, and had said that one child was as good as another, and he would make no will. There was evidence of importunities by the devisee, and of decedent's declarations thereof, and that he believed that, unless he so devised the farm, the devisee would deprive him of its use. Devisee denied improper practices, and gave evidence tending to show capacity. *Held*, that the evidence justified a verdict that the instrument was not decedent's will.

2. SAME—INSTRUCTIONS.

An instruction in a will contest that, before the jury can find that the paper read in evidence is the will of decedent, it must appear that he was "of sound mind and memory, and did not execute the paper read in evidence as his will, under undue influence," following instructions that the burden of proving that such paper is decedent's will is on proponents, is not objectionable as casting the burden of proof as to undue influence upon proponents, especially where substantially the same instruction is given with their consent.

3. SAME—DECREE.

On a bill to set aside an alleged will, on which the complainants succeed, a decree that the probate, and "proceedings thereunder, be, and the same are hereby, set aside, and the same are hereby declared null and void," is proper.

4. SAME—COSTS.

On a bill to set aside an alleged will, brought against the person named therein as executor, and others interested in the estate, such executor and the defendants who answer and undertake to sustain the will may be charged with costs if unsuccessful.

5. APPEAL—REVIEW—OBJECTIONS WAIVED.

On a will contest, where both parties gave in evidence statements of decedent made long before making the alleged will, neither party will be heard, on error, to insist that such statements were not competent evidence.

Error to circuit court, Lee county; WILLIAM BROWN, Judge.

Bill to set aside an alleged will. The third, fourth, fifth, and sixth instructions given at complainant's request were as follows: "(3) The court instructs the jury that the burden of proving the paper read in evidence to be the will of said John Moyer is upon the defendants. (4) The court instructs the jury that it is not for the complainant to prove that the paper read in evidence is not the will of said John Moyer, but it is for the defendants to prove that said paper is the will of said John Moyer; and, if the defendants have failed to prove that said paper is the will of said John Moyer by a preponderance of the evidence in the case, then the jury should find the issue for the complainant. (5) The court instructs the jury that the mere fact that said John Moyer signed his name to said paper does not of itself prove that said paper is the will of said John Moyer. (6) The court instructs the jury that, before the jury can find that the paper read in evidence is the will of said John Moyer, it must appear from a preponderance of the evidence that said Moyer was of

sound mind and memory, and did not execute the paper read in evidence as his will under undue influence at the time he signed said paper, if the jury believe from the evidence that he did sign it." The testimony of decedent's physician as to the conversation referred to in the opinion was as follows: "Was there on the 24th of March. Had conversation on some occasion with Mr. Moyer concerning the length of time he might live. Couldn't specify whether it was on the 24th or not. I told Mr. Moyer his condition; that the chances were decidedly against him; he couldn't get well; that the time was limited with him. He looked up at me rather quizzically, and wanted to know if it might not be possible for him to live to bury me yet. I told him it was barely possible, but I didn't think it probable." The jury found for the complainant, and defendants bring error.

Sherwood Dixon, for plaintiffs in error. *W & W. D. Barge*, for defendant in error.

SCOTT, J. This is a bill in chancery, brought by Caroline Swygart against Jeremiah S. Moyer, John E. Moyer, Eva Kline, and John D. Crabtree, to contest and have set aside what is alleged to be the will of John Moyer, deceased. Complainant is the only surviving daughter of decedent, and the other defendants, except Crabtree, are his only other heirs at law. It appears from the record the estate of decedent was of about the value of \$30,000, and consisted of a farm of about the value of \$10,000 or \$12,000, and the balance consisted of notes, bonds, and other securities, and some few articles of personal property. The alleged will gave to Jeremiah S. Moyer the entire farm, and a horse, carriage, and harness. No mention is made of the residue of his estate, and as to that, of course, decedent died intestate. Nor is any mention made of any of his heirs other than his son Jeremiah S. Moyer, to whom he gave his farm, and the articles of personal property enumerated. It is alleged in the bill that, at the time of the making of what is claimed to be a will, decedent was not of sound mind and memory, but, on the contrary, he was in his dotage, and his mind and memory so impaired as to render him wholly incapable of making any distribution of his estate, and that the making of the will which proponents insist upon maintaining was procured by the fraudulent practices and undue influence of defendant Jeremiah S. Moyer. These matters are amplified, as is usually done in stating the facts upon which a party relies for equitable relief. The answers of defendants admit only the formal charges of the bill, as to which no controversy exists; but deny all improper conduct on the part of Jeremiah S. Moyer, and insist the provisions of the will were not the results of undue influence, but of the deliberate judgment of decedent, and made by him in "pursuance of a long-cherished purpose." As the statute directs shall be done, the circuit court caused an issue to be made up "whether the writing produced be the will" of John Moyer, deceased. That issue was submitted to a jury chosen under the direction of the court, who found, from the evidence adduced at the trial, "the writing read in evidence is not the will of said John Moyer, deceased." On the coming in of the verdict, defendants made a motion for a new trial. That motion the court overruled, and entered a decree setting aside the writing purporting to be the last will and testament of John Moyer, deceased; and the probate thereof in the county court, and all proceedings had thereunder, were declared null and void. The proponents of the will bring the case to this court, and have assigned a number of errors on the record, the most important of which is, "the verdict is manifestly against the evidence," and for that reason the motion for a new trial should have been allowed.

The rule is, on questions of this kind, the finding of the jury is conclusive unless clearly against the weight of the evidence, and in this respect they are put upon the same footing with cases at law. Another rule of law is equally as well settled by the previous decisions of this court. It is, where there is

an irreconcilable conflict in the testimony touching the facts upon which the validity of the will depends, this court will not reverse the decree of the lower court if the evidence of the successful party, when considered alone, is clearly sufficient to sustain the verdict. The practice in that respect has been uniformly adhered to in this court, and no reason is perceived why it should be departed from in the case being considered. Nothing can be plainer than, if the case had been submitted on the testimony introduced by the contestant alone, the jury would certainly have found that, at the time of the writing purporting to be the will of decedent, he was too feeble, both in body and mind, to transact any business that required thought or the exercise of judgment, and that the making of the writing was procured by the sole devisee named in that instrument. It was shown he had personal estate, consisting of bonds and notes, and perhaps some money, as to which he made no disposition whatever. Nor did he make any reference to contestant, who was his only daughter, or to the children of his deceased son. The testimony as to his mental condition does not all come from parties in interest. Others, having no interest whatever in the subject of the litigation, visited decedent during his last sickness, and they state that, at or about the time the alleged will was written, he was too feeble mentally to comprehend much if anything; and it seems certain he had neither mental nor physical strength to withstand for any considerable time the importunities with which the testimony tends to show he was plied to devise the farm to his son. Whether there was any foundation for it or not, it is certain decedent, long before his last sickness, was greatly worried with what he alleged were the importunities of his son to make a will and give him the farm. He seems to have labored under the belief, if he did not comply with his son's wishes in that respect, he would serve some sort of papers upon him that would deprive him of the use of his property. It is possible the jury may have believed this was not a mere insane delusion. It is certain he had that belief, whether there was any ground for it or not. Many other things are proved of the same character; all tending to the conclusion decedent was importuned by his son, and perhaps others by whom he was surrounded, to give the farm to the son named in the alleged will. That there is evidence tending to show decedent frequently declared he was constantly urged by his son to make a will by which his son would get the farm cannot be doubted; and the jury may have believed that in his last sickness, when feeble in mind and body, he was induced to comply, or at least to try to comply, with the urgent wishes of his son as to the farm. This theory of the case finds some support, at least, in the fact this pretended will devises no property to any one except to this son, and only the same property which decedent in his utterances, whether sane or insane, always claimed his son insisted he should have, and that he should give it to him by will. It is not practicable to restate every fact in evidence that tends, in a greater or less degree, to support contestant's theory of the case. But a close study of the evidence shows past all doubt, if the record contained no testimony other than that given by contestant, the verdict would be amply sustained, and, under the previous decisions of this court, it should stand.

The only remaining inquiry on this branch of the case is, does the testimony offered by the proponents to sustain the will so far preponderate over the testimony introduced by contestant that the verdict, for that reason alone, should be set aside, and the cause resubmitted to another jury? It is thought it does not. On this branch of the case the testimony is so voluminous it is hardly practicable to restate it in detail, nor is it necessary to do so. The devisee was a witness in his own behalf, and denies all improper practices attributed to him to induce his father to make a will giving him the farm. He also states the condition of his father's mind at the time the writing was executed to be such as would tend to show testamentary capacity. Although this witness is directly interested, in a pecuniary view, in the result of this

litigation, there is no evidence that he is not a man of character, and is entitled to be treated as any other fair and candid witness. The evidence, as has been seen, is irreconcilably conflicting,—so much so that the jury had to determine, as well as could be done, which theory advanced was the better sustained. To do that, the testimony of one party or the other had to be disregarded; for both could not stand together. In no other way could a conclusion be reached. This disposition of the evidence by no means implies any improper conduct on the part of any witness. All may be equally candid, and yet one theory of the case may seem to be better sustained than the other. There are many facts in the case that must have been considered by the jury in coming to a conclusion, and, no doubt, they were entitled to weight in weighing other testimony. One thing is, the decedent, at the time of executing the alleged will, was in the eighty-seventh year of his age. It is conceded by all he was exceedingly feeble at or about the time of executing the paper produced as a will,—so much so that he had just before been advised by his attending physician there was “but a step between” him “and death.” When at his best, he was a man of great physical powers, tall and finely proportioned, and was possessed of such will force as gave him unusual independence of character. No one dominated him in his business affairs, or perhaps otherwise. He seems to have had the greatest affection for his family. In this entire volume of testimony there is not to be found a single harsh or unkind word towards any of his children, and the only time it appears he was ever estranged from his son was because he thought his son was correcting his own child with too much severity. But that was only temporary, and he was soon reconciled to him again. This kindly relationship in the family will serve to illustrate a phase of the case that will presently be stated. The fatal sickness commenced on the 28th of February, 1884. Prior to that time he had shown very marked indications of failing health. His first attack seems to have been accompanied with a chill; was very severe; and, when he was first discovered, he was perhaps hardly conscious of anything. Towards night of the same day he improved some. On the 22d or 23d of March of the same year he suffered a relapse, and from that time on it was apparent his sickness would soon terminate fatally. It was probably on the 24th day of that month his attending physician had a conversation with him concerning the time he might live, and he told him “the chances were decidedly against him;” and, “if he had any business matters he wanted settled, he had better do it.” His reply seems more like the delirious utterances of a disordered brain than that of one who understood his critical condition, or, indeed, anything else in regard to his surroundings. Certainly, a man that had sense enough to make a will, or to transact any business, would know that a man 87 years old, when advised his sickness was mortal, and that he could live but a brief time, could not “live to bury” his physician, who was a young man. This conversation would indicate unmistakably the decedent did not have the slightest understanding of his situation, or what the conversation concerned. “After a day or two” his physician again asked him “if he had his affairs settled.” That could not have been earlier than the 25th of March; and the scrivener was sent for, and began to draft the will, on the 26th of the same month. On that day, he wrote down to the devise of the farm to defendant Jeremiah S. Moyer. When asked by the scrivener what “disposition he wanted to make of his personal property,” decedent replied “he had not made up his mind about that,” and that he “would like to think that over.” He inquired of the scrivener if he could do “that to-morrow or any other day;” and, on being assured he could, that ended the interview that day. It is singular decedent did nothing in regard to making a will, or any disposition of his property, except as his attention was directed to it by the scrivener. On his return on the next day, the 27th, he asked decedent if he wanted to go on with his will, and he replied he wanted “to finish it up.” Still, decedent said nothing

further until he was asked what he wanted to do. He then said he "wanted to give Jerry the farm; you have got that. I want to give him the horse and buggy." The scrivener wrote that clause in. Decedent said nothing more until he was again inquired of, "What disposition do you wish to make of your personal property?" He replied, as before, he "had not determined on that yet;" and again inquired if he could not "fix that hereafter as well as now," and was told by his legal adviser it could be done "either by a new will or codicil." Nothing more was done or said as to the personal estate, nor did decedent express any wish or desire to have anything more written. But his attention was again awakened by the scrivener as to the propriety of naming an executor, and that clause was written. Then came the signing and witnessing what had been written by the persons called in for that purpose. It would be difficult to read the account of what was done or given by defendant's own witnesses without being impressed with the belief decedent knew but little, if anything, about what was being done about the execution of the paper proponents now produce as his will. It is as certain as anything can be he did nothing until his attention was first called to what was to be done; and, when that was finished, he relapsed into silence. His near neighbor, Howell, visited decedent on the 26th of March, and his testimony is to the effect he was feeble; that his "mind was rather light." He also says Jerry said to him: "You see, he is off his head." Another neighbor, Mr. Crawford, was there about the time the alleged will was written, and found him very feeble, and he states his son said he "didn't wish anybody to speak to his father. The only reason was, he was very weak." There is other testimony to the same effect; but this is sufficient to show the extremely feeble condition of decedent at the time, both physically and mentally. There is some evidence in this record that would warrant the belief, and the jury may have so found, that the will which was commenced on the 26th of March was never in fact finished. After the clause devising the farm was written, on the 26th of March, the scrivener says the further writing was postponed because decedent had not made up his mind as to what disposition he wished to make of his personal property. But other reasons are stated by the witness Crawford. As before stated, he says he visited decedent a short time before his death, and on that occasion he testifies defendant Jerry Moyer said, "There was an effort to make a will, and the old gentleman was along so far, and could not go further,—was struck by weakness." On the next day, when the scrivener returned, decedent still refused, although his attention was directed to it, to make any disposition of his personal property for the reason he had not made up his mind as to what disposition he would make of it; and all that was done the second day was to write the clause in regard to the horse and carriage and harness, and naming the executor, and the latter was not done until after the scrivener first suggested it was usual to name the executor. He still persisted he would bequeath or devise the residue of his property at another time, as he was told by his adviser he could do, but he died without ever having finished his will in that respect; and so the jury might well say the paper presented was not his will. This fact is to be considered with other facts in the case. As has been seen, decedent was fond of all his children, and was heard to say "one child was as good as another," and that he would make no will; he would let the law divide his property. It is said decedent always intended that his son Jerry should have the farm. That may be so; and had he made a will, or finished the one that was commenced for him, he could have given the farm to his son, and made his surviving daughter, and the children of his deceased son, equal with his other son, out of his personal estate. But, be that as it may, it is idle to claim that a man that had sense enough to make a will at all would make a will simply to dispose of one-third of his estate without the slightest reference to the residue of his estate, or his children to whom it would go. No doubt, the jury believed, as Mr. Crawford said, decedent

"got excited, or was overcome by something or other, and could not go through with it," and never in fact did complete the will commenced, either understandingly or otherwise. It is not possible for this court to say the verdict is against the weight of the evidence; and, that being so, the rule of law is it must stand.

It is said the sixth instruction given for contestant, considered in connection with the third, fourth, and fifth of the series, cast the burden of proof, as to "undue influence," upon the proponents of the will. This is an incorrect reading of that instruction. Undoubtedly, the rule is, where a bill is filed in chancery, under the statute, to contest a will, the law in the first instance casts the burden of proving the will upon the proponents alleging its validity. The third, fourth, and fifth charges given for the contestant simply express the general doctrine on this subject as it is declared in the previous decisions of this court, and in that respect they are unobjectionable. The sixth instruction of the series is in no direct way made to be read in connection with the preceding charges, any more than any other of the subsequent charges. It is a distinct charge by itself, as much as any other of the series. Of course, all the charges both for the contestant and the proponents should be read together,—this sixth one as well as all others; and, when that is done, it is not perceived it is obnoxious to the criticisms made upon it. It simply declares, that before the jury can find the paper read in evidence is the will of decedent, it must appear from the evidence he was "of sound mind and memory, and did not execute the paper read in evidence as his will, under undue influence at the time he signed said paper." That is undoubtedly the law. Nothing is said, however, in that charge as upon whom the burden of proving "undue influence" rests. Nor were the jury by any other charge told the law cast the burden of proving a will was executed without "undue influence" upon the part of proponents of such will. It will be seen that, on this branch of the case, the court, at the instance of contestant, gave the following instruction, and to its being given proponents consented: "If the jury believe from the evidence that John Moyer told the witness Crabtree, and did in his presence all said witness has testified to, yet if the jury further believe from the evidence that Jeremiah S. Moyer, or any person for him, had previously exercised undue influence upon said John Moyer, and that by reason of such undue influence, and as a result thereof, said John Moyer said and did, in the presence of said witness, what said witness has testified, and was, by reason of such undue influence, induced to sign said paper, then the jury would have the right to find that said paper is not the will of said John Moyer." On a close reading, it will be observed the charge given by consent of both parties contains everything that is embraced within the sixth instruction, and there can be no just ground for complaint that it was given as written. Without remarking separately upon all the objections taken to the other instructions, it is sufficient to say the points made have been carefully considered, and it is thought none of them are well taken. It seems certain the charges given contained nothing seriously hurtful to the cause of proponents. It is seldom, if ever, that a record is found to be absolutely free from error; but, when no hurtful error has intervened, the rule is, and ought to be, the judgment or decree will be permitted to stand.

The point made that it was error to render a decree for costs against the party claiming to be the executor in the will that was set aside, is disposed of by the decision of this court in *Shaw v. Moderwell*, 104 Ill. 64. So far as there may appear to be a conflict in the rule stated as to costs in such cases, the decision in *Pingree v. Jones*, 80 Ill. 177, must be regarded as having been modified by the decision in the later case of *Shaw v. Moderwell*, *supra*. See *Andreus v. His Administration*, 7 Ohio St. 143. The other defendants, John E. Moyer and Eva Kline, came in and answered, and thereby undertook to sustain the will as against contestant, and, as they were unsuccessful, there

is no reason why they should not pay costs, as well as the other defendants.

Both parties gave in evidence the statements and conversations of decedent, made by and had with him long before the making of the alleged will, and neither party will now be heard to insist such statements and conversations were not competent evidence.

It is said the decree is broader than the law will warrant, in this: that it declares the "probate of said will in the county court, * * * and the proceedings thereunder, be, and the same are hereby, set aside, and the same are hereby declared null and void." The decree in *Calvert v. Carpenter*, 96 Ill. 63, seems to have been to the same extent; but, although the point was made in the appellate court that the decree in that respect was erroneous, it was not discussed in the opinion rendered in either court. The decree in this respect, it will be perceived, does nothing more than to declare the results that will necessarily follow from setting aside the alleged will. Of course, all proceedings had under it in the county court or elsewhere would be without authority of law, and there would therefore be no error in declaring the effect that would follow from the decree finding the alleged will was no will at all.

Every phase of this case, and every point insisted upon for a reversal, has been carefully and patiently considered; and no reason is perceived for departing from the rule so long and so uniformly observed, that where, as was said by this court in *Calvert v. Carpenter*, 96 Ill. 67, "there is an irreconcilable conflict in the testimony, this court will not reverse the judgment of the trial court when the evidence of the successful party, when considered by itself, is clearly sufficient to sustain the verdict." That is precisely the case here, and the decree of the circuit court must stand. Decree affirmed.

(125 Ill. 524)

TAUBENHAN *et al.* v. DUNZ.

(*Supreme Court of Illinois. June 16, 1888.*)

WILLS—CONSTRUCTION—DESCRIPTION OF PROPERTY—EJUSDEM GENERIS.

Where a testator made a specific disposition of certain property, including all his land, and proceeded to give the legatee "all the loose property in, on, and around the homestead, consisting of one cow, two hogs, and a lot of wood," concluding by giving to her "all other property of every kind," the concluding clause carries to the legatee the entire residue of personal property, including promissory notes, and the next of kin cannot invoke the doctrine confining her to property *ejusdem generis* with cows, hogs, and wood about the premises.

Appeal from appellate court, First district.

Petition in the circuit court of Carroll county (JOHN V. EUSTACE, Judge,) by Christiane C. Taubenhan, Auguste F. Unger, and Allwine C. Weiss against Margareth Dunz, seeking a construction of the will of Charles Medler. Petition dismissed, and plaintiffs appealed.

Vocke & Storck, for appellants. *James M. Hunter* and *Geo. L. Hoffman*, for appellee.

SHOPE, J. But a single question is presented by this record, namely, what portion of the estate of Charles Medler, deceased, did Margareth Dunz take under his will? Or, otherwise stated, was any portion of said estate intestate estate? It is not controverted but that Margareth Dunz took possession of and had received the lands described and referred to, the sum of money named, the particular note and the specific articles of personal property described and referred to in the will; but, after this was done, there remained in the hands of the administrator about \$2,000 in money, and \$2,420 of notes reported by him as uncollectible; and this residue of the estate was claimed both by Margareth Dunz, under the will, and by appellants, the sisters of the testator, his heirs at law, as intestate estate. The question of first importance in every case of construction of a will is, what was the intention of the testator? and, when that is ascertained, effect is to be given thereto. In the absence of

latent ambiguity, the intention of the testator is to be gathered alone from the will itself,—from a full view and consideration of everything within “the four corners of the instrument.” *Howie v. Howie*, 7 Paige, 187; *Updike v. Tompkins*, 100 Ill. 406; *Blanchard v. Maynard*, 103 Ill. 60. Every portion of the instrument must have its just operation, unless there arises an irreconcilable repugnance, or some portion is absolutely unintelligible. As was said in *Dawes v. Swan*, 4 Mass. 208, it is the duty of the court “to give effect to all words, without rejecting or controlling any of them, if it can be done by a reasonable construction not inconsistent with the manifest intention of the testator.” See, also, 1 Redf. Wills, 434; *Loan Co. v. Bonner*, 75 Ill. 315. And, further, the natural construction of the words employed will be adopted, unless there is such an impracticability of so construing them as to authorize their rejection, or such uncertainty that no effect can be given them. *Mowatt v. Carow*, 7 Paige, 328; *Welsh v. Bank*, 94 Ill. 191. In the will before us there is neither ambiguity, repugnance, nor unintelligibility; and, if the words employed are given their natural construction and meaning, disposition is made of the testator’s entire estate. “It is presumed that a testator, when he makes and publishes his will, intends to dispose of his entire estate, unless the presumption is rebutted by its provisions or evidence to the contrary.” *Higgins v. Dwen*, 100 Ill. 554. There is here not only no evidence *abundant* of a contrary intention, but in the will itself no words are to be found manifesting an intention to leave any part of the testator’s estate undisposed of. His estate in fact consisted of both real and personal property, a large part made up of promissory notes. No question is made in respect to his real estate,—all that was specifically devised; nor in respect to the Stober note, the \$3,000 in money, or the loose property “in, on, and around the homestead,”—all that, it seems to be conceded, was specifically bequeathed; nor is it contended but that the final granting words of the will, “and all other property of every kind,” are sufficiently broad and comprehensive in meaning, if given their natural construction, to embrace the residue of the estate, consisting of the proceeds of the choses in action possessed by the testator at the time of his decease.

But the contention on behalf of appellants is (1) that the heir is not to be disinherited without an express devise or necessary implication; and (2) that the words, “and all other property of every kind,” should be confined to articles *ejusdem generis* with loose property in, on, and around the homestead; and that, as to all that part of his estate not specifically disposed of by will, testator died intestate, and the same descended to his heirs at law. The rule that the heir is not to be disinherited without an express devise or necessary implication is not questioned; but the rule can have no application here, and need not be further considered, because we have in this will an express devise, broad and comprehensive enough to embrace every species of property owned by the testator, unless the words, “and all other property of every kind,” by their connection and juxtaposition, are to be limited to property *ejusdem generis* with property theretofore particularly named. The principle of construction secondly invoked, and upon which chief reliance is placed, and by which it is sought to limit and circumscribe the application of the words of the will last referred to, which, torn from their context and standing alone, would manifest the clearest intention to bestow upon the only person named in the will the residue of the testator’s estate, is in the highest degree technical, and ought not to be adopted and applied, unless from an inspection and consideration of all the provisions of the will its adoption and application is required to carry out and give effect to the discerned intention of the testator. There is not in the principle itself anything that can give to it the nature and character of a rule of property. But does the will before us present a case of either doubt or uncertainty? We think not. But a single legatee is named in the will. But one object of his bounty seems to have been in the mind of

the testator. True, he specified only a part of his property, but such specific designation was followed by words of comprehensive import. As said by Lord ROMILLY in *Nuges v. Chapman*, 29 Beav. 290: "It is not uncommon for persons who intend to include everything, and who do not write accurately, to specify many items, and then to add a general expression." This will is inartificially drawn. It is manifest that the scrivener had some knowledge respecting the words employed in making testamentary devises and bequests; but it is apparent, from an inspection of the will itself, that he had little knowledge of the forms necessary in making testamentary disposition of estates. If it was the intention of the testator to bestow all his estate upon one person, that intention will not be defeated by a partial designation, if the general words, giving to them their natural meaning and operation, were comprehensive enough to embrace the whole estate. It is easy to see it was the intention that the legatee should take the particular lot of land occupied by him as a homestead, and from the description thereof in the will it is apparent that the draughtsman supposed the testator owned it in fee, whereas the fact is he only owned the undivided one-half interest. And it is also apparent that the intention was to give the same legatee a portion at least of the loose property in, on, and around the homestead; but it might very well have been questioned whether it was the intention to give to the legatee "all the loose property in, on, and around the homestead," since these general words are immediately followed by the particular words, "consisting of one cow, two hogs, and a lot of wood." There was in fact in, on, and around the homestead many other articles of property, such as kitchen furniture, 10 bushels of potatoes, 3 boxes export beer, 4½ barrels cider, 30 bushels corn, 50 bushels oats, a ton of hay, a lot of ice and lumber, and implements and tools of various sorts, and it might well have been said that the general words, "all the loose property in, on, and around the homestead," should be cut down to articles *ejusdem generis* with cows, hogs, and wood. There would then have been presented just such a case of doubt and uncertainty as is contemplated for the application of the principle of construction *ejusdem generis*. Were furniture, potatoes, beer, cider, corn, oats, hay, ice, lumber, tools, and implements *ejusdem generis* with cows, hogs, and wood? It is singular perhaps that this will should itself enable us to most clearly, and as it seems to us satisfactorily, mark the distinction between a case where the principle might be thought to apply and the case so strongly urged upon us. We can understand how all the loose property in, on, and around the homestead might, by the application of the principle, be cut down to articles *ejusdem generis* with cows, hogs, and wood; but what shall be said of the further words, "and all other property of every kind?" With which class or species of property shall they be held to be *ejusdem generis*? Shall they be cut down and limited to cows, hogs, and wood? The testator only had one cow, two hogs, and one lot of wood, and these were specifically bequeathed, and to hold the general words limited to the particular articles bequeathed, would be to render inoperative words of the most general import, because there would be no property upon which they could operate and to which they could attach. Operation and effect must be given to each and every provision in the will, as we have seen, unless there is irreconcilable repugnance, or unless the provision is unintelligible. It is clear neither exception here exists. And if the general words, "and all other property of every kind," cannot be cut down to the particular articles named in immediate connection, then there are left no particular words, either immediately preceding or following, by which they may be qualified. There are no following words, and the preceding words (excluding, as we have seen we must, the cow, hogs, and wood) are themselves general words, namely, "all the loose property," etc.

The most careful examination and analysis of the provisions of this will, and of the authorities relied upon, has satisfied us that the principle of con-

struction contended for cannot be applied to this will. A testator may dispose of his estate by will by specific or general designation of the subject of devise, or by both; and he may devise his entire estate to a stranger to the exclusion of the heir. He need observe no set form or phrase of order,—all that is required is that he shall so express himself and employ such words as, giving to them their natural and ordinary meaning and acceptance, renders his intention discernable. The testator here was without wife or child, and had no one apparently dependent upon him. His only kindred were far removed,—residents of a foreign country, and with whom, so far as has been disclosed to us, he held no communication. Shortly before his death he made and published his last will and testament, wherein he made specific devise to appellee of all his real estate, and a considerable portion of his personalty, and concluded the granting portion of his will by the selection of words of most general import and operation. And no satisfactory reason has been suggested why the intention clearly manifested by the plain words of his will, that provision was therein made for the disposition of his entire estate, and that the sole legatee therein named should take it all, ought not to prevail. We are not advised what relation appellee sustained towards the testator, nor is it material. It is enough for the purposes of this case, and the question before us, that she is made sole beneficiary of the testator's bounty. No extended review of the cases relied upon by appellants will be necessary. In the following cases, among others examined, it was held that the general words were limited by the particular devise. *Rawlings v. Jennings*, 13 Ves. 39; *Dole v. Johnson*, 3 Allen, 364. But see *Browne v. Cogswell*, 5 Allen, 556; *Johnson v. Goss*, 128 Mass. 433; *Fraser v. Alexander*, 2 Dev. Eq. 348; *Farish v. Cook*, 78 Mo. 212; *Wrench v. Jutting*, 3 Beav. 521; *Timewell v. Perkins*, 2 Atk. 102; *Pippin v. Elliston*, 12 Ired. 61. But see *Hurdle v. Outlaw*, 2 Jones, Eq. 75; *Hotham v. Sutton*, 15 Ves. 319; *Cook v. Oakley*, 1 P. Wms. 302; *Collier v. Squire*, 3 Russ. 467; *Crichton v. Symes*, 3 Atk. 61; *Bullard v. Goffe*, 20 Pick. 252. Interesting and instructive as these cases are, they fitly illustrate the refinement of learning upon this subject, and at the same time demonstrate the impossibility of formulating a settled rule of construction of general application; and they further show that, wherever the principle contended for has been applied, the decision is based on the peculiarities of language and fact in the particular case. In contrast with the foregoing, reference is here made to a line of authorities where the principle has been denied application. *Nugee v. Chapman*, 29 Beav. 290; *Gover v. Davis*, Id. 222, *Swinfen v. Swinfen*, Id. 207; *Bennet v. Batchelor*, 3 Brown, Ch. 26; *Dean v. Gibson*, L. R. 3 Eq. 718; *Hodgson v. Jex*, 2 Ch. Div. 122; and *Arnold v. Arnold*, 2 Mylne & K. 366. In the last case cited the bequest of "my wines and property in England" was held to apply to testator's property in England of every description, and was not confined to property *ejusdem generis* with wines; and it was observed by Sir JOHN LEACH, M. R., that "the mere enumeration of particular articles, followed by a general bequest, does not of necessity restrict the general bequest, because, as has been stated, a testator often throws in such specific words, and then winds up the catalogue with some comprehensive expression, for the very purpose of preventing the bequest from being so restricted. Clearly, therefore, in the ordinary case, the gift of the wines would not be limited by the occurrence of the subsequent word 'property,' which, be it observed, is as large and comprehensive a term as can possibly be used. Indeed, I have been unable to discover any instance in which the word 'property' has been confined to articles of the description above enumerated, unless where other expressions occurred, from which it is clear that the word was not there used in its ordinary sense. The cases upon this subject naturally turn upon very nice distinctions. In most of them the general bequest sought to be restricted has been of 'effects,' and I know of none in which the question has arisen on the word 'property,' unless where it has

been introduced by way of exception or qualification to the prior gift." And Mr. Redfield observes, in his work on Wills, (volume 1, p. 442, note,) that "the courts of equity, even in England, do not seem to apply the rule *ejusdem generis* with so much strictness as formerly." See, also, the following: *Martin v. Glover*, 1 Colly. 269; *In re Kendall*, 14 Beav. 608; *Fleming v. Burrows*, 1 Russ 276; *Jarnagin v. Conway*, 2 Humph. 50; *Hurdle v. Outlaw*, 2 Jones, Eq. 75; *Bunting v. Harris*, Phil. Eq. 11; *Kennedy v. Kelly*, 28 Beav. 223; *Campbell v. Prescott*, 15 Ves. 503; *Mitchell v. Mitchell*, 5 Mad. 69. Without extending this citation of authorities, the result of our examination may be stated in the language of Mr. Jarman, (1 Jarm. Wills, 761:) The adjudged cases "indicate the disposition of the judges of the present day to adhere to the sound rule which gives to words of a comprehensive import their full extent of operation, unless some very distinct ground can be collected from the context for considering them as used in a special and restricted sense." And especially must this rule be observed where there is no other bequest capable of operating on the general residue of the testator's personal estate, as is the case here. The judgment of the appellate court will be affirmed.

CHICAGO, B. & Q. R. Co. v. SULLIVAN.

(Supreme Court of Illinois. June 16, 1888.)

1. NEGLIGENCE—PLEADING—RAILROAD COMPANIES.

In an action by a passenger against a railroad company for personal injuries caused by its negligence, where the declaration alleges that plaintiff was "shocked," and by means of the premises was sick and disordered, plaintiff may give evidence of the disordered condition of his nervous system occasioned by his injuries, the witnesses agreeing that such nervous disorders may be produced by a "shock," and it not being necessary that all the results of the injuries should be particularly alleged.

2. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

In an action for personal injuries received by a passenger from a collision of railroad trains, where plaintiff's witnesses testified that he was suffering from nervous depression due to the shock sustained in the collision; and defendant's evidence was to the effect that plaintiff was not suffering from nervous shock; and defendant's witnesses discovered no symptoms of the existence of such disorder prior to the accident, when, as most of the witnesses agreed, he was healthy and strong,—a new trial will not be granted for the alleged discovery of evidence that, prior to the accident, plaintiff was suffering from nervous depression; since that would amount to granting a new trial in order to allow defendant to base its defense on a new theory, inconsistent with that relied upon before.¹

3. APPEAL—REVIEW—HARMLESS ERROR.

Where the evidence was voluminous, and most of the plaintiff's evidence was objected to, and defendant's counsel concede that it is almost impracticable to examine separately each exception to the admission or exclusion of evidence, and where the rulings on questions affecting the merits were substantially correct, the court will not reverse for unimportant errors in admitting and excluding testimony.

4. TRIAL—REMARKS OF COUNSEL—DISCRETION OF COURT.

Though remarks of counsel such as that to a witness, "Remembering that you told us that you expected your expert fee in this case, I hope you won't charge the poor railroad company anything extra," are objectionable, they are not cause for reversal, unless it clearly appears that great injustice was done; the conduct of the trial being within the discretion of the lower court.

Appeal from appellate court, Second district.

¹On the general subject as to when a new trial will be granted, on the ground of newly-discovered evidence, see *Boot v. Brewster*, (Iowa,) 86 N. W. Rep. 649, and note; *Railway Co. v. Wood*, (Tex.) 7 S. W. Rep. 872; *McCormick v. Railroad Co.*, (Colo.) 17 Pac. Rep. 542; *Petefish v. Watkins*, (Ill.) 16 N. E. Rep. 248; *Pemberton v. Johnson*, (Ind.) 15 N. E. Rep. 801; *Achorn v. Andrews*, (Me.) 12 Atl. Rep. 798; *Insurance Co. v. Harvey*, (Va.) 5 S. E. Rep. 553; *Railway Co. v. Walker*, (Tex.) 7 S. W. Rep. 791; *Gassaway v. White*, (Tex.) 8 S. W. Rep. 117; *Lee v. Birmingham*, (Kan.) 18 Pac. Rep. 218; *Heathcote v. Haskins*, (Iowa,) 88 N. W. Rep. 417; *Norris v. Hix*, id. 895; *Mercer v. Mercer*, (Ind.) 17 N. E. Rep. 182.

Samuel Richolson and O. F. Price, (Richolson & Gentleman, of counsel,) for appellant. Duncan, O'Connor & Gilbert, for appellee.

SCOTT, J. This action was commenced by James Sullivan in the circuit court of La Salle county against the Chicago, Burlington & Quincy Railroad Company, and was brought to recover for personal injuries sustained by plaintiff caused by the alleged negligent conduct of defendant's servants while transacting the business of defendant. It seems plaintiff was a passenger on the regular train on defendant's road from Ottawa to Streator, and occupied a seat in the rear coach. While the train was temporarily detained on the track on account of some obstruction in front, a freight train, coming from the same direction the passenger train had come, ran into the rear coach, in which plaintiff was seated, with great force and violence. The coach was wrecked and nearly or quite destroyed, and by the accident plaintiff sustained severe injuries, some of which are alleged to be permanent. On the trial plaintiff obtained a verdict. A motion for a new trial, supported in part by affidavits alleging the discovery of new and important testimony, and for other reasons, was overruled, and so was the motion in arrest of judgment, and thereupon the court entered judgment upon the verdict in the usual form. Since that judgment was affirmed in the appellate court, only questions of law raised upon the record remain to be considered in this court. All controverted questions of fact are conclusively settled by the findings of the lower courts through which the cause comes to this court, and of course are not now subject to review. Of this character are such questions whether the verdict is sustained by the evidence, and whether the damages found are excessive or not. The case has now passed beyond where these questions can be further considered. Under the previous decisions of this court the amount of damages a party will sustain in an action at law on account of the injuries proved is a question of fact, but the rule for ascertaining the damages in such cases is of course a question of law. Where the trial court has not misstated the rule for ascertaining the damages, or otherwise misdirected the jury to the hurt of defendant, the judgment of the appellate court sustaining the findings of the trial court as to the damages sustained will be regarded as conclusive in this court.

It was admitted by defendant in the trial court the injury to plaintiff was caused by its negligence, and in consequence of that admission the contest was narrowed to an inquest as to the damages sustained by plaintiff on account of the alleged negligent conduct of defendant. Of course the inquiry in this court will not be whether the evidence warrants the verdict of the jury as to the amount of damages found, but whether the testimony which the court permitted to go to the jury was competent under the averments of the declaration. It will be noticed the substance of the original and amended counts of the declaration is that plaintiff, on account of the great force and violence of the collision, was "crushed, shocked, bruised, lamed, forcibly hurled forward in the car, and jammed between the seats thereof, and in divers other ways abused and injured, by means whereof one of his legs was seriously crushed and bruised, one of his hips and his side above said hip permanently injured, one of his hands cut and disabled, his head deeply cut and gashed, and was otherwise greatly injured, bruised, hurt, wounded, lamed, and disabled; and also by means of the premises was sick, lame, and disordered, and so remained for a long time, to-wit, hitherto, during all of which time the plaintiff suffered pain, and was hindered from attending to his business, and lost and was deprived of great gains and profits which he otherwise would have made." On the trial plaintiff was permitted to give evidence of the condition of his nervous system, and to offer testimony to the effect the disordered condition of his nervous system, found to exist, was occasioned by the injuries and wounds sustained in the collision. That evidence it is said

was not competent, for the reason the averments of the declaration were not broad enough to advise defendant such testimony would be offered, and therefore it was error in the court to permit it to go to the jury. The position taken by counsel on this branch of the case can hardly be sustained. It is seen, it is alleged that, by reason of the violence of the collision, plaintiff was "shocked," and also by means of the premises was "sick" and "disordered." All the medical witnesses examined on behalf of plaintiff state he was suffering from nervous depression, and that it may be produced by a shock. Certainly any disarrangement of the nervous system is "sickness," and it is averred that by reason of the "shock" plaintiff received in the collision he became "sick." It was hardly necessary to aver what the character of that sickness was,—whether it was "nervous depression," or some other form of sickness or disease. One of the medical witnesses says unhesitatingly that plaintiff's "condition is due to shock." It seems, therefore, the disordered condition of plaintiff's nervous system was a mere result,—something that came from the "shock" it is said plaintiff received at the time of the accident. Proof of nervous condition is mere evidence of the effects of the "shock," to be considered by the jury in determining its severity, and the rules of pleading do not require that every effect or result that may follow from the infliction of a particular injury shall be set forth in the declaration. That would be to plead the entire evidence upon which a party relies to sustain his action, and so great particularity is never required. *Packet Co. v. Defries*, 94 Ill. 598.

It is said the trial court erred in relation to the admission and exclusion of evidence. Counsel for defendant, with commendable candor, concede "it would be almost impracticable to take up and separately discuss each exception to the rulings of the court in the admission or exclusion of the testimony." This record consists of an immense volume of testimony, and almost everything offered by plaintiff in evidence was objected to for some reason, either as being irrelevant or incompetent, because not pertinent to the averments of the declaration. To examine every such objection would be a very great labor, and one of little value when done. It is sufficient to say, that the evidence and the suggestion of counsel in regard to it have been closely considered; and while it is seen there are and may be errors in the rulings of the court, both in regard to the admission and exclusion of testimony, they are so slight they cannot be considered seriously hurtful. Many of the objections consist of unimportant matters, and, while this court might not approve of every ruling of the court, it is apparent no harm was done by such rulings. But be that as it may, it is seen the rulings of the court as to all important matters really affecting the merits of the case were substantially correct, and in accordance with the well-established practice.

It is also complained the remarks of counsel for plaintiff in the presence of the court and jury were "intended and calculated to influence the jury," and that it was error in the court to allow them. It may be there is some ground for the criticism made upon the conduct of counsel for plaintiff in that respect, and particularly as to the remark made to the witness Dr. Weis: "Remembering that you told us that you expected your expert fee in this case, I hope you won't charge the poor railroad company anything extra." But the mode of controlling the trial of a cause is so much within the discretion of the judge presiding, this court will hesitate to review it, and perhaps never will, unless it clearly appears great injustice is done to the party complaining. The court should require counsel constantly to observe the proprieties and courtesies that become the presence of the court in transacting public business, and should require counsel to be always observant of the rights of witnesses and parties who are not permitted to make any reply, for the reason it would cause unseemly wrangling in the presence of the court.

The point of most seeming difficulty in the case is whether the new trial ought to have been granted on the ground of the alleged newly-discovered testimony.

No negligence can be imputed to defendant in not discovering it sooner. It is that character of testimony one would not be likely to discover at all except by the merest accident. Had it not been for the notoriety given the case by the public trial, it is hardly probable it ever would have been discovered by defendant. There is and can be no doubt the alleged new testimony, had it been produced at the trial, would have been material and important. The only question made at the trial was as to the damages sustained by the plaintiff. The liability of defendant was admitted. The most serious disorder that was found to afflict plaintiff was nervous depression, which his medical witnesses affirmed was "due to shock," and the alleged new testimony would have been all important on that branch of the case. The only point is whether it comes within the rule where a new trial will be granted on account of newly-discovered testimony, as that rule is declared by the previous decisions of this court. There is no misunderstanding as to what the rule is on this subject. Before a new trial will be granted on the ground of newly-discovered evidence, it must appear it is material to the issue to be tried, and is not cumulative in its character. It is seldom, if ever, a new trial will be granted when the newly-discovered testimony would merely affect the measure of damages, and perhaps never when it is merely to impeach a witness whose testimony was heard at the trial. Undoubtedly the issue tried in this case was not whether defendant was guilty of negligence in regard to that which resulted in personal injuries to plaintiff, but whether plaintiff was afflicted with "nervous depression," "due to shock" or other injuries received in the collision. Concerning the other injuries to plaintiff no serious controversy existed. Medical witnesses on behalf of plaintiff—at least one or more of them—unhesitatingly say plaintiff's condition "was due to shock," while the testimony on behalf of defendant is to the effect plaintiff "is not suffering from nervous shock." Defendant's local physician says he found plaintiff, when he first came to him for treatment after sustaining the injuries, to be "a very healthy, hearty young farmer." The physician whose knowledge of important and material facts has been discovered since the trial treated plaintiff professionally some time before he was injured on defendant's road, and says he found him suffering from an infirmity with which he had been afflicted for quite a long time before he sought advice of him. He states his symptoms were: "An accelerated and compressible pulse, loss of appetite, insomnia, a sympathetic difficulty of the heart, and general nervous depression." It will be seen these are the precise symptoms found to exist in plaintiff at the trial, which his witnesses stated were "due to shock" or other injuries sustained in the collision. It is seen that physicians who testified on behalf of defendant, although they made examination of plaintiff to ascertain his physical condition, discovered few if any of these symptoms. One of the physicians gave it as his opinion, "Plaintiff is not suffering from nervous shock." He further stated, if plaintiff has been "suffering from nervous depression for two years," he would think he would be "a physical wreck," and that he "should expect to find him pale and emaciated," and that he would expect to find him "a nervous wreck," with "feeble pulse and impaired nutrition." Most of the witnesses on the part of defendant, both professional and non-professional, say he appeared, before the happening of the accident, to be a man in usual health; if anything, rather more vigorous than is common; nor did the physicians examined at the trial discover any of the marked symptoms of nervous depression from which plaintiff is alleged to be suffering. Prof. Lyman, whose affidavit is filed in support of the motion for a new trial, states that the conditions of "nervous debility" usually resulting from such an infirmity as plaintiff is alleged to be subject to is characterized by a feeble, rapid pulse, loss of appetite, imperfect digestion, insomnia, loss of power of sustained exertion, and general inability to perform manual labor." The physicians examined for plaintiff discover all of these symptoms in his present condition, but thought they were the

result of his injuries, and yet it is a most singular fact that not one of the physicians who examined him on behalf of either party ever detected, or even suspected, plaintiff was suffering from the infirmity or habits to which it is now alleged he was subject before the injuries received by the collision. It is obvious the alleged newly-discovered testimony, if produced, would be in direct conflict with the diagnosis made of plaintiff's condition of health by the physicians on behalf of either party. At most, then, it would be conflicting testimony, and by no means conclusive one way or the other. Besides that, if a new trial should be granted to permit defendant to introduce this testimony, it would simply be to grant a new trial to allow defendant to place its defense on an entirely new theory, and one wholly inconsistent with that relied upon in the present trial. That the law will not permit, and to allow it would be to introduce a new practice not heretofore permitted in this state, and one that might be prolific of evil results. The judgment of the appellate court must be affirmed.

(125 Ill. 370)

MARSHALL v. ENDER.*(Supreme Court of Illinois. June 16, 1888.)***PRINCIPAL AND AGENT—WHEN RELATION EXISTS—EVIDENCE.**

A broker received certain sums from his brother-in-law, which he entered in his books "for investment." He purchased a bond, and made entries charging his brother-in-law with the amount of the purchase money, and crediting him with interest received on the bond. The whole amount of the purchase money was not paid him by his brother-in-law, and having taken the bond with a blank indorsement, and obtained a renewal thereof by the representatives of the obligor in his own name, he sold it for a valuable consideration. *Held* that, although the broker appears to have intended the bond for his brother-in-law, he bought it for himself, and the purchaser took a good title.

Appeal from appellate court, First district.

Bill by Benjamin Lichtenstein to compel Samuel Marshall and John C. Ender to interplead their respective claims upon the proceeds of a bond constituting a lien upon complainant's land, and which he desired to pay. Decree in favor of Ender, from which Marshall appeals.

Blanke & Chytrous and *Francis Lackner*, for appellant. *Isaac B. Adams*, for appellee.

SCOTT, J. In the bill of complaint, filed by Benjamin Lichtenstein in the circuit court of Cook county, it was alleged he was the owner of certain real estate described, subject to an indebtedness of \$2,000 created thereon by the former owner, Carl M. Carlson,—his wife, Carin, joining in the execution of the trust deed to Lyman Baird to secure the same; that such indebtedness was due, and that he was ready and willing to pay the same so soon as it could be ascertained who was the true owner; that one Samuel Marshall claimed to be the owner; and that one John C. Ender also claimed to be the owner; and the prayer of the bill is that these respective claimants be required to interplead, and settle their rights in the premises between themselves,—complainant offering to pay the amount due and secured on the property to whichever one of claimants the court should find it belonged. A decree was accordingly entered, in conformity with the prayer of the bill, requiring the claimants to interplead, and each one to state his claim to the indebtedness in question, which they did in the usual form in such cases. On the final hearing of the cause, the court found that John C. Ender was the owner of the indebtedness, and entered a decree that complainant pay the same to him. That decree, on the appeal of Samuel Marshall, was affirmed in the appellate court of the First district, and he brings the case to this court on his further appeal. The real question in the case is much more one of fact than of law. It is as to the ownership of the indebtedness secured upon the property of complainant. There is no conflict in the evidence as to some of the

facts. Both parties claim to have bought the bond given by Carl M. Carlson, with the trust deed, to Baird, by which it was secured, from Charles A. Schmidt, who was a loan broker. Originally, the bond was made payable to Francis Brady. Afterwards he sold and assigned the bond to Miss Nancy Swift, without recourse, and Miss Swift indorsed it in blank, without recourse. In that condition, the bond, the trust deed, and perhaps other papers connected with the loan, came to the possession of Schmidt. Ender in his answer claims that on or about the 6th of September, 1881, Schmidt, for value, sold, assigned, and transferred to him, all the right, title, and interest in the bond and trust deed, and that since that date he has been the owner and holder of the same; and Marshall, by his answer, alleges that on or about the 15th day of July, 1881, he purchased the bond and trust deed from Nancy Swift, by whom they were indorsed in blank, and delivered to him, by which he became the owner; and that, on receiving the same, he left the bond and other papers with Schmidt for safe-keeping, and for the collection of interest that might thereafter become due. It is quite clear from the evidence that, at the time both claimants purchased the bond, it was overdue by its terms, but the time for payment had been extended by Miss Swift, the former owner. Both claimants alleged they bought the bond for the purpose of investment, that they might receive interest upon the funds employed in making the purchase. There is another fact in the case about which there is no controversy; that is, that after the bond came to the possession of Schmidt, on the 15th day of July, 1881, he took an agreement to himself from the legal representatives of Carl M. Carlson, whose death had occurred prior to that time, in which it was recited they were indebted to Schmidt in the sum named in the bond, and secured on the property of Carlson, that had descended to them on his death; and, in consideration that Schmidt would extend the time of payment until July 15, 1884, they agreed to pay him the principal and interest of the bond. Coupons for the semi-annual interest were executed by the legal representatives at the same time, bearing even date with the agreement, July 15, 1881, payable to Schmidt or his order. It will be noted the agreement between Schmidt and the legal representatives of the original debtor was made on the day Marshall claims he bought the bond and trust deed from Nancy Swift, and that it was made a month and a half before Ender alleges he purchased the bond of Schmidt. There can be no question, under the evidence in the case, that Ender purchased the bond and trust deed of Schmidt, after the making of the renewal agreement with the legal representatives of the original debtor, in good faith, and for a valuable consideration, and that he received the same from Schmidt at the time, and retained the same in his possession until this litigation began, except for a time it was in a bank as collateral security for his indebtedness to the bank. Afterwards that indebtedness was paid, and the bank returned the papers to him. Unless Marshall had a prior and superior right to the bond, it is evident the title of Ender is good, and should be sustained. This court is inclined to concur with the appellate court in its conclusion that the proof of the facts relied on by Marshall to sustain his claim is "confused, contradictory, and unsatisfactory." Schmidt died about the time the original bill was filed, so that his testimony concerning the transaction, which would have been of the utmost importance, is lacking in the case.

As the case now comes before this court, the evidence in support of Marshall's claim is from three sources: (1) The testimony of the claimant himself; (2) the books of Schmidt; and (3) the testimony of a son of the claimant, who was a clerk in the office of Schmidt. The testimony of the claimant is to the effect he gave Schmidt, who was his brother-in-law, \$2,000 with which to buy the bond from Miss Swift, and that afterwards Schmidt told him that he had bought it, and had the papers in his safe for him. It is not claimed that Marshall ever had the bond and other papers in his actual possession. His

explanation for leaving the papers with Schmidt is that he was a sailor, was away from home on the lakes much of the time, and had no safe depository for them at his home. But his explanation of the details of the transaction is so contradictory as to be very unsatisfactory, and that is, no doubt, why the trial court did not give more weight to his testimony. It is also seen that the testimony of his son, who was, at the time, a clerk in the office of Schmidt, throws but little, if any, light upon the payment of the \$2,000 to Schmidt with which to purchase the bond. The books of Schmidt do show that Marshall is charged with \$2,000 paid to Nancy Swift for this identical bond. That entry is under the date of July 14, 1881. Under date of July 11, 1881, Marshall is credited by Schmidt on his books with \$400 received "for investment," and under date of July 12, 1881, with \$1,396 as having been received from him also "for investment." That is all the books show as to the receipt of money to be "invested." That, of course, does not make up the sum of \$2,000, which he alleges he paid to Schmidt. On July 15, 1881, which is the date of the renewal agreement with the legal representatives of the maker of the bond, Marshall is credited with \$80 for interest due that day on the bond as having been received from them. The books also show other credits of small sums, irregular in amount, to Marshall, as having been received, from the representatives of the maker of this bond, for interest. But it is evident that, during all the time these sums of money were being paid to Marshall, Ender had in his possession the original bond, the renewal agreement, and the coupons given for the semi-annual interest, and received payment of the coupons from Schmidt as they respectively became due. The most plausible view that can be taken, and the one most consistent with the good faith of all the parties to the transaction, is that Marshall placed in Schmidt's hands for "investment" certain sums of money; and it may be and is doubtless true that Schmidt told him he would invest the sums in this identical bond in controversy. But it does not appear from any satisfactory evidence in the record that he did in fact so invest claimant's funds in this bond, or in any other securities. His books do not show that at the date Schmidt took the renewal agreement and the coupons payable to himself, he had in his hands a sufficient sum of money belonging to claimant with which to pay for the bond in controversy. Nor does it appear that he did receive a sufficient amount before he sold and transferred the bond to the other claimant, Ender. His financial condition was such that Schmidt could not carry the bond long; and it may have been for that reason he sold the bond to Ender, as he did shortly after he purchased, and took the renewal agreement to himself. This view of the transaction accords with the conduct of Schmidt in his last sickness. When approached by Marshall concerning the matter, he told claimant if he would wait until he got well again he would make it all right with him. The evidence affords some explanation, although not entirely satisfactory, for the payment of interest to Marshall by Schmidt. He not only had the money he got of claimant about the time he purchased the bond, but he owed him for money obtained long before that transaction. It may have been in consideration of these matters he paid him small sums of money at sundry times; and Schmidt may have thought, if he did not invest Marshall's money for him, he certainly ought to pay him some interest on it. The very fact Schmidt took the renewal agreement and coupons to himself shows he did not intend to buy the bond for Marshall, or any other particular person. He simply bought it so that he could transfer it to any one that would pay for it. As before remarked, he may have honestly intended to invest Marshall's money in this bond; but it seems clear he did not. But, when he ascertained Marshall did not have money enough to pay for it in his hands, Schmidt, very shortly thereafter, sold and delivered it to the other claimant. If this conclusion is not the correct one, it is evident Schmidt deliberately attempted to commit a fraud upon his brother-in-law by taking the securities in his own name,—a conclusion that ought not to be

adopted if one more consistent with honesty and fair dealing can be reached.

The decree of the trial court seems to be warranted by the evidence, and the judgment of the appellate court must be affirmed.

(126 Ill. 223).

ELLSWORTH v. MINER T. AMES CO.

(Supreme Court of Illinois. June 16, 1888.)

TRUSTS—EQUITY JURISDICTION—ASSIGNMENT OF TRUST-ESTATE TO BENEFICIARY.

Where a certificate of membership in a city board of trade, procured and paid for by a firm, is issued to one of its agents to enable him to transact its business with said board and its members, a court of equity has jurisdiction over the matter, and may decree an assignment of the certificate to the firm or its successors in business.

Appeal from appellate court, First district.

M. W. Fuller, for appellant.

Plaintiff's remedy, if it have any, is at law. *Barton v. De Wolf*, 108 Ill. 195; *Cohn v. Mitchell*, 115 Ill. 131, 3 N. E. Rep. 420. If a decree could go for complainant at all, it would be for the value of the certificate and interest. *Markham v. Jaudon*, 41 N. Y. 235; *Smith v. Dunlap*, 12 Ill. 184. Defendant is not liable either at law or in equity. The specific performance of a contract for the transfer of shares, stocks, or bonds will not be decreed. *MILLER, J., Ross v. Railway Co.*, 1 Woolw. 26, 32; *Jones v. Newhall*, 115 Mass. 248; *Cuddee v. Rutter*, (*Cud v. Rutter*, 1 P. Wms. 570,) 1 White & T. Lead. Cas. Eq. pt. 2, 1063, (*786;) *Pom. Cont. §§ 17, 18, 19; Fallon v. Railroad Co.*, 1 Dill. 125; 2 Story, Eq. Jur. § 717 *et seq.*; *Barton v. De Wolf*, 108 Ill. 195.

Thomas Dent, for appellee.

The facts developed in the case establish a trust on the part of appellant, in respect to the certificate, and the decree below was right. *Weaver v. Fisher*, 110 Ill. 146; *Jones v. Fisher*, 116 Ill. 68, 4 N. E. Rep. 255; *Barclay v. Smith*, 107 Ill. 349; Notes to 1 Lead. Cas. Eq. (3d Amer. Ed.) 768; *Woodward v. Aspinwall*, 3 Sandf. 272; *Field v. Mayor*, 6 N. Y. 179; *Ashe v. Johnson*, 2 Jones, Eq. 149.

SCOTT, J. This is an appeal from a judgment of affirmance by the appellate court of the First district of a decree rendered by the circuit court of Cook county in a suit brought by the Miner T. Ames Company against James W. Ellsworth. It is set forth in the original bill that complainant, for a valuable consideration, succeeded to the business and all the property, rights, and assets of the late firm of Miner T. Ames & Co., and that among such assets was a certificate of membership of the board of trade of the city of Chicago, which was issued on or about the 21st day of September, 1872, to defendant, who it is alleged was at the time an employe of the firm of Miner T. Ames & Co.; by which firm the admission fee for such certificate of membership was paid, and to which firm it in equity belonged, and that it was issued to defendant without any consideration paid by him, solely to facilitate the transaction of the business of that firm. An amendment filed to the original bill, by leave of court, sets forth more particularly the facts relied on for relief, and shows that the transfer of the assets and effects of Miner T. Ames & Co. to complainant was intended to be full and complete, and a general transfer of all such assets, including the certificate of membership mentioned in the original bill; but that, through some oversight or accidental omission, the written transfer does not specifically mention such certificate, yet in fact, and as a matter of right and equity as between the parties, the right to such certificate did pass to complainant by reason of its having become entitled to the assets and effects of its predecessor, of which the certificate of membership

so issued to defendant constituted a part. The relief demanded is that defendant be required to transfer and assign to complainant the certificate of membership, so that complainant may have the full benefit and advantage of it. The answer of defendant is quite full, and puts at issue all of the material allegations of the original and amended and supplemental bills, and states other matters; but in the view that will be taken of the case it will not be necessary to state them. On the hearing of the cause the trial court found the equities to be with complainant, and that it was entitled to have transferred to it the certificate of membership referred to in the pleadings, and decreed specific relief. As respects the question of ownership of the certificate of membership in the board of trade which is the subject of this litigation, and as to which the testimony is quite conflicting, it is thought the evidence is sufficient to sustain the finding that it was the property of complainant, and that complainant was entitled to have the same assigned to it, as the circuit court decreed should be done. The testimony is too voluminous to admit of any analysis in detail, and it would be a useless work when done. This court agrees with the conclusion reached by the appellate court, that the evidence shows the certificate of membership was held by defendant at the time of filing the bill under such circumstances as made it in equity the property of complainant, which fact would warrant the relief decreed. It is said if complainant is entitled to any relief; it is at law. This point in the case need not be elaborated. It is alleged in the bill the certificate of membership was partnership assets, and there is evidence tending to show it was so treated, and that it was taken in the name of defendant while the relation of principal and agent existed, that the agent with greater facility might transact the business of his principal. These facts show the property is trust property, over which equity always assumes jurisdiction, and will place it where it of right belongs. The case comes directly within and is controlled by *Weaver v. Fisher*, 110 Ill. 146. The judgment of the appellate court will be affirmed.

(125 Ill. 226)

ST. LOUIS BRIDGE CO. v. PEOPLE *ex rel.* BAKER, Tax Collector.

(*Supreme Court of Illinois. June 16, 1888.*)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—SEWERS—POWER OF COUNCIL TO LEVY ASSESSMENT—ESTABLISHMENT OF SYSTEM.

Act 1883, § 1, (Laws Ill. 1883, p. 68; *Stat. & C. St.* par. 324, p. 546,) provides that "the legislative authority of any city which now has, or may hereafter have, established a system of sewerage for such city, shall have power, annually, to levy and collect a tax * * * for the extension and laying of sewers therein, and the maintenance of such sewers: * * * provided, however, that the board of public works, * * * or the head of the sewer department, * * * shall first certify to such legislative authority the amount that will be necessary for such purpose." *Held*, that an objection to sewerage tax on the ground that the city had established no sewerage system cannot be sustained where it appears that, prior to the levy complained of, the city council had, by ordinance, created a "city sewer department," there being at the time several miles of sewers in use in the city; and that a report of the sewer department of plans for extending and repairing sewers, and estimates of the amount of tax required for that purpose, had been accepted by the council, and the amount reported included in the appropriation ordinance which forms the basis of the tax objected to; it not being necessary that the system of sewerage provided for in the act should extend to all parts of the city.

2. TAXATION—TAXABLE PROPERTY—BOUNDARY LINE BETWEEN ILLINOIS AND MISSOURI.

The taxing power of Illinois extends to all that portion of a bridge across the Mississippi river which lies east of the middle line of the main channel of that river. Following *Buttemuth v. Bridge Co.*, *ante*, 439.

Appeal from St. Clair county court; JOHN B. HAY, Judge.

G. & G. A. Koerner, for appellant. B. D. W. Holder, State s Atty., (F. G. Cockrell, of counsel,) for appellee.

SHOPE, J. This was an application in the county court of St. Clair county, by the collector of taxes of that county, for judgment against lands and lots

against which taxes were delinquent for the year A. D. 1886. No objection is made to the return of the delinquent list, or notice of application for judgment. Appellant, the St. Louis Bridge Company, appeared, and filed objections to rendering judgment against the portion of their bridge described in the assessor's return and notice of the collector, for the following reasons: (1) That the greater part of said structure lies beyond the jurisdiction of the state of Illinois, and beyond the state limits, and could not be assessed and taxed by the officers of the state of Illinois. (2) The defendant objects to the city tax of East St. Louis, the same being beyond the rate of taxation to which the city is limited; being beyond the rate of 10 mills. (3) Objection to the city tax of East St. Louis for sewerage; that city having established none. The county court overruled the objections, and rendered judgment for the delinquent taxes as shown by the collector's return. The bridge company prosecutes an appeal therefrom to this court, and insists that the objections should have been sustained, and that the judgment is therefore erroneous.

No evidence was offered to sustain the second objection; nor does anything appear in the record showing that the rate of taxation in the city of East St. Louis was greater than the prescribed limit of taxation therein.

The principal question, and the one to which the argument of counsel is chiefly directed, arises under the first objection. This involves, as contended, the determination of the western boundary of the state of Illinois at this point. The western boundary of the county of St. Clair and of the city of East St. Louis is identical with the western boundary of the state. Charter of East St. Louis; 1 Pr. Laws 1869, p. 886; *Bridge Co. v. City of East St. Louis*, 12 N. E. Rep. 723, (opinion filed June 20, 1887.) The contention, however, is that about 600 feet of the bridge belonging to appellant company, being that portion commencing at the middle of the Mississippi river as it now is, and extending east towards the Illinois shore, is not within the territorial limits of Illinois, and therefore not subject to taxation by the state, or by the authorities of said city or county. Evidence was offered tending to show that in 1818, when Illinois was admitted into the Union, the middle of the Mississippi river was 600 feet east of the now center thread of that stream; and it is contended that the boundary of the state is the line of the middle of said river as it then existed. This precise question was before this court in the case of *Huttenuth v. Bridge Co.*, ante, 439, (opinion filed January 20, 1888,) when, after full argument, the question was determined adversely to the contention of appellant. Upon petition for rehearing in that cause, the opinion again received full consideration, and was adhered to. Every point here made was then fully considered and disposed of; and the determination then reached must be adopted as conclusive upon the question of the boundary of the state, and of said city and county. All of that portion of the bridge structure assessed for taxation in the county of St. Clair and the city of East St. Louis, and as to which the taxes were returned as delinquent, lies east of the middle of the channel of the Mississippi river, and, as held in the case referred to, is liable to taxation in this state, and by said city and county.

The third objection was properly overruled. Section 1 of the act of 1883 (Laws 1883, p. 68; Starr & C. St. par. 324, p. 546) provides that the legislative authority of any city which now has, or may hereafter have, established a system of sewerage for such city, shall have power, annually, to levy and collect a tax upon the real and personal property of such city, not to exceed one mill on a dollar, for the extension and laying of sewers therein, and the maintenance of such sewers, which tax shall be known as "The Sewerage Fund Tax," to be levied and collected as other taxes: provided, however, that the board of public works of such city, if any, or the head of the sewer department of such city, shall first certify to such legislative authority the amount that will be necessary for such purpose. In 1885, prior to the levy of the sewerage tax in question, the city council of said city of East St. Louis had

adopted an ordinance creating a "city sewer department," to consist of three persons, denominated "Sewer Commissioners of East St. Louis." The first commissioners were named in the ordinance; their organization as a board, and the annual appointment of their successors in office, provided for. It was ordained that said commissioners shall have general charge of the location and construction of sewers in said city, and cause surveys and estimates of costs of sewers to be made in their discretion, and, subject to the approval of the council, to contract for constructing of sewers, and supervise all local assessments made by the council, etc. It is shown that, at the time of the passage of this ordinance, there was about three miles of sewer constructed and in use in said city. The commissioners entered upon the discharge of the duty imposed, and afterwards made a report to the city council, which was accepted by the council, of plans and estimates for extending and repairing the sewers of said city, with estimates "of the amount of tax required to extend and repair the sewers of East St. Louis." The amount so reported was, it is shown, put, as an item, in the general appropriation ordinance for the year 1886, and forms the basis for the sewerage fund tax in question. We are of opinion that when the legislative authority of the city assumed control of the sewerage of the city, and created a department of city government charged with the location, extension, construction, and maintenance of sewers, and had accepted plans and estimates for the extension of the sewerage already under its control, it had established a system of sewerage within the meaning of the act of the legislature referred to; and was authorized by that act, upon report of the city sewer department of the amount necessary for the purpose of constructing and maintaining the same, to levy and collect a sewerage fund tax. It is shown that the sewers already constructed extended along Illinois and Division avenues, Fourth and Tenth and other streets, in the city; and the plans and estimates reported, contemplated extensions and repairs thereof. It is not necessary that the system of sewerage adopted shall extend to all parts of the city. What sewerage is necessary for the welfare of the city and health of its inhabitants is political, and to be determined by the legislative authority of the city, under its grant of power. It may be, so far as anything appearing in this record, that the proposed extension and improvement of the sewers will complete a perfect system of sewerage for the entire city.

Finding no error in this record, the judgment of the county court will be affirmed.

(126 Ill. 399)

HALE *et al.* v. HALE *et al.*

(*Supreme Court of Illinois.* June 16, 1888.)

1. WILLS—CONSTRUCTION—DESCRIPTION OF PROPERTY.

A testator, who resided in Massachusetts, after making various devises and bequests, directed that all the rest of his estate should be and remain in the hands of his executors and trustees, well and securely invested, until the decease of the last of the life annuitants named in the will, when it and its accumulations should be divided among his grandchildren. *Held*, that lands of the testator located in Illinois, not mentioned elsewhere in the will, were devised by this clause.

2. SAME—PERPETUITIES.

Such a devise, all the annuitants being in existence, does not violate the Illinois rule against perpetuities, which are defined to be limitations taking the subject thereof out of commerce for a longer period than a life or lives in being, and 21 years beyond.

3. SAME—POWER TO SELL.

The trustees and executors are not authorized by the above clause to sell the lands situated in Illinois.

Appeal from superior court, Cook county; H. M. SHEPARD, Judge.

Bill filed by Ezekiel J. M. Hale and others against Ruth C. Hale and others, executors of the will of Ezekiel J. M. Hale, praying for a distribution of certain real estate of the testator situated in Illinois. Defendants filed a cross-

bill, asking for leave to sell the property. On hearing, defendants' bill was dismissed, and the relief demanded by plaintiffs' bill granted. The defendants then appealed.

Rufus C. Hall, for appellants. *John Woodbridge*, for appellees.

SCOTT, J. The bill in this case is for partition of the real estate of which Ezekiel J. M. Hale died seized, and which is situated in the county of Cook, in this state, and was brought by one of the heirs in the superior court against the widow, the executors, and the other heirs of decedent. Concerning the facts out of which the litigation arises no controversy exists. Prior to his death the common ancestor of the heirs claiming his estate in Cook county as intestate property, resided at Haverhill, in the state of Massachusetts. At the time of his death he owned a large estate in Massachusetts, consisting of both real and personal property, all of which it is conceded was disposed of by his will, which was, after his death, admitted to probate in that state, and which is conceded by all parties interested to be valid under the laws of Massachusetts. The testator also left a large amount of property situated in the state of New York, and the property involved in this litigation in Illinois. The larger portion of the estate seems to have been in Massachusetts, where the testator had resided and where his will was admitted to probate. It seems the testator gave various legacies and devises, and provided in different clauses of his will for life annuities, to a number of persons,—perhaps 12 in all,—and for other annuities, payable at stated periods, until the final division of the residue of his property under the provisions of his will. It is understood, and perhaps admitted, that there is sufficient estate in Massachusetts out of which to pay all legacies, devises, and annuities provided for or declared in the will. It is not claimed that any of the property belonging to the estate situated either in New York or this state will be wanted for the payment of either legacies, devises, or annuities under the will. The bill in this case alleges the will of Ezekiel J. M. Hale, deceased, was admitted to probate in Massachusetts, where he died, no one objecting; which is an admission it was valid, and disposed of all the property belonging to the estate in that state. But the bill is framed on the theory it was not the intention of the testator to devise the real estate now sought to be partitioned; that the scheme of his will was not adapted to the condition of his estate in New York and in Illinois, and was not intended to convey the same; that by the laws of Illinois and New York the devise was void, and had been so declared by the courts of the latter state; that such testator well knew that the provisions of his will, if applied to his real estate in New York and Illinois, made the same illegal and void on account of the statutes of such states prohibiting perpetuities; that, if the provisions of the will should be applied to the lands in Illinois or New York, the same could not be alienated for many years, and not until after the death of 12 life annuitants; that the property in Illinois is unproductive, and cannot be made productive; that the taxation upon it is large, and that the interest and taxation will entirely absorb the value of said real estate, so as to render it a total loss to the heirs, if it should be held to be included within the terms of the will, and hence not subject to division except in accordance with the will. It is alleged the property situated in New York belonging to the estate exceeds in value \$1,000,000, and that in Illinois is now estimated to be of the value of \$200,000. The executors answered the bill as they were required to do, in which they admitted most, if not all, of the formal charges in the bill, but insisted the lands sought to be partitioned passed to them under the residuary clause of the will of the testator; and, on filing their answer, they filed a cross-bill, in which they claimed to have the power under the will to sell such real estate, and ask the court to so decree. The respondents in their cross-bill make the same allegation as is contained in the original bill; that, unless the property described in the bill can be sold,

it will be absorbed by taxes and assessments and other expenses before the time for distribution would arrive under the provisions of the will. The superior court, at the hearing of the cause, dismissed the cross-bill of respondents, and found that the property described in the original bill was intestate property, and decreed a partition of the same, as it was asked to do. That decision is assigned for error.

The residuary clause of the will out of which all the questions made on this record arise is as follows: "*Twenty-Second*. As to the residue and remainder of all my estate, both real and personal, not herein otherwise disposed of, it is my will that the same be and remain in the care and control of my said executrix and executors and trustees, and their successors, well and safely invested, until the decease of the last survivor of the life annuitants named in my foregoing will; and that then the said residue and remainder, with all the accumulated interest thereof, shall be divided equally among my grandchildren *per stirpes*, to hold to such grandchildren so distributed, and to their heirs, executors, administrators, and assigns, forever." Most of the other clauses of the will contain provisions for legacies, bequests, devises, and annuities to certain persons, and others contain specific directions as to what disposition shall be made of certain property; and beyond giving an outline of the general scope of the will, and the intention of the testator as to the management of his estate by his executors and trustees, they contain nothing that is important in connection with the present discussion, and their contents need not be stated other than in a general way.

Two principal questions are made by the original and cross bills: (1) Whether the lands involved were devised by this clause of the will, or whether the same can be treated as intestate property, as not being embraced in the will; and, (2) if it shall be held the lands were devised, is any power given the executors and trustees, either expressly or by implication, by this or any other clause of the will, to sell these lands at any time within their discretion? It will be found most convenient to consider these questions in the inverse order in which they are stated, which will be done briefly.

There is and can be no pretense that any express power is given to the executors and trustees to sell any real estate situated in New York or in Illinois that had belonged to the testator by the twenty-second clause, or any other clause, of his will; and if any such power exists in them it must arise by implication from powers conferred or duties expressly imposed by the will in regard to such real estate. Power is expressly conferred upon the executors and trustees to sell certain real property, as in the second clause of the will, but nothing is said anywhere in the will concerning the sale of real property in New York or Illinois. It is not even mentioned by any description, by location, or otherwise. If it is devised at all, it is by the twenty-second or residuary clause of the will, and not otherwise. But does the twenty-second paragraph of the will confer any power upon the executors and trustees to sell real estate situated in New York or Illinois, even by implication? It is thought it does not. There can be no doubt of the correctness of the rule stated by counsel that authority to sell and convey trust property may be conferred by implication; as, for instance, where duties are imposed by the instrument creating the trust upon the trustee, which he cannot perform without making a sale, the law will imply the necessary power; otherwise there would be a failure of the objects of the trust. A most common example is where there has been an assignment for the payment of debts, if no express power is given to sell the trust property, the duties to be performed by the trustees will necessarily create the power of sale, for it is obvious in no other way could the trustee perform the duties required of him by the instrument creating the trust. The law will not permit a trust to fail because it may be inartificially declared or expressed. This is undoubtedly as liberal a statement of the implied powers of trustees as the law will sanction. Applying this

rule, neither the twenty-second clause, nor indeed any other provision, contains anything that indicates, by implication or otherwise, it was the intention of the testator that his executors and trustees should have power to sell and convey any of his real property, either in New York or Illinois, for the purpose of converting it into personalty. The words supposed to manifest the intention of the testator in this regard are "that the same be and remain in the care and control of my said executrix and executors and trustees, and their successors, well and safely invested, until the decease of the last survivor of the life annuitants named in the foregoing will." It is said the words "well and safely" mean that the testator gives the executors and trustees the usual authority to make prudent investments, and that they mean they must keep the property invested. The vice of the argument on this branch of the case lies in detaching these words from their place in the will, and giving to them a meaning inconsistent with the context. What is the direction given by the testator concerning this property in New York and Illinois? It is that it "remain in the care and control" of the executors and trustees, "well and safely invested." That is, it is to "remain," as now, "well and safely invested." Any other would be a strained and unnatural construction of the words of the will. So far from indicating any intention on the part of the testator that his executors and trustees should sell his lands either in New York or Illinois, the words used indicate unmistakably it was his intention and purpose they should "remain" in the care and control of his executors and trustees, "well and safely invested," as they then were, until the time appointed for the distribution of the residue of his estate, both real and personal, should arrive. The principle running through all the cases on this subject, so far as the writer has been able to examine the same, is, the provisions of the will must be so clearly written as to leave no doubt of the intention of the testator to have his real estate converted into personal estate, to sustain the doctrine of what is called equitable conversion. That intent does not appear from any language used by the testator in this case, and it is not perceived his trustees have any implied power to change the real property devised into personal estate for reinvestment or otherwise. This precise question was presented to the court of appeals of the state of New York by the same parties to this litigation; and in an action brought by these executors and trustees to obtain a construction of certain provisions of the last will and testament of Ezekiel J. M. Hale, deceased, that court held, after most elaborate argument, the will, while valid under the laws of Massachusetts, where the testator died and where his will was admitted to probate, contained no express direction for the conversion of the real estate into personalty, or for the sale of the real estate. *Hobson v. Hale*, 95 N. Y. 588. This court is entirely satisfied with the conclusion reached by the court of appeals in that case, and the elaborate discussion there given to the exact question involved in the case now being considered would seem to relieve this court from the necessity of any extended consideration of the question. Under this view of the meaning of the will, the relief demanded by the cross-bill, that the right of complainants in that bill to sell and convey the lands involved and to convert the same into money may be established and declared, was properly denied.

The remaining question arises on the original bill, and is whether the lands situated in Illinois, and which belonged to the estate of the testator, were devised by the residuary clause of the will, or whether the same can be treated as intestate property, as not being embraced in the will. There is evidence tending to show what the court found by its decree, that the testator bought these lands in Cook county for speculation, and that had he lived it is probable he would have sold the same on receiving the first favorable offer. That he gave expression to such views is proved past all doubt, but whether he changed his mind in that regard before his death of course cannot be known. Con-

struing the will in the light of the surrounding circumstances, as the law requires shall be done, does it show the testator intended to omit these lands from the operation of his will? It is seen the residuary clause of the will is as broad and comprehensive as it can well be expressed. It is, "As to the residue of all my estate, both real and personal, not herein otherwise disposed of." Primarily the words "all of my estate" mean all the estate of the testator, wherever situated, and that meaning will always be given to them unless something in the context will show a more restricted construction will better comport with the clear intention of the testator. It will be noticed the real estate of the testator situated in New York, if devised at all, was devised by this same clause of the will. There is no other clause of the will that can have the slightest application to it. If the lands in Illinois shall be held not to have been devised by the twenty-second clause of the will, the conclusion would necessarily be the New York lands were not within its operation. No one has ventured to suggest the testator did not intend by this clause of his will to devise his property in New York. When the case was before the court of appeals of New York, that court seems to have held, without much discussion, the property in that state was devised by the will; for it was said: "While it should not be overlooked that the testator was domiciled in the state of Massachusetts, and his will was executed there, it should also be borne in mind that by his will he devised his real estate, as real estate, situated in the state of New York." Any other conclusion would be too improbable to be adopted. The same words in the will that are held to constitute a devise of lands in New York include also the lands in Illinois. Either the lands in both states are devised, or they must be treated as intestate property in both states. It is incredible that a testator making a will that by its terms, when understood in their primary sense, disposes of all "his estate, both real and personal," omitted therefrom property conceded to be of the value of over, \$1,200,000. Such a proposition is too improbable to be adopted, unless the testator was incapable of comprehending what he was doing. Plainly the residuary clause of the will is broad enough to include all the property of the testator, no matter where situated, and there is nothing in either of the attendant circumstances, or in any other clause of the will, that shows any intention on the part of the testator to omit any property in Illinois or elsewhere from its operation. When this case was before the court of appeals of New York it was held that the clause of the twenty-second paragraph of the will that postponed the final division of the estate until the death of the last survivor of the life annuitants, so far as it applied to real estate in that state, worked an unlawful suppression of the powers of alienation, and was for that reason void, and it was also held such clause was repugnant to the provisions of the statute of that state prohibiting accumulations except for the times and purposes therein permitted. No such objection lies to that provision of the will in this state. A perpetuity in this state is defined to be a limitation taking the subject thereof out of commerce for a longer period of time than a life or lives in being and 21 years beyond. Here the right of alienation is not suspended for any period beyond the lives of certain persons in being, and hence this provision of the will is not repugnant to any rule of law in this state inhibiting perpetuities. But it is said a construction that would postpone the alienation of this property for more than 50 years is opposed to public policy. The limitation fixed is to terminate at the death of certain life annuitants, and of course when that contingency will happen is a matter of the merest conjecture. It might occur within 5, 10, 20, 40, or 60 years. Of course the time is indefinite, and all that can be known concerning it with any degree of certainty is that it is sure to happen sooner or later. The time for which the executors and trustees are to hold the residue of the estate, for which there might be a suspension of the right of alienation of the property in controversy, is limited to the death of the last survivor of the life annuitants, and

it is not perceived that in that respect it contravenes any public policy existing in this state. The decree of the superior court dismissing the cross-bill will be affirmed, and the decree granting the relief demanded on the original bill will be reversed, and the cause will be remanded, with direction to that court to dismiss the original bill also.

(125 Ill. 309)

NICHOLS v. SARGENT.

(*Supreme Court of Illinois.* June 16, 1888.)

1. GUARDIAN AND WARD—PERSONAL LIABILITY OF GUARDIAN.

If a person, describing himself as guardian of another, gives a lease, he will, in the absence of anything in the contract clearly showing a contrary intent, be personally liable thereon, although the lease has been approved by the probate court.

2. SAME—LEASE.

In an action on a lease, which had been approved by the probate court, to recover the value of improvements placed on the premises under a clause whereby defendant, as guardian, agreed to take them at a price to be fixed by arbitrators, it is no defense that defendant offered to submit to the appraisement if plaintiff would consent that the award should be subject to the approval of the probate court, before it should be binding on his ward's estate.

Appeal from appellate court, First district.

This suit was brought by Homer E. Sargent in the superior court against Annie E. Nichols, on a written lease from defendant to plaintiff, and signed by both parties. On the trial before the court without a jury, plaintiff recovered a judgment against defendant. That judgment, on the appeal of defendant, was affirmed in the appellate court of the First district, and defendant now brings the case to this court on her further appeal.

Hutchinson & Partridge, for appellant. *Dexter, Herrick & Allen*, for appellee.

SCOTT, J., (*after stating the facts as above.*) This was an action of covenant on that clause of the agreement, to renew the lease that had formerly existed between the parties, which it is said obligates defendant personally to purchase at the expiration of the lease the improvements put upon the demised premises by plaintiff, "at the valuation of three persons," to be selected as in the lease provided. The renewal agreement is signed by defendant, Annie E. Nichols, formerly Annie E. Haven, "ANNIE E. NICHOLS, Guardian." The premises seem to belong to defendant and her minor children, for whom she was guardian at the time of making the lease. It is recited in the original lease, it is between "Annie E. Haven in her own right, and as guardian" for her three surviving children, and plaintiff, Homer E. Sargent. In the declaration the covenants contained in the lease, upon which breaches are assigned, are declared upon as the personal covenants of defendant; and the first question presented is, did defendant, by executing the agreement to renew the lease, become personally liable to perform the covenant it contained for the purchase of the improvements made by the tenant on the demised premises? The precise question made in this case was made in *Sperry v. Fanning*, 80 Ill. 371; and it was there held, if a person makes a contract, describing himself as guardian or trustee for another, and so signs the same, he will be personally liable, in the absence of an express provision showing clearly that both parties agreed to act upon the responsibility of the funds in his hands alone, or upon some other responsibility, or there appears some other circumstances clearly indicating another party who is bound by the contract, upon whose credit alone it is made. The principle of that case is, if a guardian promises, on a sufficient consideration, to pay the debt of his ward, he is personally bound by it, although he expressly promises as guardian. In such cases, where the guardian discharges the debt of his ward, he may have indemnity out of the estate of his ward, or, if he has been discharged from

his guardianship, he may have an action against the ward or his estate as for money paid for his use. The facts in both cases are so nearly analogous, no reason is perceived why the case being considered is not controlled in every respect by the case cited. An effort is made, however, to distinguish this case from *Sperry v. Fanning*, on the ground that in the latter case the agreement made by the guardian was not made with the approval of the probate court, as was done in the case now before this court. In that respect there is no difference between the cases. It appears from the dissenting opinion, the contract made by the guardian in *Sperry v. Fanning* was made with the approval of the probate court; and that is persuasive evidence, at least, of the existence of that fact in the case.

The declaration seems to be framed upon the theory, defendant had refused to submit the valuation of the improvements to the appraisers, as is provided in the lease shall be done. Whether defendant did refuse to go on with the appraisement is a controverted question of fact, and, as it was found against defendant by the trial and appellate courts, it is not subject to review in this court. It is said there was an offer to go on with the appraisement if plaintiff would consent the award should be subject to the approval of the probate court, before it should be binding on the guardian or the wards' estate; and, inasmuch as plaintiff would not consent to that proposition, there was in law no refusal. Plaintiff was not bound to submit to the conditions imposed by the guardian. He very properly insisted his rights should be determined and ascertained by and under the lease. That was his clear right; and on the refusal of defendant to submit to the appraisement, as provided in the lease, it is but just and right plaintiff should recover as for the value of the improvements in controversy. In no other way could he obtain full damages for the breach of the covenants of the lease. The probate court had once approved of that mode of ascertaining the value of the improvements on the demised premises. Neither the law nor his contract required that plaintiff should submit the matter again to the probate court for further action. Most, if not all, of the other questions discussed in the elaborate argument of counsel, are controverted questions of fact, not subject to review in this court, and, of course, need not be noticed. The judgment of the appellate court will be affirmed.

STEWART *et al.* v. FELLOWS *et al.*

(*Supreme Court of Illinois.* June 16, 1888.)

MORTGAGE—WHAT CONSTITUTES—EVIDENCE—TRUSTS.

Where the assignee of a title-bond admitted, at the time, that the assignment was without consideration, and afterwards, by consent of the assignor, took a deed for the land in his own name, agreeing to convey to the assignor's wife when requested, the relation of trustee and *cestui que trust* was thereby created, and the deed cannot be enforced as a mortgage, under a claim that it was held to secure the purchase money advanced by the trustee and another debt due him, without the most undoubted evidence to sustain the claim.

Appeal from appellate court, Second district.

Bill filed in the circuit court of Will county by Frank Fellows, administrator of G. M. Leonard, deceased, against Ezra H. Stewart and wife, to cancel a deed from said Leonard to Mrs. Stewart, and to enforce one held by said Leonard for the same land as a mortgage. Defendants claimed said Leonard held the title in trust, and not to secure a debt. Others were afterwards made parties. The court decreed a foreclosure, and the case was appealed to the appellate court, and thence by defendants to this court.

Haley & O'Donnell, for appellants. *Olin & Phelps*, for appellees.

SCOTT, J. The original bill in this case was brought by Frank Fellows, administrator with the will annexed of the estate of George M. Leonard, deceased, against Ezra H. Stewart and Laura D. Stewart. It is a bill to fore-

close what is alleged to be a mortgage, and is framed on the theory that the deed for the real estate in controversy, made by David Richards and wife to decedent, although absolute in form, was made in that way to secure the indebtedness of defendant Stewart to decedent. It is true, as alleged, that defendant had previously bought the property of Richards, and had a bond for a deed conditioned upon the payment of the purchase money. That bond defendant Stewart had before that time assigned to Leonard. The assignment was confessedly made to him without consideration; and all parties concede that, when he took the assignment, it was their intention he should hold it in trust for Stewart. It is charged that Stewart was then indebted to Leonard in a large amount of money on two promissory notes: one for the sum of \$400, made by Stewart alone, payable to the order of E. C. Fellows, and by the payee indorsed to Leonard; and one for \$80, signed by Stewart and one R. F. Keys, payable to E. C. Fellows, and by him indorsed and delivered to Leonard. The purchase money for the property in controversy became due to Richards on the 18th day of October, 1874. It is alleged that, when the purchase money became due, Stewart was unable to make the payment, and solicited Leonard to advance the amount due Richards on the property for him. That, it is said, Leonard refused to do unless Stewart would allow him to take the title of the property to himself, and hold it, not only as security for the amount to be paid to Richards, but also for the sum due on the two promissory notes mentioned. It is charged Stewart agreed to the proposition, and thereupon it is averred Leonard advanced the sum of \$550, and paid the same to Richards, and, with the full consent of Stewart, took from Richards a conveyance of the property. At the same time Leonard received from Richards the note for \$500 which Stewart had given him for the land, and the same is made an exhibit in this cause. It is for the indebtedness above described. It is alleged the deed was taken as mortgaged security. Other relief is demanded by the bill, to which reference will be made further on. Defendants answered the original bill; but, as their answers were not under oath, it did little more than to put the matter alleged against them at issue, and the contents of their answers need not be stated. By an amendment to the bill, Horace S. Smith was made defendant, for the alleged reason he had some interest in the premises, and a rule was laid upon him to answer the bill. But as to him there seems to have been a default, and he need not be further noticed in the case. At the May term, 1881, the original bill was again amended by making Frances D. Fellows, executrix of the last will and testament of Elisha C. Fellows, deceased, a co-complainant in the bill, and described the original complainant as executor of the same estate. By this amendment it is charged that the sum of money advanced by Leonard to Richards, as well as the notes assigned by Fellows to Leonard, were in fact the property of Elisha C. Fellows, and that the title to the real estate was in fact held by Leonard in trust for Fellows for the payment of Stewart's indebtedness to him. The original bill in this case was filed December 26, 1879, and George M. Leonard died in September, 1875, and Elisha C. Fellows died in August, 1876. Only Ezra H. and Laura D. Stewart answered this last amended bill. Portions of their answers disclose distinctly the defense relied on, and so much of it as may be necessary will be discussed in connection with the evidence when that comes to be considered. On the final hearing of the cause, the court found most of the allegations of the bill to be sustained by the evidence, and rendered a decree of foreclosure for the \$550 alleged to have been paid to Richards for the deed, with interest thereon at the rate of 10 per cent. per annum from the date of payment, that is, October 18, 1874, to the date of the decree, but excluded therefrom the amount of the two promissory notes as not being secured by the alleged mortgage. That decree was affirmed in the appellate court of the Second district, and defendants, Stewarts, bring the case to this court on their further appeal. It seems to be conceded if the two promissory notes, one for \$400 and the

other \$80, were not secured by the alleged mortgage, as the court found they were not, they are barred by the previous discharge of Stewart in bankruptcy. The finding of the court in this respect is acquiesced in by complainants, and that branch of the case will not be further alluded to unless it may become necessary to do so to illustrate some other phase of the case. The only controversy, therefore, is as to the sum of money alleged to have been paid by Leonard to Richards to take up Stewart's note, which he had given for the purchase money of the property involved. The theory of the case, as made by the amended bill, and as now insisted upon, is that the money alleged to have been paid by Leonard to Richards for Stewart was in fact the money of Elisha C. Fellows; that Leonard got it of him for that specific purpose; that Stewart consented the deed might be made by Richards to Leonard; and that he might hold the title thereto until the purchase money should be repaid by Stewart. If this position cannot be sustained, the whole case fails. It is seldom a record is found to contain so much directly conflicting evidence. Most of the material testimony comes from the parties in interest. There is very little other testimony that throws any considerable light on the subject of inquiry. That which is testified to by one party in interest is denied by the adverse party with equal positiveness. Even the acts of the parties, about which there can be no misunderstanding, are wholly inconsistent with the theories of the case advanced by the respective counsel on behalf of their respective clients, as the sequel will show. Going back to the first of the series of transactions between the parties, it is seen Stewart held a bond for a deed from Richards for the property in controversy. On the 7th day of February, 1873, Stewart assigned and delivered that bond to Leonard. The note given for the purchase money was not then due, and did not become due until October 13, 1874. At the same time Stewart assigned his bond for a deed to Leonard, he took back from him an instrument in writing in which Leonard acknowledged receiving the assignment of the bond; that he held it in trust for Stewart, subject to his order and control; and that he had paid no consideration for the assignment. On the same day, and doubtless as a part of the same transaction, Leonard executed and delivered to Stewart his two promissory notes, each for the sum of \$500. It is conceded by defendants these notes were given without any consideration. Neither by their bill nor by any evidence have complainants given any explanation of the transaction. No reason is shown why Leonard took the assignment of the bond to himself, nor why, as a part of the transaction, he gave two notes without consideration to Stewart. But defendants, both by their answer and the testimony, do attempt to explain the transaction. The explanation given is that Ezra H. Stewart was financially embarrassed; that he had improved the property for a homestead; that he resided upon it with his family; that he had been sued by Goodspeed; and that he was apprehensive the property would be taken by Goodspeed's judgment, and that he was advised by Fellows and Leonard, who were at the time practicing lawyers, and to whom he applied for advice, to assign the bond to Leonard, which he did. Conceding this was the object the parties had in view, it was an unlawful purpose; and, if Stewart was asking any relief in regard to it, equity would lend him no aid. But he is asking no relief whatever. The parties must have had some object in view, and no one has suggested any other reason for the assignment of the bond, or the making of the notes, for the doing of which no consideration passed to either party. Unless this is the correct explanation of the transaction, it is inconceivable what purpose the parties had in view. Passing on, now, to the 13th of October, 1874, it is seen the note given by Stewart to Richards for the property became due on that day. The Goodspeed claim was still unsettled. On that day Leonard paid Richards the balance due on Stewart's note, and Richards and his wife, by the consent of Stewart, executed and delivered to Leonard a deed for the property. That deed was a matter of record in the proper office. The exact

amount paid by Leonard to Richards does not appear from any testimony in the case. Mr. Richards is the only witness in regard to it. He says the amount paid to him was over \$400, but he does not state the exact amount. The credits previously on the note, of \$50, and the other of \$100, he says were paid by Stewart. It is not proved the amount paid was \$550, the sum, with interest, for which this decree was rendered. Richards delivered Stewart's note to Leonard, who retained it, perhaps, to the time of his death. It is at this point in the case the evidence becomes conflicting and even irreconcilable. Stewart testifies he furnished to Leonard the money to pay Richards, and Richards himself says he "thought the transaction was unusually suspicious on account of Leonard's haste to get the deed." He admits he did not know where Leonard got the money to pay him, but he had an "impression at the time it was Stewart's money." The testimony of Stewart in regard to furnishing the money to Leonard to pay Richards, as given in the case, is direct and positive that the money used by Leonard in making that payment was his money, and was furnished by him. If his testimony were not impeached or otherwise discredited, it ought to control; but, as will be seen further on, he made different statements as to it under oath. On the other hand, the legitimate testimony given by complainants to show that Leonard got the money of Fellows to pay Richards is exceedingly meager. The testimony of Ada Fellows and Frank Fellows, as to what passed between Elisha C. Fellows and Leonard as to the money to be paid by Leonard to Richards for Stewart, is not evidence against Stewart, who was not present. Both witnesses do state that Leonard importuned Fellows until he did consent to let him have the money for Stewart, and that afterwards Leonard told him he had let him have it, or that he had in some way fixed the matter. But conceding, as is freely done, this conversation was had, it was in the absence of Stewart, and is not evidence against him. If this were a controversy between Leonard and Fellows, of course that would be proper testimony. The only other direct testimony concerning the payment of the money to Richards by Leonard is that given by Mrs. Fellows, the widow and executrix of Elisha C. Fellows. She testified to the same conversation between E. C. Fellows and Leonard had in the absence of Stewart, concerning the money that was to be paid to Richards. That, of course, proves nothing against Stewart. But the most important part of her testimony is the conversation she says she had with Stewart at the Methodist parsonage at Lockport. The substance of that conversation, as repeated on cross-examination, is as follows: "I followed Stewart into the parsonage after we went out of church; and I said: 'Dr. Stewart, how can you preach the gospel to me when you have done what you have? You know you owe me.' He says: 'Mrs. Fellows, you owe me more than \$400.' Then I answered: 'I don't owe you one cent. What did George Leonard give you those two notes for?' He answered: 'For borrowed money.' I said: 'When did he borrow the money of you?' He answered: 'At different times.' Then I said to him: 'What did George Leonard put that deed in the bank for?' He answered: 'So that when I paid Mr. Fellows I can keep the property.'" This is all the direct testimony given on the hearing of the cause by complainants touching the principal point of controversy, whether the deed from Richards to Leonard was made, by the consent of Stewart, as security for Stewart's indebtedness to Fellows. The testimony of the witness Hobbs is not important in this connection. It is to the effect Stewart was indebted to Fellows; that he wanted to borrow money to pay a claim to Fellows. The witness says he said Goodspeed had a judgment against him, but he said the property was his wife's, and the judgment was no lien. In answer to the question whether Stewart in that conversation said anything about a mortgage or incumbrance in connection with the claim of Fellows, the witness answered: "No; not to any mortgage or incumbrance other than shown by the will of Leonard." The witness says he had a "verbal" abstract

of title of this property, showing the title to be vested in George M. Leonard, and adds: "Dr. Stewart explained that a deed from Mr. Leonard to Mrs. Stewart was in the hands of the First National Bank, I believe, or Andy Wagner, in escrow. This money was for the purpose of obtaining the money for this deed." There is not a word in all his testimony that the deed from Richards to Leonard was ever intended by the parties as a mortgage to secure Stewart's indebtedness to Fellows. On cross-examination, the witness says: "He [Stewart] claimed that a great advantage was being taken of him by Mr. Fellows; and that, if he could find the papers that had been given him by Mr. Leonard, it would show the balance probably the other way." The testimony given by the witness Stevens is too indefinite to be of any force. It hardly tends to prove anything pertinent in the real issues involved. Add to this the testimony of Stewart given on the trial, in which he positively denies that in the conversation with Mrs. Fellows at the manse at Lockport, in answer to her question, "What did George Leonard put that deed in the bank for?" he said, "So that when I paid Mr. Fellows I can keep the property." The foregoing is the substance of all the oral testimony given on the trial touching the question on which the whole case hangs, whether the deed from Richards to Leonard was ever intended by the parties as a mortgaged security for Stewart's indebtedness to Fellows. Other than that given by the witness Hobbs, the testimony all comes from parties in interest. Objection is made to the competency of some of the witnesses on the ground of their interest, as the suit is being prosecuted by the executors of deceased persons; but as the statements and conversations of the parties in interest, when living, were given in evidence by both parties, it seems most impossible to determine that any one was an incompetent witness. The peculiar relations of the several witnesses must go to their credibility, and not to their competency. It must be conceded, if this were all the testimony in the case, it would be very unsatisfactory, and that it would hardly sustain the decree. So far as this court can know, the witnesses are of equal respectability. Before this controversy arose, the original parties to the transaction seem to have been close friends, and trusted each other with entire confidence. Under the circumstances, it is hardly possible for this court to say that one witness is more worthy of belief than another; and their testimony leaves the case in a most unsatisfactory condition.

The remaining testimony in the case consists of written instruments, and what may be called the acts of the parties, and in regard to these less uncertainty exists. But, as before remarked, it seems impossible to reconcile these acknowledged acts with the theory of either party. In the first place, Stewart, in his cross-bill in the *Goodspeed Case*, which was sworn to, alleged, in substance, "that he was so situated that he could not meet and pay the \$550 note to Richards; that there was a clause in the contract authorizing a forfeiture in case of non-payment of the principal when it became due or matured; that he feared that such a forfeiture might be declared; that, having had considerable dealings with George Leonard, he borrowed \$500 from him; that Leonard refused to advance the \$500 unless the contract was assigned to him for security; that Leonard agreed, upon repayment to him of the \$500, to reconvey the property to Stewart; that Leonard did pay the \$500 to Richards; that he (Stewart) paid the additional \$50, and assigned the contract to the said Leonard, and that thereupon Richards executed to Leonard a warranty deed; and further, that the assignment of the said contract, and subsequent conveyance, was for the purpose of securing Leonard for the amount of money advanced." It will be seen the allegations of his cross-bill in this respect are at variance with his oral testimony at the hearing of the cause, and it seems impossible to reconcile them. But even the allegations of the bill, if they stood alone, do not sustain the theory on which complainants' bill is framed. That proceeds on the ground that the deed from Richards to Leonard was made as security for Stewart's indebtedness to Fellows. The

allegation of his cross-bill is that the deed was only security for the \$500 which Leonard agreed to pay to Richards. The remainder of the cross-bill was given in evidence by defendants; and, of course, it was to be considered altogether,—that which made for him, as well as that which was against him. It is substantially alleged in the cross-bill by Stewart that he was not then indebted to Leonard in any sum. How these allegations came to be made in the cross-bill is not well explained. The suggestion they were written by the counsel who prepared the bill without sufficient knowledge of the facts, by no means relieves the embarrassment created by the contradictory statements. Again, Stewart in his schedule, made under oath, and filed in bankruptcy, states his indebtedness to the estate of Leonard, or the estate of Fellows, to be \$1,400. This statement is also in conflict with his testimony given in this case. It is not denied he was indebted to Fellows on two promissory notes; and it is said the indebtedness was stated in the larger sum, to cover all the claim that could be made by Fellows. The utmost that can be claimed is that these contradictory statements under oath, touching these important matters, have the effect to neutralize his testimony at the trial, and leaves the case precisely as if he had given no testimony at all. It cannot be said this court is to regard the allegations in the cross-bill as true, and disregard his testimony at the hearing of the cause. The allegations of the cross-bill do tend to discredit his testimony. But that is not all; they create no estoppel that might not be overcome by his own or other testimony in the case. On the other hand, the acts of the complainants, as before remarked, are inconsistent with the theory on which the amended bill is framed. In the original bill it was alleged the deed from Richards to Leonard was to secure Stewart's indebtedness to Leonard. By an amendment a new complainant was made, and it is then alleged the deed was a mortgage to secure indebtedness to Fellows. Another fact in the case is conceded, and as to which no question is made. It is that, on the eve of his departure for Colorado on account of failing health, Leonard executed a deed for the property to Mrs. Stewart, and left it with the book-keeper in the First National Bank for safe-keeping. The witness to whom the deed was handed in the bank states the instructions in regard to it were verbal and in writing. The written instructions were upon the back of the envelope containing the deed. The exact words, according to the recollection of the witness, are, "To be delivered in case of my death," and signed, "G. M. LEONARD." The witness then states: "At first he handed it in, written on it: 'To be delivered in case of my death. Orders of my executors;' and afterwards scratched out, 'Orders of my executors.'" The words "Orders of my executors," were scratched out at the suggestion of the witness, and the reason assigned is, "because he [Leonard] wanted it delivered to Dr. Stewart." It can hardly be doubted, if Leonard had died before returning from Colorado, it would have been the duty of the custodian of the deed to have delivered it to Stewart without the performance of any condition on his part whatever. This is one of the acts of a party to the transaction that is wholly inconsistent with the claim now made by complainants that the deed from Richards to Leonard was a mortgaged security to Fellows. Had the deed been a mortgage in the hands of Leonard, it is singularly strange he did not, when he left it for Mrs. Stewart with the bank, make it a condition precedent to its delivery, the payment of the indebtedness secured. But nothing of the kind was done. In the language of the witness, it was "simply to be delivered." Another fact, about which, of course, no controversy exists, that is inconsistent with the claim of complainants, is, that after his return from Colorado, and shortly before his death, Leonard made his will by which he devised the property in controversy to Fellows, subject to the conditions, nevertheless, "that in case one Ezra H. Stewart, dentist, now of Joliet, Ill., shall, within one year from the probate of this will, pay to said Fellows such sum, principal and interest, as shall, at the time of such payment, be due me

on an account now open between us, the principal sum, and interest thereon, then I authorize and empower said Fellows to convey said realty to said Stewart; and in such case I give and bequeath to said Fellows such sum of money, so paid, absolutely and without reserve." The will purports to have been made by Leonard on the "6th day of September, 1874." That is evidently a mistake of the person copying the transcript of the record; for all the testimony is the will was made on the 6th day of September, 1875, and that the testator died on the 7th day of the same month, being the next day thereafter. It will be observed the condition on which Fellows was to deed the property to Stewart was not that he should pay any indebtedness to Fellows, but that he should pay "such sum, principal and interest, as shall, at the time of such payment, be due me [the testator] on an account now open between us." The amended bill upon which this decree was rendered, does not charge that Stewart was indebted to Leonard "on an account now open between" them or otherwise, nor does the evidence show any indebtedness whatever from Stewart to Leonard. It seems most improbable, if the Richards deed was a mortgage to secure Fellows' claim against Stewart, that the provision of the will, upon the performance of which he was to deed the property to Stewart, was not stated to be the payment of the indebtedness Stewart was owing to Fellows, and not to the testator. The idea that the condition was to pay such indebtedness as Stewart may have owed to Fellows is absurd when read in connection with the closing clause of the paragraph, by which the testator bequeaths to "Fellows such sum of money, so paid, absolutely and without reserve." It is not to be supposed that Leonard undertook to bequeath to Fellows any money which Stewart owed to Fellows. That would, of course, be a useless thing, and such a construction would render these words of the will entirely meaningless. A contrary construction conforms to the whole scheme of the will, and makes its provisions consistent. Any further analysis of the evidence would be a work of supererogation. It stands proved past all doubt, in the origin of this transaction, Leonard was a trustee for Stewart, and in that capacity took the assignment of the bond for a deed from Richards. This is evidenced by the writing of February 7, 1873, the body of which is proved to be in the handwriting of Leonard, and the signature thereto is proved to be his genuine signature. In that instrument he acknowledges he has received an assignment of the bond, and holds it in trust for Stewart, and "subject to his order and control," and that he had paid no consideration for it. When did the relation created by that instrument cease, and when, if ever, did the relation of mortgagor and mortgagee begin? The evidence in this record fails to show. The proposition that such a relation exists at all rests upon no satisfactory evidence. Undoubtedly, the law is, if a trustee deals with his *cestui que trust* by which he is to receive any pecuniary profit, he must show by indubitable evidence the transaction is fair and equitable, and the burden of proving its justness rests upon him. Ordinarily, the law will not permit a trustee to contract with his *cestui que trust* for pecuniary advantage. The rule is a salutary one. It is for the protection of such persons as have committed their interests to the care and keeping of those occupying confidential relations towards them. If the trustee wishes to deal with his *cestui que trust* as with a stranger, he must first dissolve the fiduciary relations, so that they may deal at arms-length with each other. It is thought the case being considered comes within the inhibitions of these just principles. It cannot be denied that, in the first place, Leonard was a trustee for Stewart as to this property, and he could not become a mortgagee of the same property while that relation existed, without showing by the clearest and most undoubted evidence the transaction was fair, reasonable, and just. It can hardly be said such proof has been made in this case.

The judgment of the appellate court will be reversed, and the cause remanded to the circuit court, with direction to dismiss the bill.

(125 Ill. 335)

STEELE v. GRAND TRUNK JUNCTION RY. CO.*(Supreme Court of Illinois. June 16, 1888.)***1. LANDLORD AND TENANT—ACTION FOR POSSESSION—PRACTICE—JUSTICE OF THE PEACE.**

In an action of forcible detainer begun in a justice's court, where defendant pleaded in abatement the pendency of a former suit, it is error for the court, after deciding adversely to defendant on his plea, to render judgment against him without requiring plaintiff to give evidence to sustain his demand.

2. ABATEMENT AND REVIVAL—ANOTHER ACTION PENDING.

A suit to recover possession of land on the ground that the lease thereof has been terminated by failure to pay rent, and a suit seeking possession on the ground that the term for which the land was leased has expired, are based upon distinct causes of action, and the former cannot be pleaded in abatement of the latter.

3. APPEAL—PRACTICE—ASSIGNMENT OF ERRORS.

The decision of the appellate court denying a motion to strike a bill of exceptions from the files will not be reviewed in the supreme court where such decision is not assigned for error upon the record.

4. SAME—APPELLATE JURISDICTION—CERTIFICATE OF IMPORTANCE.

The certificate of importance made by the judges of the appellate court, certifying the grounds of granting an appeal to the supreme court, in cases where the sum in controversy does not exceed \$1,000, need not specifically point out the questions of law which are considered of sufficient importance to be passed upon by the supreme court; it is sufficient if it states that the cause decided "involves questions of law of such importance, either on account of principal or collateral interests, as that it should be passed upon by the supreme court."

Appeal from appellate court, First district.

H. F. Vallette, for appellant. *F. H. Culver*, for appellee.

SCOTT, J. This was an action of forcible detainer, brought before a justice of the peace by the Grand Trunk Junction Railway Company against Henry T. Steele, to recover possession of premises definitely described in the written complaint. It is alleged in the complaint, the time for which the premises had been let to defendant had expired, and that plaintiff was then entitled to possession. On the trial before the justice of the peace, defendant was found guilty of withholding the premises from plaintiff, and the usual formal judgment was rendered. That judgment was affirmed in the superior court of Cook county, and the judgment of the superior court was affirmed in the appellate court of the First district, and defendant brings the case to this court on appeal. After the papers in the appeal suit were sent up to the superior court, another paper, purporting to be a plea in abatement, was sent up by the justice of the peace, and was marked, "Filed," by the clerk of the superior court, by the order of that court. It appears to have been marked, "Filed," by the justice of the peace on the 19th day of May, 1884. That is the day on which the cause was called for trial in the justice's court. It does not appear from anything contained in the transcript filed in the superior court that the justice took any notice of the paper said to be a plea in abatement, or that his attention was called to it by either party to the suit. It is recited, "One witness was sworn and examined, and docket introduced in evidence;" and the cause was then continued to the day on which the final decision was rendered. On the trial in the superior court, that court found "the issues for plaintiff on the plea in abatement," and, without hearing any evidence whatever on the merits of the case, rendered judgment that plaintiff have restitution from defendant of the premises described in the complaint. It is this decision of the superior court that was affirmed in the appellate court, as before stated.

Before passing to consider the real ground of objection to the present judgment, it will be necessary to dispose of some preliminary questions raised by plaintiff, who is the appellee in this court. *First*. It is said this court has no jurisdiction to hear defendant's appeal, because it is said the "sum or value in controversy" does not exceed \$1,000, and there is no sufficient certificate from the judges of the appellate court to give this court jurisdiction. The record

does contain a certificate of importance, under section 8 of the appellate court act, made by a majority of the judges of the appellate court in which the cause was heard. It is said that this certificate is insufficient, for the reason it does not state or certify the "grounds of granting said appeal;" that is, it should have specifically pointed out in the certificate the questions of law which they considered of sufficient importance to be passed upon by this court. So much fullness in the making of the certificate of importance has not heretofore been required. It has always been held, that it is sufficient if it be stated, as is done in the certificate in this case, that the cause decided "involves questions of law of such importance, either on account of principal or collateral interests, as that it should be passed upon by the supreme court." There is no reason for departing from the practice that has been so long established in this respect. *Second.* It is said there is no bill of exceptions in the record. There is in the transcript of the record in the superior court what purports to be a bill of exceptions, in which the trial judge states the facts in regard to signing it, and "leaving the question that it was signed in time to the appellate court." On the hearing of the cause in the appellate court, plaintiff, who was defendant in error in that court, "moved the court to strike from the record the paper purporting to be a bill of exceptions." That motion the court took under advisement, and on a subsequent day of the same term the motion was denied by the court. As plaintiff has assigned no cross-errors on the record as respects the decision of the appellate court adverse to his motion, it will be understood he acquiesced in that decision. Had he wished to have that question further considered in this court, is indispensable he should assign it for error according to the uniform practice in this court. Omitting to do so, the decision of the appellate court denying the motion to strike the bill of exceptions from the files, whether correct or not, must stand.

The errors assigned by defendant, who is the appellant in this court, will require but a brief discussion. It is said the judgment is erroneous for many reasons, but the substance of all of them is, the court erred in rendering judgment against defendant without any proofs offered by plaintiff in support of his action. The only evidence offered in the trial court was that introduced by defendant himself to show a former suit between the same parties, for the same cause of action, that was then pending and undetermined in a court of competent jurisdiction. The omission on the part of plaintiff to introduce any evidence whatever to sustain his action is sought to be justified on the ground the trial was had on what is alleged to be a plea in abatement filed by defendant. It seems the court found the issues on that plea for plaintiff, and thereupon, without hearing any evidence on behalf of plaintiff, rendered judgment against defendant. This was clearly erroneous. *First.* There was no replication to the alleged plea; and if it were appropriate in a justice's court, and was unanswered, it would operate to abate the suit. It is recited in the bill of exceptions, "plaintiff took issue on said plea." The record contains no replication; and it is not stated in the bill of exceptions, any written replication was filed. If any issues were formed at all, it must have been simply by oral statement. *Second.* There is, and can be, no such thing as written pleadings in any action of forcible detainer in a justice's court. It is provided by statute, the complaint shall be in writing; but that is all. It might be otherwise had the suit been commenced in a court of record. Section 11 of the forcible entry and detainer act declares that trials under that act in courts of record "shall be the same as in other cases at law." But that section has no reference whatever to trials in actions of forcible detainer in a justice's court. Trials in such cases in the latter court are governed by section 10 of the same act. The impropriety of filing the paper called a "plea in abatement" in this case appears from the fact it prays the "writ and declaration" be quashed. It is unnecessary to say there is no such thing as a "declaration" in the sense that term is used in a plea in abatement in any

suit, for any cause, commenced in a justice's court. What is termed a "plea in abatement" in this case performed no office whatever, and might with great propriety have been permitted to remain in the justice's office, from whence it was brought by order of the court. Had defendant stated orally, before the trial commenced, he intended to offer evidence that a former suit was pending for the same cause of action between the same parties, it would have answered the same purpose. The written paper filed performed no other office than to notify plaintiff that such evidence would be offered on the trial, and that could have been done more appropriately, and according to the uniform practice, by oral statement. By filing written pleas in a justice's court, it is not in the power of defendant to compel plaintiff to reply in writing or otherwise. Should that practice be allowed, the anomaly would be presented of having the pleadings in a justice's court partly in writing and partly oral. The statute (section 35 of the act in relation to "Justices and Constables;" Rev. St. 1874) contemplates, when the parties appear for trial, the justice of the peace shall, in an informal way, hear their "respective allegations and proofs," and he shall then give judgment, either for plaintiff or defendant, as shall appear from all the evidence to be just and right. Even where defendant fails to appear, section 34 of the same act forbids the justice to render judgment for plaintiff unless he "shall fully prove his demand." The exception to this general provision is where the action is such that plaintiff may file an affidavit of claim. In all other cases the plaintiff must prove his demand as fully as if defendant was present and denied the same. That was not done in this case. Defendant was present, and demanded in open court that plaintiff should be required to sustain his action by proof; but the court refused to require him to do so, and rendered judgment for plaintiff without a particle of evidence to sustain the action. It cannot be known from anything contained in this record which party ought to have succeeded on the merits of the case. Neither party offered any evidence touching the merits of plaintiff's right to recover the possession of the premises. The omission of plaintiff to sustain his action by proof is fatal to the present judgment. It was no doubt irregular for defendant, in the first instance, before plaintiff had introduced his proofs, to give testimony as to the pendency of the former suit. It does not seem, however, any objection was taken to the adoption of that course; indeed, it was acquiesced in by plaintiff. Probably, it was well enough in this case; for, had the proof established the pendency of a former suit for the same cause of action between the same parties, that would have put an end to the present suit, and would have obviated the necessity for a trial of the merits of the cause. It was found by the trial court, and no doubt very correctly, the records offered in evidence by defendant did not show the pendency of a former suit for the same cause of action. In the former suit, it was alleged in the complaint, rent was due and unpaid, and that plaintiff had given notice of his election to terminate defendant's lease for non-payment of rent. The allegation in the complaint in this case is, the lease had expired, and that defendant still held over without right, after the expiration of the time mentioned in the lease. It is plainly seen the causes of action were not the same. The case of *Merrin v. Lewis*, 90 Ill. 505, is conclusive on this point in the case. After it had been determined the proof offered by defendant on that branch of his defense was not sufficient to show the pendency of a suit for the same cause of action, the court ought to have allowed defendant's demand that plaintiff should sustain his action by competent proof. To refuse that request, or, what is the same thing, to render judgment against defendant without a particle of evidence to sustain the justness of plaintiff's demand, is manifest error, for which the judgment of the appellate and superior courts will be reversed, and the cause remanded to the superior court.

(125 Ill. 351)

HUGHES v. AU SABLE QUARRY CO.*(Supreme Court of Illinois. June 16, 1888.)***APPEAL—PRACTICE—RECORD.**

Where no bill, answer, or replication, and no summons or other process appears in the transcript of a cause as certified by the clerk of the lower court, and there is no joinder in error, or appearance by defendant, or evidence of service of process on him, the order taking the cause for decision will be set aside, and the cause placed on the docket to be submitted in proper form at the next term of court, otherwise to be stricken from the docket.

Error to circuit court, Cook county; **M. F. TULEY**, Judge.

S. C. Stough and *A. W. Bulkley*, for plaintiffs in error. *M. C. Kelley*, for defendant in error.

PER CURIAM. It is evident this cause is in no condition to be submitted for decision. The transcript of the record filed in this court is very imperfect. There is no bill, answer or replication, and no summons, writ of injunction, or other process appears in the transcript as certified by clerk of circuit court. Errors have been assigned on the record such as it is, but there is no joinder in error or appearance by defendant, or any evidence of service of process upon him. It seems the record was filed in the office of the clerk of this court on the 28th day of February, 1885. The order taking the cause for decision will be set aside with directions to place the cause on the docket with the understanding that, unless the cause is ready to be submitted at the next term of this court, it will be stricken from the docket. Order taking case set aside.

(125 Ill. 237)

ILLINOIS STARCH CO. v. OTTAWA HYDRAULIC CO.*(Supreme Court of Illinois. June 16, 1888.)***1. MORTGAGES—STRICT FORECLOSURE—LEASE.**

Plaintiff gave defendant a lease containing a mortgage clause, constituting the rents reserved a first lien on all the buildings and machinery to be erected on the land. On a bill to foreclose, it appeared that defendant was insolvent; that its buildings had been lying idle and unoccupied for years, and were liable to destruction from fire; that its property was not of sufficient value to satisfy the rents accrued; and that a sale thereof would subject plaintiff to unnecessary expense and loss of rents. *Held*, that a decree of strict foreclosure was proper, though there was a judgment creditor of defendant who had purchased its equity of redemption in the premises.

2. LANDLORD AND TENANT—LEASE—TERM.

When plaintiff holding land under a lease for 20 years, with right to renew for like periods indefinitely on certain conditions, leases the same to defendant for 999 years, but subject to "all the covenants, conditions, limitations, and restrictions" contained in the first lease, the second lease is not absolute for the term named, but conditional on the prior termination of the first, and is such as plaintiff had power to make.

Error to appellate court, Second district.

Bill by the Ottawa Hydraulic Company to foreclose for rents due and unpaid under a mortgage clause contained in a lease of land and water-power executed to the Illinois Starch Company, then known as the Ottawa Starch Company. The lien covered the buildings and machinery of defendant erected on the land. From a judgment of the appellate court, affirming a judgment of the circuit court of La Salle county, awarding a strict foreclosure, without right to redeem, defendant brings error.

Bull, Strawn & Ruger, and *John Dean Caton* (*L. W. Brewer*, of counsel) for plaintiff in error. *Duncan, O'Connor & Gilbert* and *Lorenzo Leland*, for defendant in error.

PER CURIAM. This writ of error is prosecuted to the appellate court of the Second district, to reverse the judgment of that court, affirming the decree of

strict foreclosure rendered by the circuit court of La Salle county. We have carefully considered the record, and the several errors assigned thereon, and are of the opinion that there was no error in rendering said decree. We concur, both in the presentation of fact, and the application of principles, by the appellate court in its opinion, by BAKER, J., and for the reasons there stated the judgment of the appellate court is affirmed. The opinion of the appellate court is as follows:

"BAKER, J. The Illinois Starch Company was originally organized under the name of the Ottawa Starch Company, but afterwards its name was changed to that which it now bears. The present bill was filed by the Ottawa Hydraulic Company against the starch company for the purpose of foreclosing for rents due and unpaid under the mortgage clause contained in a lease executed by it to the starch company. The lease-bore date on the 1st day of March, 1856, and the demised premises were a certain water-power therein particularly described, and a tract of land on the west side of La Salle street, in Ottawa, also described, the water leased to be drawn from the hydraulic basin and used on said land. By the terms of the lease it was to continue and be in force for the period of 999 years, with the privilege of renewing the same, and the lessee covenanted to pay as rent the sum of \$2,500 per annum, to be paid quarterly in advance. The lease, among many other provisions, contained the following: 'It is further understood and agreed that in case of a failure on the part of the party of the second part, or its assigns, to pay the said rent at the time when it shall become due, time being hereby made an essential part of this contract, or in case of a failure to comply with all the covenants and conditions herein, and also with all the covenants, conditions, limitations, and restrictions contained in said lease from said canal trustees to said party of the first part, for the purpose of securing to the said parties of the first part prompt payment of the said rent, and the performance of the said covenants to be kept and performed by the said party of the second part, the said party of the first part shall have the right to declare this lease absolutely null and void, and so to consider; or the said party of the first part may, at its election, enforce the payment of said rent, and also for all damages for non-payment; and may also enforce compliance with the said lease from the said canal trustees, and with all the covenants in this lease; and may also, whether this lease shall be declared void or not, recover all damages for a breach of either of said leases by said party of the second part or its assigns. It is further understood and agreed that the rent therein covenanted to be paid by the said party of the second part, and also all of the covenants on the part of the said party of the second part herein contained, are to be a lien upon the said tract of land hereby leased, and all improvements thereon, or which may be put upon the same, which shall include machinery of every kind used upon the said premises.' The right of the Ottawa Hydraulic Company to the water-power and the land leased to the starch company was obtained under a lease dated the 24th day of May, 1852, from the board of trustees of the Illinois & Michigan canal to them. By the provisions of this latter lease this right expired at the end of 20 years from the date of such lease, with a right to renew the lease in periods of 20 years each, on the same terms, or at such higher terms as might be offered by the highest responsible bidder. In pursuance of these stipulations of the lease, it was afterwards renewed for a further term of 20 years, to expire in May, 1892. Upon the hearing the circuit court found the allegations of the bill of the hydraulic company to be true; that there was due, for rent and for interest on installments of rent after due, the sum of \$8,964.41; that it was entitled to a first lien on the premises and machinery; that the Illinois Starch Company was insolvent, and an execution would be unavailing; that it owned no property aside from its interest in the machinery and premises in question; that they were not worth over \$6,000, and were insufficient to

satisfy the amount due the hydraulic company; and that a sale would subject the latter to unnecessary charges and expenses. A decree was thereupon rendered for \$8,964.41, and for a strict foreclosure; and it was ordered that, in default of payment of the decree within 100 days from the entry thereof, the hydraulic company should be let into possession of the premises, and improvements thereon.

"Upon this writ of error three objections are urged against the decree. It is insisted that the lease to the starch company purported to convey an absolute, unqualified, and indefeasible leasehold estate for the period of 999 years, whereas the hydraulic company had no absolute right for any such period, but its right and interest was subject to termination by the canal trustees if they could get better rent for the water at the end of any period of 20 years; and that as the starch company, on the strength of its lease, expended large sums of money in building and making improvements, it was error to render a decree for the rent claimed by the hydraulic company without taking into consideration the fact that the starch company had been greatly damaged in the value of its expenditures by reason of the uncertain tenure of its water lease. There is no force in this point. The lease to the starch company expressly states that it is understood and agreed between the parties that all the conditions, limitations, and restrictions contained in the lease of the trustees of the Illinois & Michigan canal to the hydraulic company, bearing date the 24th day of May, 1852, are to apply to and constitute part of this lease, and that the starch company, its lessees and assignees, are to be governed, limited, and restricted by them; the water and land hereby leased being part of the water and land leased by the trustees to the hydraulic company in and by that lease. This provision in the contract shows that the two leases are to be taken and construed together, and that it was the understanding and agreement between the parties that the second leasehold interest was not for 999 years absolutely, but for that term in the event the first leasehold interest was not terminated prior to the expiration of that period. Besides this, George H. Norris, who was president of the starch company, and executed the lease on its behalf, was at the same time a stockholder and director of the hydraulic company, and as such had signed the agreement of May 24, 1852, between the canal trustees and the latter company. In fact, we find no evidence to prove the fraud that is alleged and stated in the answer of plaintiff in error.

"In the second place, it is claimed that the evidence does not show the value of the property was less than the rent due. Four witnesses were examined at the hearing on behalf of the hydraulic company, all of whom stated that they were well acquainted with the property. Lorenzo Leland testified that all of the buildings and machinery together were worth less than one-half of the debt. H. J. Logan testified that he was a mill-wright, and acquainted with buildings and machinery for manufacturing purposes, and had experience in judging of their value; that he had recently examined the buildings and machinery in question, and the whole were worth in all not to exceed \$5,000. M. A. Cushing testified that the whole thing would not be worth over \$5,000 for any purpose. William Thomas testified that the expense of remodeling the building, so as to adapt it for any practical purpose, would be greater than to build a new building for the same purpose, and that the expense of tearing it down would be greater than the value of the materials after it was torn down. Three witnesses were examined for the starch company. Charles A. Caton testified that the building and machinery had last been used for a few months in the winter of 1881-82; and that since that time the Sanders Bros. had been employed at an expense of \$2,500 to make repairs. He also made statements showing that, prior to the time mentioned, large sums of money had been expended upon the premises. He further said he would not undertake to state what the building was now worth, or make

any statement of its present value. William and Frank Sanders each declined to say what the building was now worth, but stated that it probably cost \$50,000 or \$60,000, and had depreciated at least 75 per cent. Without going further into the details of the testimony, we may observe that it conclusively shows that both the building and the machinery originally cost a great deal of money, and that years ago considerable sums were expended in making repairs, and that now they are both in a very dilapidated condition. The statements of the witnesses Sanders, that the building has depreciated in value at least 75 per cent., are not equivalent to statements that in their judgment the building was now worth the 25 per cent. of the original cost, as seems to be supposed by counsel. In fact, they refused to place a value upon it. In our opinion, the evidence would not have justified the court in assuming a higher valuation for the property than it did.

"The third and principal ground relied upon for a reversal of the decree is the claim that it was error to award a strict foreclosure of the mortgage clause of the lease, because it appeared from the evidence there was a judgment creditor of the Illinois Starch Company who was also a purchaser at sheriff's sale of its equity of redemption in the premises. We do not understand the rule in this state to be that a strict foreclosure will in no case and under no circumstances be allowed where there are other creditors or other incumbrances upon the mortgaged property, or purchasers of the equity of redemption. It is undoubtedly true that the general rule is that a strict foreclosure will not be permitted where there is such creditor, purchaser, or incumbrance; but, in our view, there are exceptions to this general rule. The authorities relied on by plaintiff in error are *Farrell v. Parlier*, 50 Ill. 275, and *Boyer v. Boyer*, 89 Ill. 447. In the first-mentioned case the supreme court said: 'In our state, and in view of our statute, it is only in strong cases, which form exceptions, that there should be decreed strict foreclosure. It may be, in rare cases, where it appears the property is of less value than the debt for which it is mortgaged, and the mortgagor is insolvent, and the mortgagee is willing to take the property in discharge of his debt, that a strict foreclosure may be allowed. But it is not, as a general rule, proper, when there are other incumbrances upon the property, or creditors or purchasers of the equity of redemption. The statute allowing redemption in such cases intends to make the property pay as much of the mortgagor's debt as it is worth.' Why was it said by the court that in any of the cases enumerated a strict foreclosure 'is not as a general rule proper?' Why did they not say that in such cases such foreclosure 'is not proper?' Why did they not omit the words, 'as a general rule?' We think the answer is obvious, and that it is plain they used those words as a qualifying clause, for the purpose of qualifying the inflexible rule that would have been announced by the language of the court with the words in question omitted. A statement, a thing is 'thus as a general rule,' *ex vi termini* imports there are exceptions to the rule enunciated. *Boyer v. Boyer* merely reiterates the doctrine announced and language employed in *Farrell v. Parlier*, and otherwise there was nothing in the case that throws light upon the present inquiry. Assuming, then, that there are or may be exceptional cases that do not fall within the rule which prohibits a strict foreclosure where there are other incumbrances or creditors or purchasers of the equity of redemption, the question arises whether the suit at bar is such exceptional case. The evidence shows that John D. Caton recovered a judgment for \$281,155.83 against the Illinois Starch Company, and that since this suit was begun the property in controversy was sold on an execution issued on said judgment for \$40,000 to Thomas D. Catlin, the business agent at Ottawa of Judge Caton. The evidence also shows that the plaintiff in error is wholly insolvent, and has no property of any kind besides that in respect to which its equity of redemption was foreclosed by the decree herein. It is important to bear in mind that by the terms of its contract the Ottawa Hydraul-

lic Company not only had the first lien upon the property, but a right to declare a forfeiture on the 1st day of January, 1883, and every three months thereafter; and had it chosen to execute such right it might, time and again, have entirely extinguished all claims of the Illinois Starch Company and its creditors in or to such property. Instead of enforcing the harsh and effectual remedy it held within its own grasp, and cutting off speedily and forthwith all right and interest of both plaintiff in error and its creditors, it sought relief in the court of equity, thereby expressing its willingness to waive the numerous acts of forfeiture, to give its debtor a day in court, and further and full opportunity to settle the just debt due it, and even the extension of the time of payment for a period of 100 days beyond the day of the entry of a decree of foreclosure. The evidence in this case shows that the property affords but scant payment to defendant in error for its debt, and that it is not reasonably possible that either the plaintiff in error or the other creditors could reap any benefit, even if the premises were sold with right of redemption. Most of the machinery has been removed, and that which is left is worth just about what old iron would sell for. The building is old, rotten, and out of repair, the doors and windows are many of them gone, and the roof has in part fallen in. The witnesses state these facts, and others of like effect, in regard to the present condition of the property, and they are not contradicted. They also state that tramps and stragglers can enter and go all through it, and sleep there without molestation, and that it is in constant danger of being burned. It would indeed be fortunate if not only defendant in error, but all the other creditors of the insolvent corporation, could make their debt out of this property, but that cannot be done. It is the intent of the law that the property of a mortgagor should pay as much of his indebtedness as it is worth, but the law does not presume it will pay more than it is worth. It would seem no good or beneficial result would be accomplished by keeping the hydraulic company out of possession 15 months longer. The property is not worth its debts now, and is constantly deteriorating in value. This is not the case of an ordinary foreclosure of mortgage, where the amount due upon the preferred lien would increase only at the rate of 6 per cent. per annum; but here the preferred lien, at the end of 15 months, will have increased, not only to the extent of 6 per cent. upon \$8,964.41, the amount of the decree, but in the further sum of \$3,125 for rents accrued in the interim, unless the inequitable doctrine should be held that defendant in error should lose all benefit of its water-power and land during such interim. The premises have been used for no beneficial purpose since the winter of 1881-82, and, if sale had been decreed with right of redemption, they would have lain idle for 15 months longer. In our opinion, the whole question lies in a nutshell. The court of equity will not, by a decree of strict foreclosure, sacrifice the just and equitable rights of creditors, or of those holding second liens, or the equity of redemption. Neither will the court of conscience sacrifice or endanger the rights of a complainant who comes within her portals with a just cause, and holding the oldest and preferred lien and best equity, for the bare possibility of a wholly improbable benefit to one having a second lien and subordinate equity. In this case, if sale and redemption were allowed by the decree, and no redemption made, all the loss occasioned by the further decay and destruction of the property would fall upon defendant in error. It would also lose all interest upon its decree and \$3,125 in water-rents, and would at the same time be compelled to pay rents upon the water-power and property to the canal trustees. The building is exposed to great danger of destruction by fire, and in the event it were burned down during the 15 months allowed for redemption the loss would fall wholly upon the hydraulic company, and in that case, in addition to losing the water-rents accruing after decree entered, it would lose the moneys adjudged to it by the decree. The rule that is intended to conserve the equities of the creditor should not

be used as a weapon to endanger or destroy the rights of the holder of the superior equity. We think the present case, owing to the altogether peculiar circumstances out of which it arises and of the property, is one of the exceptional cases which the opinion in *Farrell v. Parlier* intimates does not fall within the rule there announced. The decree of the strict foreclosure is affirmed."

(121 Ill. 269)

HUNT, Atty. Gen., *et al.* v. FOWLER *et al.*

(*Supreme Court of Illinois.* June 17, 1837.)

For majority opinion, see 12 N. E. Rep. 331.

SCHOLFIELD, J., (*dissenting.*) I do not concur in this opinion. I hold that courts of equity in this state exercise no prerogative powers, but, as contradistinguished therefrom, only judicial powers; that, not exercising prerogative powers, the court could not, by the act of the individual, be, and here is not, invested with a power not judicial, namely, that of selecting or designating the "worthy poor" to be the recipients of the testatrix's bounty; and that, since it has not been and could not be invested with such power, it cannot appoint and invest a trustee with such power. I concede the testatrix might have invested a trustee with such power, leaving and directing the court to appoint the trustee; but that is a very different case.

(147 Mass. 185)

ADAMS v. MESSENGER.

(*Supreme Judicial Court of Massachusetts.* Middlesex. June 19, 1838.)

SPECIFIC PERFORMANCE—ENFORCEABLE CONTRACT—ASSIGNMENT OF PATENT-RIGHTS.

A patentee contracted to furnish and deliver a certain number of the patented articles within a specified time, and, in case of his taking out United States patents for improvements, to take out Canadian patents, and assign them to the purchaser. *Held*, that the provision for the sale of the articles could be specifically enforced in equity, even if the provision with reference to Canadian patents could not be; and that, for all that appeared of Canadian law, the latter provision was so far enforceable in the courts of Massachusetts that plaintiff might ask an assignment of defendant's title to the improvements as far as Canada was concerned, and a preliminary injunction against incumbering the right to Canadian patents.

Appeal from supreme judicial court, Middlesex county.

Bill in equity, by George B. Adams against William T. Messenger, to compel the performance of an agreement to furnish the plaintiff with certain perfect working injectors for steam-boilers, and to apply for and assign to plaintiff certain letters patent in the dominion of Canada. Hearing in the supreme judicial court upon defendant's demurrer, which was sustained, and the plaintiff appealed. The facts are stated in the opinion.

Wm. B. Durant, for plaintiff.

"Agreements for the assignment of a patent, and for delivery of chattels which can be supplied by the vendors alone, are among those which will be specifically enforced." *Hagood v. Rosenstock*, 23 Fed. Rep. 86; *Satterthwait v. Marshall*, 4 Del. Ch. 337; *Binney v. Annan*, 107 Mass. 94; Fry, Spec. Perf. § 33; Wat. Spec. Perf. § 18; *Burke v. Smyth*, 3 Jones & L. 193; *Willis v. Astor*, 4 Edw. Ch. 594. Specific performances will be ordered of an agreement to sell shares of stock, where the value is uncertain, or the stock cannot be purchased in the market, (Wat. Spec. Perf. § 19; *White v. Schuyler*, 1 Abb. Pr. N. S. 300; *Treasurer v. Mining Co.*, 23 Cal. 390;) also of an agreement to construct an archway under a railroad, or a siding of a specified length, (*Storer v. Railway Co.*, 2 Younge & C. Ch. 48; *Greene v. Railway Co.*, L. R. 13 Eq. 44;) and of an agreement to accept and pay for water-works, (*Water-Power Co. v. Columbia*, 5 S. C. 235.) It is evident from these decisions that the mere facts that the delivery of chattels may call for me-

chanical skill and personal labor on the part of the defendant will not prevent the court from exercising jurisdiction. The value of a patent-right cannot be ascertained by computation only, or by any sufficient certain estimate, so as to make a suit at law for damages an adequate remedy for a breach of a covenant to assign the right. This is the true test of the jurisdiction for specific performance. *Satterthwait v. Marshall*, 4 Del. Ch. 337. Equity will order a defendant to apply for a patent, and, when obtained, assign it to the plaintiff. *Runstetler v. Atkinson*, 4 MacArth. 382; *Newell v. West*, 13 Blatchf. 114; *Somerby v. Buntin*, 118 Mass. 279. Unless, then, the fact that the letters patent are to issue from the government of a foreign country prevents the exercise of equitable jurisdiction in this case, the plaintiff would be entitled to relief under the authority of the decisions just cited. The prayer of the bill is merely that the defendant perform his agreement to apply for letters patent, and, when received, (or if received,) assign them. It is not necessary, for this purpose, that the defendant should leave the state of Massachusetts. He can make application and receive a patent by mail. He is not asked or required to go out of the jurisdiction. It is sufficient if he simply signs his name, and makes affidavit to the application, here in Massachusetts. Pat. Laws Can. 35 Vict. c. 26; 36 Vict. c. 44, §§ 6, 11-15. "A personal appearance of the applicant or his representative at the patent-office is not required." Rules of Canadian Patent-Office, Nov. 1st, 3d, 5th. The plaintiff submits that the courts have gone further already than to order a defendant to apply by mail to the government of Canada, with the proper papers, and, if he receives a patent, assign it to the plaintiff. A person may be enjoined from suing abroad, in breach of a contract, or may be compelled to convey land situated abroad. *Pingree v. Coffin*, 12 Gray, 288; *Dehon v. Foster*, 4 Allen, 545; Wat. Spec. Perf. § 48; 2 Story, Eq. Jur. §§ 899, 900, 1291; Fry, Spec. Perf. §§ 102, 103. A creditors' bill may be maintained here to reach land in a foreign country, and a conveyance of the same compelled. Such conveyance, necessarily, must be according to the laws of the foreign country, and the deeds must be sent to the foreign country for record. *Bailey v. Ryder*, 10 N. Y. 363; *Cleveland v. Burrill*, 25 Barb. 532; *Newton v. Bronson*, 13 N. Y. 587. If a defendant can be ordered not to apply to the court of a foreign country, as has been decided, it would seem, conversely, that he might be ordered to apply, if he can do so without leaving the jurisdiction. *Lord Portarlington v. Soubby*, 3 Mylne & K. 104. But, however these grounds of demurrer may be disposed of, it appears that the plaintiff's bill prays also for an assessment of damages. Therefore, if the court, for any reason, should deny specific performance of the contract, the bill may be "retained, and, under the prayer for damages, the decree may be moulded to one of damages for non-conveyance." GRAY, C. J., in *Pingree v. Coffin*, 12 Gray, 305; *Andrews v. Brown*, 3 Cush. 136; *Peabody v. Turbell*, 2 Cush. 226. Specific performance and damages may be prayed for in the same bill, and relief granted, partly by way of damages, and partly by order for specific performance. *Curran v. Water-Power Co.*, 116 Mass. 90; Aldr. Eq. Pl. & Pr. 201, 202; *Milkman v. Ordway*, 106 Mass. 253. "No action or suit shall be defeated on the ground that there is an adequate remedy at law, or that the relief sought can only be obtained by a suit in equity." The dismissal of the bill was therefore erroneous. St. 1883, c. 223, § 17. If any argument should be addressed to the court upon the form of the bill, it seems sufficient to say that the form is taken from the statute of 1883, and the only text-book upon equity pleading and practice thereunder, and that it sets out a mutual agreement under seal. St. 1883, c. 223; Aldr. Eq. Pl. & Pr. 322.

Charles S. Knowles, for defendant.

The common law is, and the law of this commonwealth, both by common and statute law, has been, until altered by St. 1887, c. 383, that no plaintiff

shall be permitted to maintain a suit in equity when he has a plain, adequate, and complete remedy at law by a suit for damages. *Russell v. Barstow*, 144 Mass. 130, 10 N. E. Rep. 746; Pub. St. c. 151, § 2; *Hodge v. Cole*, 140 Mass. 116, 2 N. E. Rep. 774; *Stetson v. Moulton*, 140 Mass. 597, 600, 5 N. E. Rep. 809; *Allen v. Storer*, 132 Mass. 372, 377; *Perkins v. Hendryx*, 23 Fed. Rep. 418; *Knight v. Ashland*, 61 Wis. 246, 21 N. W. Rep. 72. St. 1883, c. 223, § 17, did not extend or enlarge the equity jurisdiction of the court, but simply indicated a more speedy and direct course to be pursued by a plaintiff who had brought a suit in equity when his remedy was at law, and *vice versa*. Its construction is indicated by decisions rendered since the passage of said statute. *Russell v. Barstow*, 144 Mass. 130, 10 N. E. Rep. 746; *Lenz v. Prescott*, 144 Mass. 505, 514, 11 N. E. Rep. 923; *Hodge v. Cole*, 140 Mass. 116, 2 N. E. Rep. 774; *Stetson v. Moulton*, 140 Mass. 597, 600, 5 N. E. Rep. 809; *Pratt v. Pond*, 5 Allen, 59. St. 1887, c. 383, does not give a court of equity jurisdiction over this case, since this suit was begun before the passage of that act. These statutes, enlarging and extending equity jurisdiction, must be construed strictly. *Buck v. Dowley*, 16 Gray, 555, 558; *Pratt v. Pond*, 5 Allen, 59. According to practice in this commonwealth, a bill is demurrable, not only if it show that the plaintiff has a remedy at law, but if it fails to show that he is without such remedy. *Pool v. Lloyd*, 5 Metc. 525, 528, 529; *Woodman v. Saltonstall*, 7 Cush. 181; *Pratt v. Pond*, 5 Allen, 59. The supreme court, sitting in equity, cannot grant the relief which is sought by the prayer of the plaintiff's bill. The general rule of the common law is that a bill in equity will not be maintained to enforce the specific performance of a contract, the subject-matter of which is personal property; and it devolves upon the party seeking such performance to put himself within one of the exceptions to this general rule. Specific performance of a part only of a contract will not be decreed; the door being left open for other suits. *Marble Co. v. Ripley*, 10 Wall. 339, 359; Pub. St. c. 151, § 2; *Stocker v. Wedderburn*, 3 Kay & J. 393, 407; *Cowles v. Whitman*, 10 Conn. 121; *Coal Co. v. Canal Co.*, 31 N. Y. 91; *Kimberley v. Jennings*, 6 Sim. 352; *McLane v. Elmer*, 4 Ind. 239; *McGarvey v. Hall*, 28 Cal. 140; *Bank v. Seton*, 1 Pet. 299; *Carlisle v. Carlisle*, 77 Ala. 339. A court of equity will not enforce the specific performance of a contract for personal services, especially when such services stipulated for require the exercise of mechanical skill, intellectual ability, or judgment, (*Wollensak v. Briggs*, 20 Bradw. 50; *Stocker v. Wedderburn*, 3 Kay & J. 393; *Clarke v. Price*, 2 Wils. 157; *Ford v. Jermon*, 6 Phila. 6; *Mapleson v. Del Puente*, 13 Abb. N. C. 144; *Kemble v. Kean*, 6 Sim. 333; *Marble Co. v. Ripley*, 10 Wall. 339, 359; *Hamblin v. Dinneford*, 2 Edw. Ch. 529;) nor to enforce the specific performance of a contract to make an invention, or to build a machine embodying the same, (*Wollensak v. Briggs*, 20 Bradw. 50;) nor to enforce the specific performance of a contract when it is impossible for it to specify or describe in its decree the particular thing to be done, or when, if it attempted to lay its mandate upon the defendant to proceed, it could never know with certainty whether its order was obeyed, and especially never when there is any possibility that collusion may defeat the object of the decree, (*Id.*; *Ford v. Jermon*, 6 Phila. 6; *Marble Co. v. Ripley*, 10 Wall. 339, 358.) The securing of letters patent in Canada involves the action of officers of a foreign government, and cannot be the subject of an order for specific performance, nor will the court ever require specific execution when a compliance with its mandate involves the acts, will, or volition of persons not parties to the action, and not within the jurisdiction of the court. *Hurlbut v. Kantzler*, 112 Ill. 482. The plaintiff's bill cannot be sustained, unless the objects of its prayer are definite and certain, and nothing is left to be supplied by inference or conjecture. *Carlisle v. Carlisle*, 77 Ala. 339; 12 U. S. Dig. (1st Ser.) 613; *Marble Co. v. Ripley*, 10 Wall. 339, 358. The plaintiff's bill was brought primarily for specific performance; and, as it cannot

be maintained for that form of relief, the bill will not be retained for the granting of an injunction, nor for the assessment of damages, which objects are only ancillary and secondary to the prayer for specific performance; and for the same reason, granting that the injunction were the primary object of the bill, the bill cannot be retained for the assessment of damages unless the injunction is granted. *Emery v. Bidwell*, 140 Mass. 271, 275, 3 N. E. Rep. 24; *Pool v. Lloyd*, 5 Metc. 525, 529; *Root v. Railway Co.*, 105 U. S. 189; *Stanford v. Lyon*, 37 N. J. Eq. 94; *Kemble v. Kean*, 6 Sim. 333; *Geiger v. Patterson*, 4 Gill, 472, 475; *Chambers v. Cannon*, 62 Tex. 293; *Gelston v. Meyenberg*, 27 Md. 334; *Kimberly v. Jennings*, 6 Sim. 341; *Ford v. Jermon*, 6 Phila. 6; *Allen v. Burke*, 2 Md. Ch. 537; *Durell v. Pritchard*, L. R. 1 Ch. 244; *Martin v. Douglass*, 16 Wkly. Rep. 268; *Hamblin v. Dinneford*, 2 Edw. Ch. 529. This was a principle of the common law, and prevailed in England until the passage of St. 21 & 22 Vict. c. 27, (see section 2,) and 25 & 26 Vict. c. 42, (see section 1;) and in the state of Massachusetts until the passage of St. 1837, c. 383, which, however, was not passed until after this suit was begun. *Emery v. Bidwell*, 140 Mass. 271, 275, 3 N. E. Rep. 24; *Wedmore v. Bristol*, 11 Wkly. Rep. 136; *Johnson v. Wyatt*, 9 Jur. (N. S.) 1333; *Durell v. Pritchard*, L. R. 1 Ch. 244; *Martin v. Douglass*, 16 Wkly. Rep. 268. But, if the injunction were the primary object of the bill, it cannot be maintained, since the plaintiff has a plain, adequate, and complete remedy at law. *Francis v. Flinn*, 118 U. S. 385, 6 Sup. Ct. Rep. 1148; *Finley v. Thayer*, 42 Ill. 350. Neither is a general allegation of irreparable injury, nor apprehension of threatened wrong, sufficient; but the facts on which the allegation is founded must appear. *Hale v. Railroad Co.*, 23 W. Va. 454; *Mariposa Co. v. Garrison*, 26 How. Pr. 448; *Casey v. Holmes*, 10 Ala. 776, 785; *Morse v. Water-Power Co.*, 42 Me. 119. The defendant is entitled to his costs. *Pool v. Lloyd*, 5 Metc. 525, 529; *Elder v. Manufacturing Co.*, 4 Gray, 201; *Stocker v. Wedderburn*, 3 Kay & J. 407.

DEVENS, J. It is the contention of the defendant that the plaintiff has a full, complete, and adequate remedy at common law by a suit for damages, and that the court, sitting in equity, cannot grant the relief sought by the prayers of the bill. The controversy arises from the failure to perform an executory written contract. So far as this relates to personal property, the objections arising from the statute of frauds, which have sometimes been found to exist when oral contracts were sought to be enforced, have, of course, no application. The general rule that contracts as to the purchase of personal property are not specifically enforced, as are those which relate to real property, does not rest on the ground of any distinction between the two classes of property other than that which arises from their character. Contracts which relate to real property can necessarily only be satisfied by a conveyance of the particular estate or parcel contracted for, while those which relate to personal property are often fully satisfied by damages which enable the party injured to obtain elsewhere in the market precisely similar property to that which he had agreed to purchase. The distinction between real and personal property is entirely subordinate to the question whether an adequate remedy can thus be afforded. If, from the nature of the personal property, it cannot, a court of equity will entertain jurisdiction to enforce the contract. 1 Story, Eq. Jur. § 717; *Clark v. Flint*, 22 Pick. 231. A contract for bank, railway, or other corporation stock, freely sold in the market, might not be thus enforced, but it would be otherwise where the stock was limited in amount, held in a few hands, and not ordinarily to be obtained. *White v. Schuyler*, 1 Abb. Pr. (N. S.) 300; *Treasurer v. Mining Co.*, 23 Cal. 390; *Poole v. Middleton*, 29 Beav. 646; *Doloret v. Rothschild*, 1 Sim. & S. 590. Where articles of personal property, also, are peculiar and individual in their character, or have an especial value on account of the associations connected with them, as pictures,

curiosities, family furniture, or heirlooms, specific performance of a contract in relation to them will be decreed. *Lloyd v. Loaring*, 6 Ves. 773; *Fells v. Read*, 8 Ves. 70; *Louther v. Louther*, 13 Ves. 95; *Williams v. Howard*, 3 Murph. 74. An agreement to assign a patent will be specifically enforced. *Binney v. Annan*, 107 Mass. 94. Nor do we perceive any reason why an agreement to furnish articles which the vendor alone can supply, whether because their manufacture is guarded by a patent or for any other reason, should not also be thus enforced. *Hapgood v. Rosenstock*, 23 Fed. Rep. 86. As the value of a patent-right cannot be ascertained by computation, so it is impossible, with any approach to accuracy, to ascertain how much a vendee would suffer from not being able to obtain such articles for use in his business.

The contract of the defendant was twofold: to furnish and deliver certain described workingsteam-injectors, within a specified time, to the plaintiff; and also that if the defendant shall make improvements in injectors for steam-boilers, and shall take out patents therefor in the United States, he will apply for letters patent in Canada, and, on obtaining them, will assign and convey the same to the plaintiff, and that he will not do any act prejudicial to these letters patent of Canada, or the monopoly thus secured. It is said that the court will not enforce a contract for personal services when such services require the exercise of peculiar skill, intellectual ability, and judgment, and that, therefore, the defendant cannot be ordered to make and deliver the injectors contracted for. But the principle on which it is held that a court of equity cannot decree one to perform a personal service involving peculiar talent or skill, because it cannot so mould its order and so supervise the individual executing it that it can determine whether he has honestly obeyed it or not, has no application here. The defendant has agreed to furnish and deliver certain injectors, which the contract shows to be patented articles. There is nothing in the bill from which it is to be inferred that they were yet to be made when the contract was executed; but, if it be assumed that they were, there is nothing from which it can be inferred that any skill peculiar to the defendant was required to construct them. For aught that appears, they could be made by any intelligent artificer in the metals of which they were composed. The details of their manufacture are given by reference to the patents, which are referred to in the agreement; so that no difficulty, such as has sometimes been experienced, could have been found in describing accurately and even minutely the articles to be furnished. Nor are there found in the case at bar any continuous duties to be done, or work to be performed, requiring any permanent supervision, which, as it could not be concluded within a definite and reasonable time, has sometimes been held an obstacle to the enforcement of a contract by the court. Agreements to make an archway under a railway, or to erect a siding at a particular point for the convenience of the land-owner, have been ordered to be specifically enforced. Although the party aggrieved might have obtained damages which would have been sufficient to have enabled him to pay for constructing them, and although the work to be done necessarily involved engineering skill as well as labor, he was not bound to assume the responsibility or the labor of doing that which the defendant had agreed to do. *Storer v. Railway Co.*, 2 Younge & C. Ch. 48; *Greene v. Railway Co.*, L. R. 13 Eq. 44. The case at bar is readily distinguishable from that of *Wollensak v. Briggs*, 20 Bradw. 50, on which the defendant much relies. In that case the defendant was to construct for the plaintiff certain improved machinery for a particular purpose, but no details were given as to the form, structure, principle, or mode of operating the proposed machine. It was obviously a contract too indefinite to enable the court to order its specific enforcement.

It is urged that specific performance of a part only of a contract will not be ordered when it is not in the power of the court to order the enforcement of the whole, and that it would not be possible to enforce that portion of the

contract which relates to the application for letters patent in Canada, and the subsequent assignment of them. But where two parts of a contract are distinctly separable, as in the case at bar, there is no reason why one should not be enforced, and the plaintiff compensated in damages for the breach of the other. When a contract relates to but a single subject, and it is impossible for the defendant to perform it except partially, the plaintiff is entitled to the benefit of such partial performance, and to compensation, if it be possible to compute what is just, so far as it is unperformed. It was therefore held in *Davis v. Parker*, 14 Allen, 94, that where one had agreed to convey land, with release of dower, and was unable to procure a release of dower, the purchaser was entitled to a conveyance without such release, with an abatement from the purchase money of the value of the wife's interest at the time of the conveyance. See, also, *Milkman v. Ordway*, 106 Mass. 253; *Curran v. Water-Power Co.*, 116 Mass. 90.

We have assumed, in favor of the defendant's contention, that the only relief that the plaintiff could obtain for the breach of that portion of the agreement which relates to the application for a patent in Canada for the improvements which defendant had made, would be in damages. We have not intended thus to decide. That equity, by virtue of its control over the persons before the court, takes cognizance of many things which they may do or be able to do abroad, while they are themselves personally here, will not be controverted. One may be enjoined from prosecuting a suit abroad. He may be compelled to convey land situated abroad, although the conveyance must be according to the laws of the foreign country, and must be sent there for record. *Pingree v. Coffin*, 12 Gray, 288; *Dehon v. Foster*, 4 Allen, 545; *Cunningham v. Butler*, 142 Mass. 47, 6 N. E. Rep. 782; *Bailey v. Ryder*, 10 N. Y. 363; *Newton v. Bronson*, 13 N. Y. 587. There is nothing to show that the plaintiff, in making his application in Canada for the patent, is compelled to leave the state, any more than he would be compelled to do so if he was an applicant at Washington. The grant of such a patent is an act of administration only. If it were to be granted here, the party would be ordered to make application. It was held in *Runstetter v. Atkinson*, 4 MacArth. 382, that where a formal assignment of an invention had not been made, but a valid agreement had been made so to assign, equity would order the party to make the formal assignment, and also to make application for the patent, which, in such case, would issue to the assignee. The laws of Canada, which we can know only as facts, are not before us by any allegations as to them. If all that is required by them is a formal application in writing by the inventor, there would seem to be, from the allegations of the bill, sufficient reason why the defendant should be required to make and forward it, or place it in the hands of the plaintiff to be forwarded, to the Canadian authorities. In any event, as the application is preliminary only to obtaining letters patent for the purpose of assigning them to the plaintiff, the averments of the bill, taken in connection with the terms of the agreement, set forth a good reason why the plaintiff may ask an assignment of his title to the improvements in question from the defendant, so far as the dominion of Canada is concerned, and also why the defendant should be restrained from alienating or in any way incumbering any right he may have to letters patent from Canada if plaintiff should decide to seek his remedy in this form, rather than in damages for breach of this part of the contract. Demurrer overruled.

(147 Mass. 263)

ATLANTIC COTTON-MILLS v. INDIAN ORCHARD MILLS.

(Supreme Judicial Court of Massachusetts. Suffolk. June 20, 1883.)

1. PRINCIPAL AND AGENT—CONSTRUCTIVE NOTICE TO PRINCIPAL OF AGENT'S FRAUD.
Where the defaulting treasurer of a corporation, whose defalcation is as yet unknown and unsuspected, steals money from a third person, and places it with the

funds of the corporation in order to conceal and make good his defalcation, without the knowledge of any other officer, the corporation, having used the money as its own, does not thereby acquire a good title to it, as against the true owner, since it is charged with the knowledge of its treasurer, who was its sole representative in the transaction.¹

2. SAME—BOOK ENTRIES OF AGENT.

The treasurer of two corporations took money from one and placed it with the funds of the other, to conceal and make good a defalcation, no other person having knowledge of the fact of the defalcation or the misappropriation of the money. *Held*, that the fact that the treasurer upon a private memorandum charged himself with the sums fraudulently withdrawn by him was immaterial, and that the corporation receiving the money without consideration could not avoid liability for its return by showing that the treasurer entered the same upon the books of the other corporation as loans to other persons, and that the latter corporation had endeavored to collect the same from such persons.

Reported case from supreme judicial court, Suffolk county; DEVENS, Judge. This action was by the Atlantic Cotton-Mills against the Indian Orchard Mills, and, taken with the declaration in set-off and the answers thereto, was one brought to settle all accounts between the parties, of which the controverted parts related to certain losses caused by the defalcation of William Gray, Jr., from 1881 to August, 1886. Gray was the treasurer of both companies, and committed frauds on both. The frauds were discovered on the last-mentioned day, and Gray then resigned both offices. There was a legitimate course of borrowing and lending on book-account between the parties, conducted wholly by Gray, by means of checks of one mill in favor of the other, and the plaintiff's claim was for the balance of this loan account, which, as appeared by their ledgers, was \$365,500. The defendants contended that the amount actually due was \$146,385.52, and that they were entitled to recover upon their declaration in set-off the sum of \$219,114.48. The auditor to whom the case was referred found, among other things, as follows: "When the frauds were exposed August 14, 1886, the transfers of cash by checks, as above mentioned, made to conceal the truth, were larger by the defendants to the plaintiffs than from the plaintiffs to the defendants by the sum in dispute, viz., \$219,114.48, which is the difference between \$365,500 and \$146,385.52; and the question is whether the defendants ought to be credited with this amount. The balance is, in a certain sense, accidental; depending on the fact that the frauds were discovered about six weeks after the Atlantic Mills had made up their semi-annual account, at which time their cash was made good from the defendants' treasury, and before Gray had gone far in preparing for the next settlement with the defendants by transferring to their credit checks of the Atlantic Mills. He had in fact transferred about \$50,000. If the Atlantic Mills can hold this sum of \$219,114.48, their loss by Gray will be \$47,627.57, and that of the defendants \$486,680. It follows, from the mode in which the transfers of cash were made, that if each company is charged with the checks transferred to it from the other the exact amount of money taken by Gray from each company will be lost by the company. This is the mode of accounting contended for by the defendants. If the Indian Orchard Mills can recover of the Atlantic Mills the balance of \$219,114.48, it will not extinguish the deficit in its cash, shown by the *memoranda*, \$187,950, but it will receive the sum of \$31,164.48 towards refunding the sums carried through its books to fictitious persons. I rule, as matter of law, that the account should be made up as asked for by the defendants, and that consequently the defendants owe the plaintiffs \$146,385.52 and interest." The

¹Where the cashier of a bank fraudulently procures plaintiff's note as an accommodation, for his personal benefit, and, selling the same, receives in payment a draft, which he indorses to his bank, it being ignorant, except through him, of the circumstances of the transaction, the bank is not charged with notice of the fraud, the usual presumption that an agent has disclosed his knowledge to his principal not in this case arising, since the circumstances render it certain that the cashier did not so disclose his knowledge to the bank. *Hummell v. Bank*, (Iowa,) 37 N. W. Rep. 954.

case was heard upon the auditor's report in the supreme judicial court, and reported to the full court. Other facts are stated in the opinion.

J. G. Abbott, R. M. Morse, Jr., and C. S. Hamlin, for plaintiff.

The defendant has the burden of proof to maintain this claim in set-off. If it could not maintain an independent action to recover, it cannot maintain its claim in set-off. The magnitude of the amounts involved has no legal significance. The sole inquiry is whether, upon legal principles, the defendant can recover this money of plaintiff. *Bank v. Bank*, 10 Gray, 559. The plaintiff contends that this loss must remain where it has fallen, and that the Indian Orchard cannot recover on any part of its claim in set-off. The plaintiff, in denying the defendant's right to maintain its claim in set-off, relies on these propositions: (1) That it was a creditor of Gray for the amount of each of his abstractions from its treasury; (2) that the checks or the proceeds of the checks of the Indian Orchard Mills transferred by Gray, without regard to his intention as to their use, have in fact been appropriated to the payment of his debts to the Atlantic Mills; (3) that Gray had the legal title to the checks and funds on which they were drawn, and did in fact transfer that title to the plaintiff; (4) that the Atlantic Mills had no actual knowledge of Gray's fraud; (5) that Gray's knowledge will not be imputed to the plaintiff; (6) that even if the defendant could maintain its claim where the frauds were perpetrated by two persons, one of whom was the agent of plaintiff and the other of the defendant, it cannot do so where the frauds are those of a common fiduciary; (7) that the Indian Orchard Mills has been negligent in the management of the business, especially as regards its relation with Gray and with the plaintiff, and that by reason of that negligence it has caused, or has contributed to cause, the losses out of which this controversy has arisen, and that, therefore, it cannot maintain its claim in set-off; (8) that it is estopped to deny the correctness of the transactions as shown on its books. In examining the authorities, we consider first the very few cases upon which the defendant will probably base its claim. But they can readily be distinguished from the case at bar. *Bank v. Bank*, 10 Gray, 532; *Skinner v. Bank*, 4 Allen, 290; *Bank v. U. S.*, 16 Ct. Cl. 54; *Bank v. U. S.*, 114 U. S. 401, 5 Sup. Ct. Rep. 888. See Bigelow, *Fraud*, 239, note; *Distilled Spirits*, 11 Wall. 356. We now proceed to examine the decisions of this court which bear upon any of the propositions involved in this case. *Ingraham v. Bank*, 13 Mass. 208; *Bank v. Plimpton*, 17 Pick. 159; *School-Dist. v. Bank*, 102 Mass. 174; *Thacher v. Pray*, 113 Mass. 291, *Pope v. Lowitz*, 14 Bradw. 96; *Innerarity v. Bank*, 139 Mass. 332, 1 N. E. Rep. 282. Here, as in the case at bar, one of two innocent parties must suffer by the fraud of their common agent or fiduciary, and it was determined that the loss must rest where it had fallen. See, also, *Insurance Co. v. Abbott*, 131 Mass. 397. But there are a series of decisions in harmony with the Massachusetts cases above cited, wherein the courts have dealt more closely with the precise question presented in this case, so far as it arises from the fraud of a common fiduciary, though in none of them, it is submitted, have the facts been so favorable to the plaintiff's contention. *Ex parte Apsey*, 3 Brown, Ch. 265; *Jaques v. Marquand*, 6 Cow. 497; *Dunlap v. Limes*, 49 Iowa, 177; *Hollembaek v. More*, 44 N. Y. Super. Ct. 107; *Thorn-dike v. Hunt*, 3 De Gex & J. 563; *Case v. James*, 29 Beav. 512; *Taylor v. Blakelock*, 32 Ch. Div. 560. But the defendant may claim that the Atlantic Mills is not an innocent holder, because Gray's knowledge of the fraud should be imputed to it. To this the plaintiff answers that, upon the well-settled law in this state, Gray's knowledge will not be imputed to the plaintiff. See statement, DEVENS, J., in *Innerarity v. Bank*, *ubi supra*; *Bank v. Lewis*, 22 Pick. 24; *Barnes v. Gas-Light Co.*, 27 N. J. Eq. 33; *Bank v. Christopher*, 40 N. J. Law, 435; *Dillaway v. Butler*, 135 Mass. 479. This statement of the law is supported by numerous decisions, beginning with *Kennedy v. Green*.

3 Mylne & K. 699; *Cave v. Cave*, 15 Ch. Div. 639. See, also, *Sankey v. Alexander*, 9 Ir. Eq. 259; *Waldy v. Gray*, L. R. 20 Eq. 238; *In re Southamptons' Estate*, 16 Ch. Div. 178; *In re Bank*, L. R. 5 Ch. 358; *In re Railway Co.*, L. R. 7 Ch. 161; *Kettlewell v. Watson*, 21 Ch. Div. 685; *De Kay v. Water Co.*, 38 N. J. Eq. 158; *Burton v. Burley*, 13 Fed. Rep. 811; *Wheel Co. v. Hagon Co.*, 20 Fed. Rep. 699; *Rolland v. Hart*, L. R. 6 Ch. 678. It may well be questioned whether the fact that Gray was the common treasurer of both mills—a common fiduciary—does not absolutely preclude any question of imputed notice from being raised. Neither can show a better right to be made whole than can the other. The one, therefore, upon whom the loss, because of the fraud of the agent, has fallen, must remain the sufferer. If it were necessary for the decision of the case, it might further be claimed, upon the doctrine of *Dana v. Bank*, 132 Mass. 156, that the defendant has failed to use such diligence as it was bound to use to entitle it to maintain the action in set-off. Further, the defendant is estopped to deny the correctness of the transactions as shown on its books. *Bank v. Root*, 2 Metc. 522; *Whiting v. Wellington*, 10 Fed. Rep. 810; *Com. v. Bank*, 137 Mass. 431.

W. G. Russell and Geo. Putnam, for defendant.

This action is brought to recover the balance of an account between the two corporations. Plaintiff is entitled to recover or to have credit for the sums paid directly from its cash to plaintiff, entered on plaintiff's check-book, and received and used by plaintiff; and the secret *memoranda* of Gray, called his private accounts, cannot be used to change the character of such payments. We claim the right to have the record duly completed, and to treat the transactions as lawful. We deny the competency of any secret or private *memoranda* to control their legal effect. The secret *memoranda* or "private accounts" of Mr. Gray are not competent evidence against either company. (1) because neither company was a party to or had knowledge of the private accounts; (2) because it is not competent to show that the transactions which were perfectly lawful in themselves were entered into from an unlawful motive, for the purpose of giving them an unlawful character. The acts of the most dishonest trustee will be taken to be honest and lawful, so far as they can be so taken. *In re Hallett's Estate*, 13 Ch. Div. 727, 747; *Drake v. Curtis*, 1 Cush. 416. Upon the same principle, Gray cannot be heard to say, nor can plaintiff use his statement, that defendant's money, which he had a right to pay over to them on defendant's account, was in fact wrongfully paid over to them on Gray's account. Even if Gray had no right to lend the money of the one mill to the other, so that the transaction could not be in any way viewed as a lawful one, the result would be that the party receiving the money would be bound to refund it to the party from whom it was taken, without regard to any unlawful or unauthorized contracts made by its agent without its knowledge. This proposition is illustrated and enforced by the case of *Telegraph Co. v. Bank*, L. R. 7 Exch. 119. See, also, *Gray v. Lewis*, L. R. 8 Ch. 1035. It is an argument of no little weight in support of defendant's position that the result of it will be to leave each corporation to lose the exact sum stolen from it by Gray. The only real transactions are the thefts, and the losses from these should rest where they originally fell. If Gray's private *memoranda* are taken into account, the most favorable result to the plaintiff would be that they would show that the unposted checks represent money stolen by him from one company and used by him to make good the deficiency in the cash of the other company. *Bank v. Bank*, 10 Gray, 532; *Skinner v. Bank*, 4 Allen, 290; *U. S. v. Bank*, 96 U. S. 30; *Bank v. U. S.*, 16 Ct. Cl. 54; *Telegraph Co. v. Bank*, L. R. 7 Exch. 119. The present case differs from these only in the fact that the same person was the agent of both parties. *Olmsted v. Hotelling*, 1 Hill, 317; *Bank v. U. S.*, 114 U. S. 401, 5 Sup. Ct. Rep. 888. The plaintiffs contend that they are not chargeable with notice of

the fact that the money taken from the Indian Orchard Mills, and applied by Gray to the payment of his debt to the Atlantic Mills, was stolen, on the ground that the imputation of notice to the principal of facts known to his agent does not arise when the agent is engaged in a fraudulent transaction, so that it must be presumed that he would fail to communicate to his principal the facts of which notice is sought to be imputed. The true reason for the imputation of notice is that the agent represents the principal. *Boursot v. Savage*, L. R. 2 Eq. 134; *Espin v. Pemberton*, 3 De Gex & J. 547; *Sankey v. Alexander*, 9 Ir. R. Eq. 259, 269, note, 318; *Cave v. Cave*, 15 Ch. Div. 639; *Bradley v. Riches*, 9 Ch. Div. 189, 195, 196; *Bank v. Bank*, 10 Gray, 532; *Skinner v. Bank*, 4 Allen, 290; *U. S. v. Bank*, 96 U. S. 30; *Telegraph Co. v. Bank*, L. R. 7 Exch. 119; *Bank v. U. S.*, 16 Ct. Cl. 54; *Kennedy v. Green*, 3 Mylne & K. 699; *Rolland v. Hart*, L. R. 6 Ch. 678; *Sankey v. Alexander*, 9 Ir. R. Eq. 259; *DeKay v. Water Co.*, 38 N. J. Eq. 158; *Dillaway v. Butler*, 135 Mass. 479; *In re Bank*, L. R. 5 Ch. 358; *Bradley v. Riches*, 9 Ch. Div. 189; *Thacher v. Pray*, 113 Mass. 291; *Bank v. Plimpton*, 17 Pick. 159; *School-Dist. v. Bank*, 102 Mass. 174; *Thompson v. Cartwright*, 33 Beav. 178; *Waldy v. Gray*, L. R. 20 Eq. 238; *Atterbury v. Wallis*, 8 De Gex, M. & G. 454; *In re Railway Co.*, L. R. 7 Ch. 161; *Innerarity v. Bank*, 139 Mass. 332, 1 N. E. Rep. 282; *In re Southampton's Estate*, L. R. 16 Ch. Div. 178; *Insurance Co. v. Minch*, 53 N. Y. 144; *Dillaway v. Butler*, 135 Mass. 479; *Barnes v. Gas-Light Co.*, 27 N. J. Eq. 33; *Dana v. Bank*, 132 Mass. 156. The question, however, when properly stated, is not whether Gray's knowledge is to be imputed to the plaintiff, but whether the plaintiff received our money in payment of Gray's debt, in ignorance that it was ours. The burden is not upon us to show knowledge, but upon them to show ignorance. *Telegraph Co. v. Bank*, L. R. 7 Exch. 119. To assume that either corporation dealt with Gray as its debtor is to assume an impossibility. To assume it as to the Atlantic involves its knowledge of his fraud. Neither company could have received the check of the other to its order, in payment of a debt arising out of Gray's thefts, without being bound to inquire how he came by it. See *Bank v. Bangs*, 106 Mass. 441, 445, *ad fin.* Defendant is not chargeable with notice of the fact that a part of the sums received by plaintiff from defendant's cash were entered upon its books as a loan to Clifford. *Telegraph Co. v. Bank*, L. R. 7 Exch. 119; *Gray v. Lewis*, L. R. 8 Ch. 1035. This defense of plaintiff's to defendant's claim for credits amounts to a claim of estoppel. The plaintiff claims that we are bound by the knowledge which Mr. Cram acquired in his examination of the accounts of the company, of the Clifford loan account, and of the private account of Mr. Gray. See *Bank v. Bank*, 10 Gray, 532; *Insurance Co. v. Minch*, 53 N. Y. 144; *Dana v. Bank*, 132 Mass. 156; also *Atterbury v. Wallis*, *supra*. But the imputation of Cram's knowledge to the defendant would not help the plaintiff. We do not seek to hold the benefit of any wrong committed by Gray or concealed by Cram. The supposed negligence of Indian Orchard Mills directors in not discovering the frauds is relied on as a defense to the defendant's claim in set-off. We were under no obligation to the plaintiff to watch our treasurer; certainly under no obligation to watch theirs. Plaintiff claims that certain cases cited establish the proposition that, when a trustee of two funds makes up a deficiency in one fund with money belonging to the other, the latter fund cannot recover the money from the former. We submit that all these cases disclose a settlement by the defaulting trustee with some one representing the deficient fund, and having no notice of the source whence the deficiency was made good. *Thorn-dike v. Hunt*, 3 De Gex & J. 563; *Case v. James*, 3 De Gex, F. & J. 256; *Taylor v. Blakelock*, 32 Ch. Div. 560; *Ex parte Apsey*, 3 Brown. Ch. 265; *Jaques v. Marquand*, 6 Cow. 497. Doubted in *Jewett v. Phillips*, 5 Allen, 150; *Hollembaek v. More*, 44 N. Y. Super. Ct. 107; *Dunlap v. Limes*, 49 Iowa, 177.

C. ALLEN, J. The only question in this case is whether the defendant is entitled to be allowed, by way of set-off, for certain checks, amounting to the sum of \$219,144.48, which were fraudulently drawn by Gray on account of the defendant in favor of the plaintiff, as shown in the auditor's report, and transferred to and used for the benefit of the plaintiff. There is no doubt that there has been an unauthorized transfer of property to this amount from the treasury of the defendant corporation to the treasury of the plaintiff corporation, without any consideration as between the two corporations. It was a fraudulent transfer by Gray, who was the treasurer of both corporations. If this were all there was to it, it would be quite plain that the plaintiff could not in good conscience retain the money. The doctrine is universal, and prevails alike at law and in equity, that a person, though innocent, cannot avail himself of an advantage obtained by the fraud of another, unless there is some consideration moving from himself. It was long ago declared by Lord MANSFIELD that, "although a third person shall not be punished for the fraud of another, he shall not avail himself of it. There is no case in the law where that can be done." *Robson v. Calze*, 1 Doug. 228; *Bank v. Bank*, 10 Gray, 532, 545; *Olmsted v. Hotelling*, 1 Hill, 317; *Udell v. Atherton*, 7 Hurl. & N. 171; *Huguenin v. Baseley*, 14 Ves. 273; *Scholefield v. Templer*, 4 De Gex & J. 429; *Topham v. Duke of Portland*, 1 De Gex, J. & S. 517, 569; *Russell v. Jackson*, 10 Hare, 204, 212.

The ground on which the plaintiff asserts a right to retain the money is that Gray had embezzled its funds, as well as the funds of the defendant, to a large amount, and that it is entitled to apply the money thus received from him to reduce his indebtedness for such embezzlements, and treat the same as a payment *pro tanto*; that from the nature of the transaction the law stamps it as a payment; and that thus the plaintiff is a holder of the funds for a valuable consideration. There is no doubt that a thief may use stolen money, or stolen negotiable securities before their maturity, to pay his debts, and in such case an innocent creditor may retain the payment. But this doctrine is inapplicable to the present case, for two reasons: In the first place, under the circumstances disclosed in the auditor's report, the plaintiff cannot be considered as an innocent creditor,—that is, a creditor without notice; and, moreover, the transaction did not amount to a payment. It is true, that no officer of the plaintiff besides Gray knew of the fraudulent origin of these checks; but, in the very transaction of receiving them, the plaintiff was represented by Gray, and by him alone, and is bound by his knowledge. It is the same as if the plaintiff's directors had received the checks knowing what he knew. For the purpose of accepting the checks, Gray stood in the place of the plaintiff, and was the plaintiff. It is quite immaterial, in reference to this question, in what manner or by what officers of the corporation the funds were afterwards used. The important consideration is how the plaintiff became possessed of the money; and it is apparent that it was through the act of no other person than of Gray himself. It is not as if Gray had stolen the money, and then called the directors of the plaintiff corporation together, and informed them of his indebtedness, and of his desire to make a payment on account, and had then paid over to them the money as money coming from himself, and they had received it without knowledge or suspicion that it had been stolen, and given him credit for it on part payment. There was no transaction whatever between Gray and the plaintiff, in respect to the transfer of this money, in which the plaintiff was represented either in whole or in part by any other person than by Gray; and therefore, even though the transfer to the plaintiff had been made in bank bills or in gold coin, (which it was not,) the plaintiff must be deemed to have had knowledge of the true ownership, because in receiving the funds it acted solely through Gray's agency. It must be deemed to have known what he knew, and it cannot retain the benefit of his act without accepting the consequences of his knowledge. The

plaintiff cannot obtain greater rights from his act than if it did the thing itself knowing what he knew. Such is the doctrine either expressly declared or necessarily involved in numerous adjudged cases. The leading case in this commonwealth is *Bank v. Bank*, 10 Gray, 532, where there was the semblance of an accounting between the guilty agent and other officers of the bank which received the money, but it was held that there was no real accounting, and the general principle was held to be applicable. That case was followed by *Skinner v. Bank*, 4 Allen, 290, where the facts were similar. In *Loring v. Brodie*, 134 Mass. 453, 468, one of the numerous questions discussed, arose upon the following alleged facts: Brodie, as trustee, held certain trust funds, and as an individual owed the Merchants' National Bank. Fuller was cashier of the bank, and was also the agent of Brodie. As such agent, Fuller was in possession of certain moneys belonging to Brodie's trust funds, and wrongfully paid the same in discharge of Brodie's private indebtedness to the bank, either to himself as cashier of the bank, or to the teller, who was under him. On a bill in equity by the *cestuis que trustent*, it was declared by the court that, if these facts were proved, the bank must restore the money thus paid; that Fuller's knowledge was the knowledge of the bank; and that the bank could not receive the trust funds, except charged with the knowledge which the cashier had, and subject to the responsibilities which that involved. But the court found that the proof was not sufficient to establish the facts as charged; and in another part of the same case, on page 458, a similar application of the same general doctrine was made, in holding the bank chargeable with Fuller's knowledge that certain securities pledged by Fuller as Brodie's agent to the bank, and received by Fuller as cashier, were trust funds. The court say: "If Fuller was the instrument of Brodie in committing a fraud on the bank by unlawfully transferring to it the securities of another, whether he concealed this fact or not, the bank could not take the securities from his hands, or hold them in its custody, except with the knowledge he had. The only authority the bank could have to hold or sell them was under the contract made by or through Fuller, its cashier." See, also, *U. S. v. Bank*, 96 U. S. 30; *Bank v. U. S.*, 114 U. S. 409, 5 Sup. Ct. Rep. 888.

The effect of knowledge is to put the plaintiff in the same position that it would be in if there were no pretense of a consideration moving from it. In order to entitle it to retain the defendant's funds, both elements must exist,—a good consideration, and the want of knowledge that the funds belonged to the defendant. Such want of knowledge cannot, in the view of the law, exist, where the party in the particular transaction is represented solely by one who has knowledge. The rule is general that if one assumes to do an act which will be for the benefit of another commits a fraud in so doing, and the person to whose benefit the fraud will inure seeks after knowledge of the fraud to avail himself of that act, and to retain the benefit of it, he must be held to adopt the whole act, fraud and all, and to be chargeable with the knowledge of it, so far at least as relates to his right to retain the benefit so secured. This rule is applied to preferences under insolvent or bankrupt laws, where fraudulent knowledge of the creditor's agent or attorney is imputed to the creditor, though he himself is personally innocent. *Bush v. Moore*, 133 Mass. 198, 200; *Rogers v. Palmer*, 102 U. S. 263. And for numerous other illustrations of the chargeability of a principal with his agent's knowledge, reference may be made to the following cases: *Bank v. Cushman*, 121 Mass. 490; *Suit v. Woodhall*, 113 Mass. 391; *Sartwell v. North*, 144 Mass. 188, 10 N. E. Rep. 824; *Moseley v. Hatch*, 108 Mass. 517; *Distilled Spirits*, 11 Wall. 356; *Doggett v. Emerson*, 3 Story, 700, 735; *Bank v. Milford*, 36 Conn. 93; *Bank v. Davis*, 2 Hill, 451, 464; *Bennett v. Judson*, 21 N. Y. 238; *Crans v. Hunter*, 28 N. Y. 389; *Glyn v. Baker*, 18 East, 509, 516; *Dresser v. Norwood*, 17 C. B. (N. S.) 466; *Boursot v. Savage*, L. R. 2 Eq. 134; *Rolland v. Hart*, L. R. 6 Ch.

678; *Espin v. Pemberton*, 8 De Gex & J. 547; *Telegraph Co. v. Bank*, L. R. 7 Exch. 119; *Bradley v. Riches*, 9 Ch. Div. 189; *Blackburn v. Vigors*, 17 Q. B. Div. 553, 559, on appeal, 55 Law, J. Q. B. 347. We have preferred to put the decision of this point upon the broad ground that if the treasurer of a corporation is a defaulter, and his defalcation is as yet unknown and unsuspected, and he steals money from a third person, and places it with the funds of the corporation in order to conceal and make good his defalcation, and the corporation uses the money as its own, no other officer knowing any of the facts, the corporation does not thereby acquire a good title to the money as against the true owner, but the latter may maintain an action against the corporation to recover back the same. But it is also apparent that in the present case the decision might rest upon a narrower ground. The fraudulent transfers were made by checks of the defendant, payable to the order of the plaintiff, and these checks, before being available, must necessarily have been indorsed by the plaintiff, by some officer authorized to indorse checks payable to its order. If these checks, therefore, were taken by the plaintiff in payment of indebtedness of Gray, they carried notice upon their face that they were checks of the defendant, not payable to Gray's order, but to the order of the plaintiff. Now, assuming that Gray's transaction had been conducted with some other officers of the plaintiff, who represented that corporation, it is impossible to suppose that they could have accepted these checks, in extinguishment of a known indebtedness of Gray to the plaintiff, without being put upon inquiry as to how he came by the defendant's checks to so large an amount, made payable to the plaintiff, which he could apply upon his private account. *Bank v. Bangs*, 106 Mass. 441, 445, 446.

Many authorities have been referred to on behalf of the plaintiff which show that an agent's knowledge is not in all cases to be imputed to the principal. As a general thing, they fall within some clear line of distinction from the present case. The most recent of these cases is *Innerarity v. Bank*, 139 Mass. 332, 1 N. E. Rep. 282, in which Burgess, the fraudulent agent, did not represent the bank in the particular transaction in question, but he was on one side of the transaction as representing himself, and other officers of the bank were on the other side, as representing the bank. Under such circumstances, his knowledge of his fraud was not imputed to the bank. That case did not present the question whether a principal can avail himself of the results of his agent's fraud without responsibility for the fraud. So in *Dillaway v. Butler*, 135 Mass. 479, where the facts are not very fully set forth, it sufficiently appears that, in determining to accept the fraudulent mortgage in question, the plaintiff acted for himself and innocently, and the supposed agent who was privy to the fraud, and who advised him to take the mortgage, was not at that stage of the transaction his agent, but was acting in his own interest, and for the mortgagor, and what he did was not for the benefit of the plaintiff, but a fraud upon him. He was not a general agent or solicitor for the plaintiff, but his agency for the plaintiff was limited to completing a transaction which the plaintiff himself had determined to enter upon. In *Bank v. Bank*, 10 Gray, 532, the dissenting opinion goes upon the ground that the examination of the funds in the teller's custody was in fact an accounting by him, in which he on the one side represented himself as an accounting officer, and the examining officers on the other side represented the bank. This view of the facts did not prevail with a majority of the court, but the principle relied on, even in the dissenting opinion, is entirely consistent with our present decision; while the view of the facts taken by the majority of the court brought that case substantially under the same rule applicable to the present case. The case of *Ingraham v. Bank*, 13 Mass. 208, is still much relied on, notwithstanding the explanation given in *Bank v. Bank*, 10 Gray, 553, 556, of the ground upon which that decision must rest. In that case, the cashier of the Maine bank drew official checks as cashier, got

the money upon them, and placed the money with the funds of the bank, without entering it upon the books. Thus the bank received the money raised upon its own checks, which it was bound to pay, and it might well be said that this money was its own, under these circumstances. Nobody could claim it by any prior title, unless it were the bank's upon which the checks were drawn; and they, instead of seeking to reclaim the money, relied upon and collected the checks which they held. The statement by the court that "the transaction cannot be distinguished from an actual payment from his own funds to supply the defalcation," does not imply that the bank could in such case have held the money, as against the true owner, if he had stolen it from some one else, or that in such case the money would have been its own for all purposes. If such were the necessary implication from the language used, to that extent the doctrine stated could not be supported. In the *Case of the European Bank*, L. R. 5 Ch. 358, the decision was placed on the ground that the claim of the Oriental Commercial Bank to the bills in controversy, as having been purchased with their money, was an equity attaching to the bills, and that the Eastern Commercial Bank, having purchased them when overdue, took them subject to this equity. The question respecting which Lord Justice GIFFARD, in delivering judgment, expressed his opinion that, under the peculiar circumstances disclosed, the Eastern Bank was not affected with notice through Puffer, its sole director, was not material in the decision of the case, and his opinion, whether vindicable or not, is not an authority. The case *In re Railway Co.*, L. R. 7 Ch. 161, stands upon the same ground as *Innerarity v. Bank*, *ubi supra*. There is also a class of cases, which perhaps embraces the *Case of the European Bank*, *ubi supra*, where the act of the assumed agent is not for the benefit of his principal, but where, on the contrary, the agent forms a plan to cheat his principal; and it is held that in that act he does not bear the character of agent, although his position as agent may enable him to carry out his plan. If an agent misuses funds of his principal which are in his hands, and devotes them to private purposes of his own, that is not an act of agency. So if he palms off poor securities of his own upon his absent principal, he conducting both sides of the transaction, it cannot be said, in a proper sense, that in such transaction he represents his principal. The principal is unrepresented. The agent cheats his principal. An embezzler does not represent his principal while in the act of stealing from him, although there is no one else to supervise the transfer of the property. Such cases are *Cave v. Cave*, 15 Ch. Div. 639; *Kettlewell v. Watson*, 21 Ch. Div. 685; *De Kay v. Water Co.*, 38 N. J. Eq. 158; *Wheel Co. v. Wagon Co.*, 20 Fed. Rep. 699. They serve to illustrate the position of Gray towards the defendant, in drawing the checks in controversy, but do not show that the plaintiff can retain the benefit of them without being chargeable with the knowledge which he possessed.

There is another class of cases where the same person has been trustee of two different funds, and has fraudulently transferred securities from one trust fund to the other. But, in each case of this class which has been cited, there has been something in the nature of an accounting, and the trust fund which has received, and has been held entitled to retain, the benefit has been partly or wholly represented, either by the *cestuis que trustent*, or by an innocent trustee representing them. *Thorndike v. Hunt*, 3 De Gex. & J. 563; *Taylor v. Blakelock*, 32 Ch. Div. 560; *Case v. James*, 29 Beav. 512, on appeal, 3 De Gex. F. & J. 256. In the last case, the final decision was put specially upon the ground that the surviving trustee himself, who was the sole plaintiff, and sought to follow the trust funds, had been guilty of a breach of trust in wrongfully consenting to a transfer, and that it did not appear that any *cestuis que trustent* were interested in the proceeding and that the trustee himself had no equity for his own benefit to follow the funds.

There is another class of cases which have been cited for the plaintiff which

rest upon the ground that money, or negotiable securities, transferred to a third person, who receives them innocently as property of the person from whom they come, for a valuable consideration, cannot be followed by the true owner; and the same rule extends to such property received by a firm from one of its members. *Bank v. Plimpton*, 17 Pick. 159; *School-Dist. v. Bank*, 102 Mass. 174; *Thacher v. Pray*, 113 Mass. 291; *Ex parte Apsey*, 3 Brown Ch. 265; *Jaques v. Marquand*, 6 Cow. 497; *Dunlap v. Limes*, 49 Iowa, 177. These cases do not touch the principle upon which the present decision rests.

Thus far the discussion has proceeded upon the assumption that, even if the transfer of the defendant's property to the plaintiff were intended as a payment on account of Gray's indebtedness to the plaintiff, yet the plaintiff would not be entitled to hold the same, on the ground that it would be chargeable with Gray's knowledge of the source from which the money came. But it is equally clear that the transfer cannot be considered as a payment by Gray to the plaintiff, because it was not so understood or intended by either party. There was no accounting between them. Nobody on the part of the plaintiff called Gray to any account, or knew that he was accounting, or that he was indebted to the plaintiff, or that these funds had come into the plaintiff's possession, or that they had come from Gray. Nobody knew any of these things except Gray himself. Nobody but Gray could possibly have intended that the transaction should amount to a payment, and his intention, if entertained, was ineffectual, because of his fraud. It is not necessary to deny or doubt that Gray might secretly transfer to the treasury of the corporation money or property of his own, and thus, if the same should be kept, extinguish an indebtedness arising from a former embezzlement. There would be nothing fraudulent in the act of such a transfer; and the corporation, being lawfully in possession of the money or property, might properly keep it. But where he undertook in this manner to make a payment by secretly transferring the property of a third person, the act cannot take effect as a payment, because it was not received as such by any person acting on behalf of the plaintiff. There was not even the semblance of an accounting. And under these circumstances, if the plaintiff would adopt the intention to make it a payment, it must also adopt the fraud. It cannot adopt so much of Gray's act as was beneficial, and reject the rest. As Lord KENYON said, in *Smith v. Hodson*, 4 Term R. 211, it cannot blow hot and cold. This ground also is fully covered by the decisions in *Bank v. Bank*, 10 Gray, 532, 547-553, and *Skinner v. Bank*, 4 Allen, 290.

It has been further suggested on the part of the plaintiff that there was such a degree of negligence on the part of the defendant as ought to preclude it from maintaining its claim to the funds in controversy. In respect to this, it is sufficient to say that we see no such negligence as ought to have the effect to deprive it of its property. The fact that Gray, upon a private memorandum, charged himself with the sums fraudulently withdrawn by him, is immaterial. This act was unauthorized, and the defendant is not bound by it. Entering it in this manner did not make the transaction a loan from the defendant to Gray. It was none the less a fraudulent taking. The substantial rights of the parties are not affected by the methods of book-keeping adopted by him to conceal his frauds, or by entries made upon private memoranda for the purpose of keeping an account of them. Nor can the plaintiff avoid liability for money which it received without consideration by showing that Gray fraudulently entered the same upon the defendant's books as loans to other persons, and that the defendant has endeavored to collect the same from those persons. The plaintiff was not misled, and gained no rights thereby. *Com. v. Bank*, 137 Mass. 431; *Holden v. Hoyt*, 134 Mass. 181. The result is that judgment should be entered according to the report of the auditor. So ordered.

(147 Mass. 171)

PEASLEE v. PEASLEE *et al.*PEASLEE *et al.* v. PEASLEE.

(Supreme Judicial Court of Massachusetts. Essex. June 19, 1888.)

1. DIVORCE—PRACTICE—MAKING DECREE NISI ABSOLUTE—NOTICE.

After the divorce of a woman from bed and board, a statute was passed providing for divorces *nisi*, and for making them absolute after the parties had lived apart five years; and further providing that parties divorced from bed and board should be in the position of parties divorced *nisi*. Thereupon she was divorced absolutely, but it did not appear that notice was served on the other party. She then married again, and on the death of her second husband sued for dower. *Held*, that the making the divorce absolute was so far a part of the original proceedings that no notice was necessary to confer jurisdiction, and that she was entitled to dower in the estate of her second husband.

2. DOWER—BAR BY ANTENUPTIAL CONTRACT—FRAUD.

Demandant's testimony that, being about to execute an antenuptial agreement, before she had read it through, she said to her promised husband, "I suppose it is just as you talked?" that he said, "Yes;" that she believed him, and signed without other knowledge of the contents; and that in fact the provision made for her was not what he had promised in the talk referred to, if believed, warranted a finding that she was induced to sign by fraudulent misrepresentation.

3. SAME—RATIFICATION—ACTS DURING COVERTURE.

A wife had executed an antenuptial contract to bar her dower, on false representations made by her husband as to its contents. *Held*, that she could not ratify it during coverture, nor could her acts during coverture be admitted in evidence to explain her acts after her husband's death.

4. SAME—EVIDENCE—CORROBORATION.

In a suit for dower, where demandant testified that a jointure was obtained by her husband by false representations as to its contents, statements made by him to others, which imported such an arrangement as she testified to, were admissible to support her testimony; the jury being instructed to disregard them as mere expressions of intention.

5. SAME—RENTS AND PROFITS.

A woman had been induced by the false representations of her husband to execute an antenuptial contract to bar her dower, by which the husband gave her the rents and profits of a trust-estate during coverture, and provided for the conveyance of the estate to her on his death, and the wife accepted "said transfer" in lieu of dower. *Held* that, to avoid the contract, she need not return the rents and profits received during coverture, they being intended as a marriage settlement; or execute a release of the land, her refusal to accept a deed after the husband's death having prevented the title from passing to her; and that she was not precluded by having, since her husband's death, received rents in ignorance of her rights.

Exceptions from superior court, Essex county; HAMMOND, Judge. Appeal from supreme judicial court, Essex county; C. ALLEN, Judge.

The first case was a writ of dower by Abby D. Peaslee against Byron L. Peaslee and others, devisees of Hiram Peaslee. The second case was a bill in equity by Byron L. Peaslee and others, defendants in the first case, against Abby D. Peaslee, to enjoin the action at law. In the first case, at the trial in the superior court, the verdict was for the plaintiff, and the defendants excepted; and in the second case the supreme judicial court sustained the defendants' demurrer, and the plaintiffs appealed. The facts are stated in the opinion.

Henry Carter and J. P. & B. B. Jones, for demandant.

The decree of divorce from bed and board was granted under Gen. St. c. 107. The decree from the bonds of matrimony was made under St. 1870, c. 404. The latter statute is retroactive in its terms, and has been sustained by the court. *Bigelow v. Bigelow*, 108 Mass. 38; *Sparhawk v. Sparhawk*, 116 Mass. 315. The tenants claim that the decree absolute is void because the records do not show that notice was given to the libelee. The answers to this are threefold: (1) The statute did not require that notice should be given of a petition to have the decree of divorce from bed and board or the decree

nisi made absolute. The statute is not invalid for want of such a requirement. *Pennoyer v. Neff*, 95 U. S. 714. In case of a wife divorced from the bed and board of her husband, there is no constitutional objection to a statute providing that the court, upon *ex parte* hearing, and upon proof that the parties have lived apart three consecutive years, may decree the divorce to be from the bonds of matrimony. If the legislature have power to authorize the courts to grant a divorce between a citizen and non-resident without notice to the latter, it would seem to have power, in the case of a divorce from bed and board between its own citizens, to authorize the courts, in an *ex parte* hearing, and upon proof of the prescribed cause, to decree a divorce from the bonds of matrimony. It is true that the practice of the courts has been to order notice of the petition to the other party. This fact, in and of itself, confirms the position of the demandant on this point; for if St. 1870, c. 404, was invalid or unconstitutional in not requiring notice, the court could not, by its practice or rules, impart validity to it; or, in other words, the judicial department cannot exercise legislative powers. If the statute is valid, it is valid independently of the rules of practice of the court. If the statute was not valid, the court could not have acted under it, or applied its rules to it. The power of the legislature in the matter of divorces is not limited by the constitution of the United States. *Opinion of the Justices*, 16 Me. 479, 481. Its power is limited by the provision in the state constitution that it shall not exercise judicial powers. *Sparhawk v. Sparhawk*, *supra*. The statute in question authorized the court, upon proof that parties divorced from bed and board had lived apart for three years, to decree a divorce from the bonds of matrimony upon the application of either party. Such decree does not deprive either party of vested rights; for they have no legal rights in each other's property. *Pierce v. Burnham*, 4 Metc. 303. Nor does it even impute moral guilt; for it involves only the question of separation after the decree from bed and board. (2) If notice was requisite, the presumption is in favor of the regularity of the proceedings of a domestic court. *Edds' Case*, 137 Mass. 346. *Huntington v. Charlotte*, 15 Vt. 46, is a case directly in point. See *Grignon's Lessee v. Astor*, 2 How. 319; *Hahn v. Kelly*, 34 Cal. 391; *Miller v. U. S.*, 11 Wall. 268; *Waltz v. Borroway*, 25 Ind. 380; *Rhoades v. Selin*, 4 Wash. C. C. 715; *Newcomb v. Newcomb*, 13 Bush, 544; *Lefever v. Lefever*, 6 Md. 472; *Fridge v. State*, 3 Gill & J. 112; *Fitch v. Boyer*, 51 Tex. 336; *U. S. v. Ambrose*, 7 Fed. Rep. 554. (3) A want of notice, even if notice was requisite, is an irregularity in the proceedings not affecting the jurisdiction of the court, and the decree cannot be impeached collaterally, but can be set aside only by proceedings instituted directly for that purpose. *Cook v. Darling*, 18 Pick. 393; *Emery v. Hildreth*, 2 Gray, 228; *Finneran v. Leonard*, 7 Allen, 54, 55; *Hendrick v. Whittmore*, 105 Mass. 23; *Stockwell v. McCracken*, 109 Mass. 84; *McCormick v. Fiske*, 138 Mass. 379; *Foley v. Haverhill*, 144 Mass. 352, 11 N. E. Rep. 554; *Harvey v. Tyler*, 2 Wall. 328. A decree of divorce can be vacated or annulled by proceedings instituted directly for that purpose. *Edson v. Edson*, 108 Mass. 596. It would seem as if every reason of public policy which upholds the judgment of a justice of the peace rendered in a case wherein the records disclose no service of notice on the defendant would apply to a decree of divorce entered in the supreme judicial court of the commonwealth. The decisions in *Smith v. Rice*, 11 Mass. 506; *Jochumsen v. Bank*, 3 Allen, 87; *Newhall v. Sadler*, 16 Mass. 122,—require some consideration. In the first two cases the court place the right to collaterally impeach a decree on the ground that a party who had no notice of the proceeding had no other means of having the decree reversed or vacated, and it is fair to assume that, if the court had decided that such party could have had the decree reversed or vacated by proceedings directly instituted for that purpose, it would have held that the decree could not be collaterally attacked. In *Waters v. Stickney*, 12 Allen, 1, it

was decided that although the decree of a probate court could not be reversed or vacated by error, *certiorari*, or bill in equity, it could be reversed or vacated by proceedings directly instituted for that purpose. But see *McKim v. Doane*, 137 Mass. 195; *Bassett v. Crafts*, 129 Mass. 513; *Emery v. Hildreth*, 2 Gray, 228; *Jenks v. Howland*, 3 Gray, 536.

The tenants excepted to the admission of the testimony of Ellen S. Smith and Isaac C. Pear, that, after the engagement, Peaslee told them that he was going to settle \$10,000 on the demandant; \$5,000 in money, and \$5,000 in land. The ruling of the court in regard to this was correct. *Thurston v. Thornton*, 1 Cush. 89; *Camerlin v. Palmer Co.*, 10 Allen, 539. The statement of Hiram Peaslee in regard to the jointure was fraudulent, in that it misrepresented the contents of a written instrument to a person to whom the same was presented for execution. *Foster v. MacKinnon*, L. R. 4 C. P. 707; *Chapman v. Rose*, 56 N. Y. 157; *Gibbs v. Linabury*, 22 Mich. 479; *Trambly v. Ricard*, 130 Mass. 259; *Lewis v. Rees*, 3 Kay & J. 132. The fact that the demandant was an educated person was only evidence on the question of due care in signing without reading. It was a question for the jury. *Savage v. Stevens*, 126 Mass. 207; *Foster v. MacKinnon*, and *Trambly v. Ricard*, *supra*. Indeed, the court could have correctly ruled, as matter of law, that the demandant had a right to rely upon Peaslee's statement. *Kline v. Kline*, 57 Pa. St. 120; *Kline's Estate*, 64 Pa. St. 122; *Cranson v. Cranston*, 4 Mich. 230; *Brown v. Bronson*, 35 Mich. 415; *Buzick v. Buzick*, 44 Iowa, 259; *Littleton v. Littleton*, 1 Dev. & B. 327; *Smith v. Smith*, 6 N. J. Eq. 515; *Chandler v. Hollingsworth*, 3 Del. Ch. 99. A representation as to the price paid by a third party is actionable. *Medbury v. Watson*, 6 Metc. 259; *Manning v. Albee*, 11 Allen, 520; *Com. v. Wood*, 142 Mass. 459, 8 N. E. Rep. 432; *Van Epps v. Harrison*, 5 Hill, 70; *Page v. Parker*, 43 N. H. 369; *Sandford v. Hundy*, 23 Wend. 269. Inadequacy of a jointure assented to while the parties are engaged, raises a presumption of fraud. *Grogan v. Garrison*, 27 Ohio St. 50. It is important in this connection that, when the demandant signed said indenture, she believed, by reason of the fraud of Peaslee, that it contained a pecuniary provision. In such case the signature is no more than a forgery would be. *Foster v. MacKinnon*, *supra*; *Walker v. Ebert*, 29 Wis. 194; *Whitney v. Snyder*, 2 Kans. 477; *Taylor v. Atchison*, 54 Ill. 196; *Wait v. Pomeroy*, 20 Mich. 425. The jointure is an equitable one, and is so inadequate that equity will not enforce it. To constitute a legal jointure under St. 27 Hen. VIII., c. 10, the estate must be so limited that it must take effect immediately upon the death of the husband, (Bac. Abr. bk. 3, tit. "Dower and Jointure," G, 1; 1 Washb. Real Prop. c. 8, § 6; *Vernon's Case*, 4 Coke, 2;) and it must be made to the wife directly, and not to any one in trust for her. The jointure in question is not a legal jointure under the statute; for, upon the death of the husband, the estate did not vest immediately in the wife. It was necessary that the trustee should act, and execute and deliver a deed to her, before the estate could vest in her. The indenture in question is one of bargain and sale, and the use raised by means of the bargain was executed in Smart by force of the statute of uses; and, as the statute does not execute a use upon a use, the legal estate remained in Smart as trustee for the wife. Bac. Abr. bk. 10, tit. "Uses and Trusts," H 1; *Stearns v. Palmer*, 10 Metc. 32. See *Murphy v. Collins*, 121 Mass. 6. See *Wilson v. Cheshire*, 1 McCord, Eq. 238; *Mott v. Buxton*, 7 Ves. 201; *Nevil v. Saunders*, 1 Vern. 415. It was an equitable jointure, and governed by the rule that such a jointure will not be enforced if not an adequate provision. *Buckinghamshire v. Drury*, 2 Eden, 60; *Caruthers v. Caruthers*, 4 Brown, Ch. 374; *Smith v. Smith*, 5 Ves. 189; *Gould v. Womack*, 2 Ala. 83; *Grogan v. Garrison*, 27 Ohio St. 59; *McCartee v. Teller*, 2 Paige, 511; *Mason v. Mason*, 140 Mass. 63, 3 N. E. Rep. 19; *Seymour v. De Lancy*, 3 Cow. 445. On the question of ratification during coverture, the demandant submits: (1) If Peaslee, Smart, and the de-

mandant had executed, during coverture, an agreement similar to the one in question, providing the same jointure, limited in the same manner, and containing the same covenants on her part, she would not have been bound by it, and could have elected to hold her dower upon her husband's death. (2) Not having capacity to bind herself during coverture by such an agreement, she cannot bind herself during coverture by ratifying it. (3) The indenture was a jointure settled on her, without her assent, before marriage; and the doctrine of ratification is inapplicable to it. See *Hastings v. Dickinson*, 7 Mass. 153; *Vance v. Vance*, 21 Me. 364; *Gibson v. Gibson*, 15 Mass. 106; *Fowler v. Shearer*, 7 Mass. 21; St. Hen. VIII. c. 10, §§ 6, 7; Bac. Abr. bk. 3, tit. "Dower and Jointure," F; *Martin v. Martin*, 22 Ala. 86; *McCartes v. Teller*, 2 Paige, 511, 560; 1 Washb. Real Prop. c. 8, § 18; Pub. St. c. 124, § 6. There is nothing, then, in these statutes which supports the position that a married woman during coverture can bar her dower in any other mode than by releasing the same to the person to whom her husband's lands have been conveyed. *Bigelow v. Hubbard*, 97 Mass. 195; *Carson v. Murray*, 3 Paige, 483; *Martin v. Dwelly*, 6 Wend. 1. The demandant could not ratify, during coverture, a contract which coverture incapacitated her from making. *Bank v. Bellis*, 10 Cush. 276; *Lowell v. Daniels*, 2 Gray, 161; *Plumer v. Lord*, 7 Allen, 481; *Pierce v. Chace*, 108 Mass. 254; *Leggate v. Clark*, 111 Mass. 308; *Machine Co. v. Emerson*, 115 Mass. 554. In *Lowell v. Daniels*, *supra*, the court refused to follow *Hunsden v. Cheyney*, 2 Vern. 150; *Savage v. Foster*, 9 Mod. 35. *Smith v. Lucas*, 18 Ch. Div. 531, is in point. *Carson v. Murray*, 3 Paige, 483, is exactly in point. In *Milner v. Harewood*, 18 Ves. 258, the right of dower was not in litigation. See *Price v. Furman*, 27 Vt. 268; *Chandler v. Simmons*, 97 Mass. 508; *Walsh v. Young*, 110 Mass. 396, assume that this was a voidable, and not a void, contract. A minor's contract is voidable, but he cannot affirm it during his infancy. *Chandler v. Simmons*, *supra*; *Walsh v. Young*, *supra*. The contract of a person of unsound mind can be ratified, but not during his incapacity. *Howe v. Howe*, 99 Mass. 88, 98; *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. Rep. 735. The legislature, in requiring the assent of a party to an antenuptial agreement, never contemplated an assent obtained by illegal means. If the indenture be considered as a contract, then she could not rescind it during coverture. *Durnford v. Lane*, 1 Brown, Ch. 97; *Milner v. Harewood*, 18 Ves. 258. An infant cannot bind himself by an act of disaffirmance during infancy. *Bool v. Mix*, 17 Wend. 182; *Roof v. Stafford*, 7 Cow. 179; *Eminons v. Murray*, 16 N. H. 390. And see *Zouch v. Parsons*, 8 Burrows, 1794. The failure by a party to restore benefits received under a contract during disability does not destroy his right to rescind unless he retains in his possession, after the removal of his disability, the identical benefit received. The question is not one of the rescission of a contract, but of an election between a jointure and her dower. See *Mathews v. Mathews*, 141 Mass. 511, 6 N. E. Rep. 776; *Watson v. Watson*, 128 Mass. 152. The facts wholly fail to show an election on the part of the demandant to accept the jointure. Her acts were wholly consistent with her election to hold her dower. *Smith v. Holyoke*, 112 Mass. 517. The demandant is not estopped from claiming dower by collecting the rent. *Audenried v. Betteley*, 5 Allen, 382. Time is of the essence of the contract. *Benedict v. Lynch*, 1 Johns. Ch. 370; *Grey v. Tubbs*, 43 Cal. 359; *Grigg v. Landts*, 19 N. J. Eq. 350. Moreover, the contract is not founded on adequate consideration, and will not be enforced.

Chas. U. Bell and Wm. H. Moody, for Byron L. Peaslee et al.

The decree of divorce from the bond of matrimony was void because it was passed without any notice whatever to the libelee. *Sparhawk v. Sparhawk*, 116 Mass. 315, 319; *Graves v. Graves*, 108 Mass. 314, 320; *Bigelow v. Bigelow*, Id. 38, 40. The so-called divorce from bed and board, or divorce *nisi*,

was a mere judicial separation, and not a true divorce, and a decree of absolute divorce affected and changed the rights both of person and property of the parties, and could not be considered as a mere incident to the former petition. There can be no doubt, then, that this decree of divorce from the bond of matrimony was wholly irregular. Is it valid until set aside? See *Smith v. Woolfolk*, 115 U. S. 143, 5 Sup. Ct. Rep. 1177; *Windsor v. McVeigh*, 98 U. S. 274; *Bradstreet v. Insurance Co.*, 3 Sum. 600; *Woodruff v. Taylor*, 20 Vt. 65; *Greene v. Greene*, 2 Gray, 361, 362; 2 Bish. Mar. & Div. § 753e; *Cheely v. Clayton*, 110 U. S. 701, 4 Sup. Ct. Rep. 328. A court has no more power to assume jurisdiction over a marriage contract than over any other subject, without due service of process, or appearance of the party defendant. *Hoffman v. Hoffman*, 46 N. Y. 30, 34; *Hollingsworth v. Barbour*, 4 Pet. 472; *Isaacs v. Price*, 2 Dill. 351; *Kitsmiller v. Kitchen*, 24 Iowa, 163. It is a rule founded in the first principles of natural justice that a party shall have an opportunity to be heard in his defense before his property is condemned, and that the charges on which the condemnation is sought shall be specific, determined, and clear. STORY, J., *Bradstreet v. Insurance Co.*, 3 Sum. 600, 607. All cases which appear to hold any other doctrine than that a judgment with no notice is absolutely null and void for all purposes, will be found, upon examination, to be cases where notice was actually served, but it was in some way defective or irregular. It is uniformly held that third parties may avoid such a judgment by plea and proof. A judgment depending on proceedings *in personam* can have no force as to one on whom there has been no service of process, actual or constructive, who has had no day in court, and no notice of any proceeding against him. That with respect to such person such a judgment is absolutely void. He is no party to it, and can no more be regarded as a party than any and every other member of the community. *Webster v. Reid*, 11 How. 437; *Harris v. Hardeman*, 14 How. 339; *Winship v. Conner*, 42 N. H. 341, 346; *Borden v. Fitch*, 15 Johns. 141. Was there evidence of fraud? If the question and reply ("I suppose it is just as you talked?" "Yes;" in connection with proof of an oral contract a year before) authorized the jury to find the allegation in the replication that Hiram Peaslee "presented it to her as and for the antenuptial agreement orally agreed on, and represented to her that said written agreement was all right; that it was just what they had agreed on; that there was no necessity for her to read it; and that he, the said Hiram, was in a great hurry; and thereby induced the demandant to sign it without reading it,"—to be true, in that case the tenants make no contention; without the question and answer, the case would be simply the ordinary one of a person's signing an instrument without reading it, although the opportunity to do so has been given; in which case, by familiar law, he is bound and may not show that the oral agreement was different. *Trambly v. Ricard*, 130 Mass. 259. It is submitted that there was no evidence of a fraudulent representation by act or word. The testimony of the witnesses Pear and Smith should have been excluded. It had a manifest tendency to lead the jury from the real issue. It is to be observed that the conversation with Smith was not in the demandant's presence, and so was not part of the "talk" with the latter. Was there an election to waive the jointure? If the antenuptial contract was void for fraud, and has been duly avoided, it was still a jointure before marriage, without the assent of the intended wife, and is a bar to her dower, unless within six months she made her election to waive the jointure. Pub. St. c. 124, § 9. There was no evidence of such a waiver, and the tenants' fourth request should have been given. From a claim inconsistent with the terms of the jointure, it is not competent to infer a waiver of the benefits of the jointure. The equitable rule that one holding a beneficial interest under a will cannot set up any claim which will impair its full effect would seem, by analogy, to apply to the case at bar. See *Watson v. Watson*, 128 Mass. 152, where this rule, with limitations, is expressed. *Pratt v. Felton*, 4 Cush. 174. Assum-

ing that the jury were authorized, on the evidence, to find that the antenuptial contract was procured by the fraud of the intended husband, that fact made it voidable, and not void. The effect of fraud is always to render the instrument, contract, conveyance, or transaction voidable only. *Hare, Cont.* 301; *Rowley v. Bigelow*, 12 Pick. 307; *Bank v. Jackson*, 33 Ch. Div. 1; *State v. Richmond*, 26 N. H. 232; *Pearsoll v. Chapin*, 44 Pa. St. 9; *Mullen v. Railroad Co.*, 127 Mass. 86, is widely distinguished. Assuming that the court would have held the release void in the sense of being incapable of confirmation, (which is by no means certain,) it was clearly a case where the document signed was of a different class from that intended. *Matthews v. Baxter*, L. R. 8 Exch. 132; *Molton v. Camvoux*, 2 Exch. 487, 4 Exch. 17. It is submitted that a married woman may have a capacity to confirm a contract made while sole, although she may not, at the time of confirmation, have the capacity then to make such a contract. Confirmation in many respects resembles waiver, and a wife may waive her equity for a settlement. 2 Story, Eq. Jur. (18th Ed.) § 1418. The English courts have held distinctly that a married woman, during coverture, may confirm a marriage settlement, made by her while an infant, and therefore voidable. *Barrow v. Barrow*, 4 Kay & J. 409; *Smith v. Lucas*, 18 Ch. Div. 531; *Wilder v. Pigott*, 22 Ch. Div. 263; *Corley v. Stafford*, 1 De Gex & J. 238; *Ardesoife v. Bennett*, 2 Dick. 463. These cases, if sound, settle the principle that a power to confirm a voidable instrument exists during coverture. Can any distinction be suggested between a contract voidable through infancy, and one voidable for fraud? The wife is in a position to act with freedom. It cannot be said that her powers are suspended during coverture, for she may rescind and avoid a contract. *Walsh v. Young*, 110 Mass. 396. Mrs. Peaslee might, at any time after a discovery of the fraud practiced upon her, have sought her remedy in equity, (*Ayer v. Ayer*, 16 Pick. 327; *Scott v. Rand*, 115 Mass. 104; *Dixon v. Dixon*, 9 Ch. Div. 587; *Wood v. Wood*, 19 Wkly. Rep. 1049; *Black v. Black*, 30 N. J. Eq. 215; *Roberts v. Evans*, 7 Ch. Div. 830;) and there is jurisdiction in equity to set aside or reform an antenuptial contract for fraud or mistake, (*Clemmons v. Drew*, 2 Jones, Eq. 314; *Sanderlin v. Robinson*, 6 Jones, Eq. 155; *Love v. Graham*, 25 Ala. 187; *Durham v. Taylor*, 49 Ga. 166; *Brown v. Bonner*, 8 Leigh, 1;) and it is submitted that a court of equity might order a specific performance of the oral contract. As to the effect of our statutes upon a wife's capacity to confirm, see Pub. St. c. 147, §§ 1, 2; *Major v. Holmes*, 124 Mass. 108; *Butler v. Ives*, 139 Mass. 202; *Chandler v. Simmons*, 97 Mass. 508. The tenants contend that the acts and declarations during coverture were at least competent to characterize and explain the acts and declarations after coverture, and, in connection with these latter, prove a confirmation after coverture ceased. The acts during coverture had some tendency to prove a confirmation after coverture. *Jones v. Fleming*, 104 N. Y. 418, 10 N. E. Rep. 693. The tenants contend that the case at bar falls within the rule of *Snow v. Alley*, 144 Mass. 546, 11 N. E. Rep. 764. The offer to return a portion of the rents at the trial, signifies nothing, as property stands upon a different footing from notes, which are mere promises. As to a part of the consideration received, *Chandler v. Simmons*, *ubi supra*, may be cited. But the disabilities of coverture are not, at least in modern times, those of infancy. The vital distinction between *Chandler v. Simmons* and the case at bar is that in that case the consideration was received under a contract which the party could not indefeasibly make; in this, under a contract which she could so make. The demandant has received and now retains important and valuable considerations under the terms of a contract which she had the full power to make. She has received much after a full knowledge of the alleged fraud, and retained all after that knowledge. She has received, and not seasonably returned, a part while discoverd. The farm which was conveyed to her is still vested in her. If she was defrauded, equity can do her full justice

without the necessity of injustice to others. Therefore the tenants submit that every reason which sustains the rule of *Snow v. Alley*, *supra*, is present here in the case at bar.

At common law, a woman could not, before marriage, bar her dower, because she then had no title, and because no collateral satisfaction can bar a freehold. A woman was not dowerable of uses, upon which tenure land was generally held before the statute of uses. That the wife might not be destitute, it was at that time the custom to convey to her, before marriage, land which was called her jointure. When the use was executed by the statute, it became necessary to provide that those women who already had jointures should not also have their dower. At the same time, the same rule was laid down for future cases. 27 Hen. VIII. c. 10, §§ 4, 7. The whole system of barring dower by a jointure rests, therefore, upon this statute. A jointure must be within the express terms of this statute in order to constitute a bar at law of dower. *Vernon's Case*, 4 Coke, 2, (1a); *Hastings v. Dickinson*, 7 Mass. 153. Pub. St. c. 124, § 7, (which was first enacted in the Revision of 1836,) does not alter the statute of uses. "A freehold estate in lands for her life at least" is co-extensive with the kinds of jointure marked out in the statute of uses. See Commissioners' Report of Revision of 1836. Equity early held any provision which was accepted by the wife a bar to dower. *Dyke v. Rendall*, 2 De Gex, M. & G. 209; *Sullings v. Richmond*, 5 Allen, 187; *Tarbell v. Tarbell*, 10 Allen, 278; *Paine v. Hollister*, 139 Mass. 144. And these cases show that a bill for an injunction was the proper method of asserting this equitable right. So far as *Freeland v. Freeland*, 128 Mass. 509, decides that an equitable jointure is a legal bar to a writ of dower, it is not to be reconciled with the preceding cases. The proper construction of the antenuptial contract is submitted to the court. If it vests a freehold in the respondent, it is clear that it is a bar at law, and, under the equity jurisdiction of this court, this bill will not lie. If the respondent's estate is an equitable one, this bill, under the decisions, will lie. Chapter 223, § 14, Acts 1883, does not alter this case. That section is permissive, and does not exclude a person from resorting to equity to avail himself of an equitable right. Where the equitable relief requires an affirmative act on the part of the court, there is a practical difficulty in obtaining that relief under this statute, and one desiring that relief should be permitted to seek it in any way he wishes.

EDLMES, J. The first case is a writ of dower brought by Abby D. Peaslee as the widow of Hiram Peaslee against his devisees. The tenants deny the validity of the marriage, and set up an antenuptial contract by way of equitable defense. The second case is a bill in equity brought by the tenants to enjoin the action at law against them on the ground of the same antenuptial agreement. It comes here upon appeal from a decree sustaining a demurrer, but the bill is not pressed unless it is necessary to protect the tenants' equitable rights; and, as the facts were tried in the action at law, and all the questions sought to be raised are raised there, we shall confine our discussion to the latter. St. 1883, c. 223, § 14; *Freeland v. Freeland*, 128 Mass. 509, 512.

The first question raised is whether the demandant's marriage to Hiram Peaslee was valid. She had been married previously to one Rowe, who was living at the time of her marriage to Peaslee, in 1873. She obtained a divorce from bed and board against Rowe on November 4, 1868. On April 16, 1872, she filed a petition to make the decree absolute, and on May 24, 1872, a decree was passed purporting to make absolute the divorce from the bonds of matrimony. The record shows personal service of the libel on Rowe, and a default by him, but discloses no order of notice, or notice to him of the petition. The proceeding on the petition was under St. 1870, c. 404, which did away with divorce from bed and board, enlarged the number of causes of divorce from

the bonds of matrimony, and enacted that, if the libellant prevailed, the court should enter a decree of divorce *nisi*; and that, if the parties should continue to live separately for five consecutive years next after the decree, the court should, upon proof thereof, make said decree absolute, and might make it absolute after the parties had lived apart three consecutive years. The first section provided that all persons then divorced from bed and board should be in the same legal condition as if divorced *nisi* under that act; and this provision, it will be seen, applied to the demandant. The validity of the provision is established. *Bigelow v. Bigelow*, 108 Mass. 38; *Graves v. Graves*, Id. 314, 320. See *Jacquins v. Com.*, 9 Cush. 279. The petition to make the decree absolute "takes the place of the libel, under the General Statutes, (c. 107, § 10,) for a divorce from the bond of matrimony after parties divorced from bed and board had continued to live apart for the requisite time." *Graves v. Graves*, *ubi supra*. But in this case and in others the proceeding is spoken of as a new one, upon which the court always ordered notice to the other party, (*Garnett v. Garnett*, 114 Mass. 379, 380; *Sparhawk v. Sparhawk*, 116 Mass. 315, 319;) and, practically, it was dealt with as such, being entered as a new cause, and the records, in some counties, although not, we believe, in Essex, disclosing an order of notice and hearing. In Essex, as well as elsewhere, of course, the original papers, when complete, show an order of notice, and generally show a compliance with it either by return or affidavit, as the case may be. But when we have to consider whether a divorce accepted by the parties, and on the faith of which the marriage under consideration took place, shall be declared void, at the suggestion of a stranger, for want of jurisdiction, because the record and papers found on file do not show such notice to have been given, the question assumes a different aspect. It is true that in practice the proceeding was dealt with as a new one. But this was not necessarily due to any other cause than the length of time intervening between the decree *nisi* and the proceeding to make the decree absolute. Under St. 1870, c. 404, the time to elapse was not less than three or five years, and therefore the old cause went off the docket. But it must be kept in mind that the provisions of that statute were primarily provisions for making absolute decrees *nisi* also made under that statute, and that the further clause giving persons divorced from bed and board the same *status* as if divorced *nisi* under the statute was an independent matter on one side. The question how far and in what sense the proceeding was a new one must be discussed with reference only to the proceeding to make absolute a decree *nisi* under the statute. It seems to us that, by the very terms of the statute, it was a proceeding, in the original cause, to make the original decree absolute. The words are "shall make said decree absolute." Under the earlier statute of 1867, c. 222, when the decree *nisi* was to be made absolute after six months, the cause was continued, and the final decree appeared as part of the original record. The same is true under the present statute. St. 1882, c. 223. There is no such difference in the language or provisions of the act of 1870 as to warrant a different interpretation. The statute does not even say anything about notice, and the language of the court in the cases cited does not purport to be a construction of the statute, but a statement of judicial practice. As the fact that the parties had lived separately was to be proved, and as other grounds for refusing to make the decree absolute might exist, it was very proper to require notice of the application, so that the other party might be present at the hearing if he saw fit, although, under St. 1882, while a petition is always filed, notice is expressly dispensed with by the act, and the burden is thrown on the objecting party to take his objection in time. But it is one thing to say that notice will be required on judicial grounds, and another to say that service or its equivalent was necessary to found jurisdiction. If the latter had been necessary, it would have been a question for consideration whether a decree could ever have been made absolute without personal serv-

v.17 N.E.no.5—33

ice, as the statute, saying nothing about service or notice, of course did not provide expressly for service by publication, although, no doubt, it might have been held impliedly to adopt the modes of service authorized in the original cause. *Blackinton v. Blackinton*, 141 Mass. 432, 5 N. E. Rep. 830. However this may be, we are of opinion that the proceeding to make a decree *nisi* under St. 1870 absolute was a continuation of the original proceedings; and that jurisdiction, acquired by personal service in the original cause, continued until the decree was made absolute. We think that the grounds for this opinion are at least as strong as those on which it has been held that *scire facias* against a trustee is a continuation of the original proceeding, and therefore that a Massachusetts judgment on *scire facias*, without personal service against a trustee who was served in the original action, is conclusive in another state. *Adams v. Rowe*, 11 Me. 89. See *Nations v. Johnson*, 24 How. 195, 205.

If our conclusion is right as to proceedings wholly under St. 1870, it must govern the present case. As we have said, the validity of the act as applied to existing divorce from bed and board is established by decision. The only effect of our construction is that a new service was not necessary to found jurisdiction for the supplementary proceedings. But it was patent on the face of the statute that no service was expressly required, and that fact must have been before the mind of the court when making the decisions which we have cited, and it was as obvious then as now that judicial practice could not impart validity to the act if it was not valid without such aid. However, as the statute was not considered in quite the same light in which it now is presented, we may add that, even if an independent petition *ex parte* had been allowed, it would be hard to see what rights of parties, domiciled here, would have been impaired, (*Pierce v. Burnham*, 4 Metc. 303,) or what greater objections could be urged than can be against divorces without service or personal notice of the institution of the suit, (*Burlen v. Shannon*, 115 Mass. 438; *Pennoyer v. Neff*, 95 U. S. 714, 735; *Cheely v. Clayton*, 110 U. S. 701, 705, 4 Sup. Ct. Rep. 328.) But the statute did not go to that extent. It did not throw on the party concerned the burden of watching the dockets of all competent courts for a new entry. It simply threw on him, by a statute which he was presumed to know, the burden of noting in a cause to which he was a party his desire to be heard in opposition to the making of a decree. We think it clear that it was no more necessary, under St. 1870, than it is at present, to await the filing of a petition in order to file objections to the decree being made absolute. If we could construe St. 1870 as by implication requiring notice, we should be inclined to think that it might be presumed that notice was given, without contravening any general proposition as to proceedings not according to the course of the common law. *Com. v. Blood*, 97 Mass. 538. See *Henry v. Estes*, 127 Mass. 474, 475. The court had jurisdiction of the subject-matter, and was the court of the parties' domicile. The justice who made the decree absolute was a member of the bench which stated the practice to be that the court always ordered notice. All the reasons which justify a presumption of jurisdiction in other cases would have to be present here. In *Edds' Case*, 137 Mass. 346, it was presumed that the probate court had satisfied itself outside the return that service had been made or ordered. In *Huntington v. Charlotte*, 15 Vt. 46, domicile of the parties was presumed in support of the jurisdiction to grant a decree of divorce. See *Grignon v. Astor*, 2 How. 319, 340; *Waltz v. Borroway*, 25 Ind. 380; *Innerarity v. Byrne*, 5 How. 295.

The other questions relate to the antenuptial agreement. It is enough to say, without more detail, that there was some evidence that the demandant's intended husband induced her, by what might have been thought a pretense, to sign the paper before she had read it through; that she said, "I suppose it is just as you talked?" that he said, "Yes;" that she believed him, and signed it, knowing the contents only from what he said; and that in fact the pro-

vision for her was not what he had promised in the talk referred to. This evidence, if believed, warranted a finding that the demandant was induced to sign the paper by a fraudulent misrepresentation of the contract. See *Kline v. Kline*, 57 Pa. St. 120.

Hiram Peaslee's alleged conversations with the witnesses Pear and Smith, fairly construed, imported an arrangement with the demandant such as she had testified to, or at least might have been found to have had that meaning, and were therefore admissible in support of that part of her testimony to make out a case of fraud. The jury were instructed to disregard them so far as they were mere expressions of intention. See *Camerlin v. Palmer Co.*, 10 Allen, 539, 542.

It will not be necessary to consider whether the fraud alleged would have made the agreement voidable or void, nor whether the provision in lieu of dower would be a legal or only an equitable bar. We shall assume that the instrument was capable of confirmation, at least, and that if confirmed it would be a bar in equity if not in law. But we are not of opinion that the demandant could not ratify the instrument during coverture. If the provision would have been a legal bar, her power to accept such a provision was governed by statutes which have not been affected by the enlargement, in other directions, of the powers of married women. See *Mason v. Mason*, 140 Mass. 63, 3 N. E. Rep. 19. Under Pub. St. c. 124, § 9, she could not bar her dower during coverture by any expressions of assent to a provision made for her at that time. See *Bigelow v. Hubbard*, 97 Mass. 195. It can make no difference whether the instrument was made before or during coverture. The policy of the law is directed, not against the husband's drawing the instrument, but against the wife's concluding herself by accepting it while under marital influences. If she cannot accept a provision made at one time, she cannot accept one made at another. See *Smith v. Lucas*, 18 Ch. Div. 531, 544. This principle of policy is equally applicable to cases not strictly within the statute as to those within its letter. It applies as fully to the ratification of an instrument which purports to have been assented to before marriage, but which the wife has a right to avoid, as to one which is presented to her for the first time after marriage. If the jointure should be deemed an equitable one, it would be governed by the same rule. In this particular, equity would follow the law. It follows from what we have said that the court was right in rejecting evidence of acts and declarations during coverture tending to show ratification at that time. It is true that a part of the evidence rejected was of the giving of a note to a trustee for the demandant, coupled with a written assent on her part. But there was no offer to show that she sought to compel the trustee to retain the note after her husband's death, or any offer otherwise to make the receipt of the property the foundation for proof of ratification when the demandant was able to ratify. It is suggested that the acts during coverture were admissible to show the character of the acts after coverture. But the acts of the demandant during coverture, being acts of a person incompetent so to act with legal effect, had no character, and could not be used for adjective any more than for substantial purposes. Otherwise the rule which we have laid down would be evaded by a very simple device. See *Lowell v. Daniels*, 2 Gray, 161; *Pierce v. Chase*, 108 Mass. 254, 259.

But it is argued, and the court was requested to instruct the jury to that effect, that the demandant could not rescind the antenuptial contract without returning all the benefits which she had received under it. The benefits referred to are the marriage itself, certain rents received by the demandant during coverture, a few dollars collected afterwards in ignorance of her right, which she offered to return at the trial, and the estate or interest purporting to be conveyed by the indenture. Assuming that the marriage was in any technical or practical sense founded in part upon the contract as consideration, it would be pushing *Snow v. Alley*, 144 Mass. 546, 11 N. E. Rep. 764, to

undreamed-of consequences were we to hold that the statute bar of dower is irrevocably fixed if a man, by any fraud, can get his intended wife to execute an antenuptial agreement, or what turns out to be one, and to marry him before she discovers the fraud. In *Johnson v. Johnson*, 53 Law J. Ch. 1015, affirmed, 52 Law T. (N.S.) 76, the fraud alleged was fraud directed to and inducing a marriage. The settlement made by the husband could only be reached through the marriage, and, while the marriage stood, the settlement stood. It was intimated that, after marriage, a settlement could not be avoided for fraud; but some of the American decisions, that a fraudulent jointure can be set aside after marriage, were referred to, and seem to have been thought by the court of appeal entirely consistent with their intimation. *Kline v. Kline*, *ubi supra*; *Kline's Estate*, 64 Pa. St. 122; *McCartee v. Teller*, 2 Paige, 511. The right of dower can be barred only by meeting the requirements of the statute in substance as well as in form, and the cases show that even when the fraud goes only to the motives for signing, and not to the identity of the instrument, marriage does not cut off the right to rescind; and that, although the marriage is irrevocable, yet, as was said in answer to a proposition not more startling than the one we are discussing, "that account is *in equilibrio*." *Price v. Sears*, 2 Low. 553. See *Rau v. Von Zedlitz*, 132 Mass. 164, 169. Then as to the rents collected during the marriage. It will be observed that the instrument under consideration contains two distinct sets of provisions, which are as independent of each other as if contained in separate documents. There is a gift of the rents and profits in trust for the wife during coverture, which may be regarded as a marriage settlement, and there is a provision that the legal estate shall be conveyed to her upon the husband's death, which is the proposed jointure. It is "said transfer," that is, the conveyance after his death, which the wife accepts in satisfaction of dower. The rejection of this provision does not involve the rejection of the independent gift during coverture, and therefore does not require a return of the rents received during that period. The collection of a few dollars by the demandant after her husband's death, in ignorance of her rights, if it stands on a different footing from the previous receipt of rents, and the fact that the amount was not formally tendered back until the trial, did not necessarily conclude her. *Watson v. Watson*, 128 Mass. 152; *Smith v. Holyoke*, 112 Mass. 517; *Rau v. Von Zedlitz*, 132 Mass. 164. The bill of exceptions states that all acts tending to show ratification after her husband's death were submitted to the jury with proper instructions.

The alleged jointure is pleaded as an equitable jointure only, and seems to have purported to convey only an equitable estate by the law of New Hampshire, so far as we can rely upon the proceedings under the New Hampshire statute put in evidence by the tenant. Apart from local statutes, we cannot assume that the law of New Hampshire is different, upon this question, from that of Massachusetts; and by the law of Massachusetts the use would not be executed under a similar instrument. The trust is for a married woman. The intent manifested by the instrument is that the legal title should remain in the trustee until the death of the grantor, and the demandant is then to acquire a title only by conveyance. Also a consideration purports to have been given by the trustee sufficient to raise a use in him. See *Ayer v. Ayer*, 16 Pick. 327; *Richardson v. Stodder*, 100 Mass. 528; *Hastings v. Merritt*, 117 Mass. 245, 252; *Chapin v. Society*, 8 Gray, 580; *Stearns v. Palmer*, 10 Metc. 32, 35; *Mott v. Buxton*, 7 Ves. 201. If the demandant lawfully refused to accept a conveyance tendered her in pursuance of the terms of the agreement, and repudiated the agreement, there was no need for her to go further, and to tender a reconveyance. The instrument being void by her election, if not before, it is hard to see why a release should have been necessary, even if it had purported to convey a legal title. *Somes v. Skinner*, 16 Mass. 348, 357; *Somes v. Brewer*, 2 Pick. 184, 191; *Chandler v. Simmons*, *ubi supra*. Still

more, when the instrument, if valid, would give a mere equitable right to a conveyance, which, strictly speaking, is only a *ius in personam*, (*Telegraph Co. v. Caldwell*, 141 Mass. 489, 492, 6 N. E. Rep. 737,) and which, if sought to be enforced, would be met by the answer that she had elected against the instrument, and that the trustee no longer held the property in trust for her. But, in order to clear the record title, it may be made a condition of dismissing the bill, and of ordering judgment for the demandant, that she file a release of all her rights under the instrument. Exceptions overruled. Bill dismissed.

(147 Mass. 237)

BENSON v. GOODWIN *et al.*

(Supreme Judicial Court of Massachusetts. Suffolk. June 20, 1888.)

MASTER AND SERVANT—NEGLECTANCE OF FELLOW-SERVANTS—SEAMEN.

The mate and a common sailor upon a merchant vessel, are fellow-servants, and the owners of the vessel are not liable for injuries sustained by a sailor in consequence of the negligence of the mate; the vessel at the time being in charge of the captain.¹

Exceptions from superior court, Suffolk county; MASON, Judge.

Action of tort by James Benson against Eben P. Goodwin and others, part owners of the merchant ship *Benj. F. Packard*, to recover damages for personal injuries to the plaintiff. At the trial in the superior court, the plaintiff testified that he shipped on board the *Benj. F. Packard* as a sailor to take her to New York from Bath; that he went as a sailor or runner; that at the time of the accident the vessel was being towed down the river from Bath, Me., with one tug-boat ahead, and one on the starboard side; that the men on board were engaged in getting up the port anchor; that, as the anchor was being hauled up, it caught in a moulding on the side of the ship, and the mate said that they were in a hurry to fish the starboard anchor, and that they would hang this anchor in the shank painter; that he then said to plaintiff, "You go down, and pass the shank painter;" that he (plaintiff) went down in obedience to the mate's command, and was injured by the flukes of the anchor falling on his foot; plaintiff also testified that at the time of the accident the captain was on the poop deck, with the pilot, on the after-part of the ship, and that the captain had charge of the vessel; that he (plaintiff) knew it was a patent anchor, and that the flukes played on a pivot, and that he knew that, if the flukes came down on him, it would hurt him; that, when he passed the shank painter around, he sat on the shank, and threw both legs down on the shank, and then got up, and stood with his left foot where the fluke caught him, and his right within the space made by the shank and the curved fluke of the anchor after the fluke fell. There was other evidence tending to show that the plaintiff acted under orders from the mate, but there was no evidence that he had signed shipping articles. The defendants requested the court to rule that a common sailor and mate are fellow-servants, and that plaintiff could not recover; but the court refused so to rule, and ruled that a common sailor and mate were not fellow-servants, and that the defendants would be liable for the negligence of the mate if the plaintiff was injured in consequence thereof. The jury returned a verdict for the plaintiff for \$7,000, and the defendants excepted.

C. B. Southard, and *Russell Bradford*, for defendants.

The contention of the defendants is based upon the principle that a master is not liable to one of his agents or servants for injuries sustained through the negligence of another servant or agent, when both are engaged in the same general business. This principle is fully established. *Farrowell v. Rail-*

¹As to who are fellow-servants, see *Wolcott v. Studebaker*, 84 Fed. Rep. 8, and note; *McMaster v. Railway Co.*, (Miss.) 4 South. Rep. 59.

road Corp., 4 Metc. 49; *Clifford v. Railroad Co.*, 141 Mass. 564, 6 N. E. Rep. 751; *Wright v. Railroad Co.*, 25 N. Y. 562, and cases cited. The defendants, having employed suitable servants, and having provided proper apparatus, are not responsible to one servant for the negligence of another in the management and use of such apparatus. *Holden v. Railroad Co.*, 129 Mass. 268, 274; *Carle v. Railroad Co.*, 43 Me. 269. It is equally well settled in this commonwealth that all servants employed by the same master in a common service are fellow-servants, whatever may be their grade or rank. *Rogers v. Manufacturing Co.*, 144 Mass. 198, 203, 11 N. E. Rep. 77, citing *Albro v. Canal Co.*, 6 Cush. 75; *O'Connor v. Roberts*, 120 Mass. 227; *Walker v. Railroad*, 128 Mass. 8; *Holden v. Railroad Co.*, 129 Mass. 268; *McDermott v. Boston*, 133 Mass. 349; *Flynn v. Salem*, 134 Mass. 351; *Mackin v. Railroad*, 135 Mass. 201. See, also, *Buzzell v. Manufacturing Co.*, 48 Me. 113; *Blake v. Railroad Co.*, 70 Me. 60. Plaintiff and the mate were in the same service, derived their compensation from the same source, and were under the same direction and control of the captain, who was in command of the vessel. *Albro v. Canal Co.*, 6 Cush. 75, 77; *Gilman v. Railroad Corp.*, 10 Allen, 233, 236. 2 Thomp. Neg. 1026. The mate is a sailor, and is one of the crew, and is under the orders of the master. Curt. Merch. Seam. 86, 99; Dana, Seam. Fr. 137, 199; *Holt v. Cummings*, 102 Pa. St. 212; *The Ocean Spray*, 4 Sawy. 105; *The Minna*, 11 Fed. Rep. 759; *Scarff v. Metcalf*, 13 N. E. Rep. 796; *Atkyns v. Burrows*, 1 Pet. Adm. 244. "Seamen" includes all on board excepting the captain and apprentices. Rev. St. U. S. § 4612, tit. "Merchant Seamen." The master and mate of a vessel are fellow-servants. *Mathews v. Case*, 61 Wis. 491, 21 N. W. Rep. 513. The master and keeper of a vessel is a fellow-servant of the mate. *Caniff v. Navigation Co.*, 33 N. W. Rep. 744. Boat-swain and stevedore are fellow-servants. *The Furnessia*, 30 Fed. Rep. 878. Master, mate, and sailor are fellow-servants. *Malone v. Transportation Co.*, 5 Biss. 315. Mate and sailor are fellow-servants. *Holverson v. Nisen*, 3 Sawy. 562. Captain and sailor are fellow-servants. *Loughlin v. State*, 11 N. E. Rep. 371. Chief engineer and third engineer on steamer are fellow-servants. *Searle v. Lindsay*, 11 C. B. (N. S.) 429, (1861.) "The master of a vessel may be the *alter ego* of the owners; but the mate, when the master is on board, is not an *alter ego*, and the mate and seamen are fellow-servants." *Olsen v. Clyde*, 32 Hun. 425. A seaman and the officers of a ship are fellow-servants. *The City of Alexandria*, 17 Fed. Rep. 390. That the plaintiff owed obedience to the mate is immaterial. This court has repeatedly held that persons employed in the same work, although one has the control and direction of the other, are fellow-servants. *Duffy v. Upton*, 113 Mass. 544. Conductor and brakeman are fellow-servants. *Hayes v. Railroad Corp.*, 3 Cush. 270. Superintendent of sewers and laborer are fellow-servants. *Johnson v. Boston*, 118 Mass. 114. Superintendent and laborer are fellow-servants. *Floyd v. Sugden*, 134 Mass. 563. If a party is ordered by one to whom he owes obedience into a dangerous service, other than that for which he was employed, his obedience will not, as a matter of law, be negligence. Beach, Contrib. Neg. § 132. But the duty of obedience, assuming it to exist, is not material in any other respect. The danger of the employment may be greater as the duty of obedience is greater; but "if the employment is attended with extraordinary dangers, fully known to the workmen who enters upon the employment, he assumes those risks also." *Joyce v. Worcester*, 140 Mass. 245, 250, 4 N. E. Rep. 565. The owners of a vessel are not liable for injuries to a sailor, although occasioned by the negligence of the master himself. NELSON, J., *Hanson v. The A. Heaton*, U. S. Dist. Ct. Dec. 4, 1886. The plaintiff was an able seaman, and undertook to run all the ordinary risks of the service, which included the risk of negligence on the part of others in the service of the same employers. *Albro v. Canal Co.*, 6 Cush. 75; *King v. Railroad Corp.*, 9 Cush. 112; *Hutchinson v. Railway Co.*, 5 Exch. 343. "The naviga-

tion of a ship from one port to another constitutes one common undertaking, for which all the ship's company in their several stations are alike employed. Each one takes the risk of any negligence of his associates in the common employment." *The City of Alexandria*, 17 Fed. Rep. 390, (Dist. Ct. S. D. N. Y. July 3, 1883.) The owners placed competent officers in charge of the vessel, and furnished suitable apparatus. They could do no more to protect the plaintiff. To hold them liable for the negligence of the mate would put a responsibility on the owners of vessels beyond all limits. *Searle v. Lindsay*, 11 C. B. (N. S.) 429, 440. The obligations of vessel owners have been defined in nearly the same language in ancient and modern authorities. Sailors, if injured without fault of their own, are only entitled to be cured at the charge of the ship. Laws of Wisbuy, § 18; Curt. Merch. Seam. 109, 110. They are not to receive any compensation or allowance for the effects of the injury. *Reed v. Canfield*, 1 Sum. 195, 202. See *The E. B. Ward, Jr.*, 20 Fed. Rep. 702. The determination of this case is not affected by the fact that the accident occurred in Maine. *Davis v. Railroad Co.*, 143 Mass. 801, 303, 9 N. E. Rep. 815. The plaintiff relies upon three cases: *The Chandos*, 6 Sawy. 544, 4 Fed. Rep. 645; *Daub v. Railway Co.*, 18 Fed. Rep. 625; *Thompson v. Hermann*, 47 Wis. 602, 3 N. W. Rep. 579. In the first case the question now before this court was not considered, and the judge expressly stated that it was not necessary so to do. In the second case there is no discussion of authorities; nothing is reported except the charge to the jury. In the third case the facts were not the same, as the injury was occasioned by the master of a vessel, who was also part owner. Notwithstanding the general allegation that the plaintiff was free from negligence, the facts set forth show that he was guilty of contributory negligence, and that he had such a complete knowledge of the risk and danger he was subject to in going on the anchor that he assumed the risk with full knowledge of the danger.

L. W. Howes and G. C. Abbott, for plaintiff.

The tendency now is, both by the courts of the highest order and by legislation, to narrow and limit, and not broaden, the old rule as to master and servant, making a marked distinction between those whose only duty is to manage, direct, and command, and those under them, whose only duty is to obey their commands and do the work. In the one case, such manager or superintendent, having entire control and management of the enterprise, clothed with full power, the owners acting only through him, becomes their agent and representative, and his acts are their acts, and they are responsible for them. *Railway Co. v. Ross*, 112 U. S. 390, 394, 5 Sup. Ct. Rep. 184, and cases cited; *Booth v. Railroad Co.*, 73 N. Y. 38; *Darrigan v. Railroad Co.*, 24 Amer. Law Reg. (N. S.) 453; *Railway Co. v. Henderson*, 37 Ohio St. 552; 1 Redf. R. R. 554; *Railroad Co. v. Keary*, 3 Ohio St. 201; *Railroad Co. v. Stevens*, 20 Ohio, 415. Such superintendent or overseer, who directs the whole enterprise, is the personal representative and agent of the owners, and for whose acts and negligence the owners should be liable. Such a rule insures more care in selecting such agents, and gives greater security to the servants employed under them in an employment requiring the most prompt and unhesitating obedience to the orders of such agents or officers. Mr. Wharton, in his treatise on the Law of Negligence, says, after commenting upon some decisions: "The true view is that, as corporations can act only through superintending officers, the negligence of those officers with respect to other servants are the negligences of the corporation." Section 232a. The author, in a note, cites *Brickner v. Railroad Co.*, 2 Lans. 506, decided in the supreme court of New York, and afterwards confirmed in the court of appeals, 49 N. Y. 672; and to *Malone v. Hathaway*, 64 N. Y. 5, decided in said court of appeals, which accord with his views. The duty of the superintendent or officers is to manage and direct, and of those under them to obey. The owners

are constructively present in all acts performed by the officers of the ship. 1 Redf. R. R. 554. The reasons given by Judge SHAW, in the great leading case, *Farwell v. Railroad Corp.*, 4 Metc. 49, for the rule there laid down, and as the foundation of the rule, do not hold in this case. The mate is not the fellow-servant of the common sailor. *The Chandos*, 4 Fed. Rep. 649, (decided, 1880, in Oregon;) *Daub v. Railway Co.*, 18 Fed. Rep. 635, (decided, 1883, in Oregon;) *The Neptuno*, 30 Fed. Rep. 925, (1887, in New York.) The cases of *Olson v. Clyde*, 32 Hun. 428, and *Halverson v. Nisen*, 8 Sawy. 562, cited by defendants to the contrary, were decided previous to the above cases, and before the distinction between sailors and laborers on shore had been judicially noted. Both cases were in New York, and were decided upon the strength of *Wright v. Railroad Co.*, 25 N. Y. 565; and *Halverson v. Nisen*, *ubi supra*, was overruled in *The Chandos*, *ubi supra*, and a different doctrine has ever since, and repeatedly, been held as between sailor and mate. The case of *Wright v. Railroad Co.*, on which the only opposing decision rests, relies for its first authority and for its best reasoning on *Farwell v. Railroad Corp.*, 4 Metc. 57, which is the leading Massachusetts case on the doctrine of fellow-servant. In the case at bar the plaintiff is a common sailor, and had no opportunity to guard against the risk of acting under a negligent mate. He could not "leave the service." See Rev. St. U. S. §§ 4598, 4600. This doctrine of *The Chandos* is affirmed three years later (in 1883) in *Daub v. Railway Co.*, 18 Fed. Rep. 635. Again, the same doctrine is affirmed in *Sullivan v. The Neptuno*, 30 Fed. Rep. 925. And see New York, in *The Titan*, 23 Fed. Rep. 413. The case of the employe in a manufacturing establishment or railroad corporation, or any other business on land, is vastly different from the sailor on shipboard. Of course, the sailor, when he ships for the voyage, assumes the ordinary dangers incident to it, but not the carelessness or reckless conduct of the master or mate towards him. Shear. & R. Neg. (3d Ed.) § 105, and note. As to contributory negligence on the part of the plaintiff, the jury had all the evidence before them, and it was a question of fact for them to determine, and was properly submitted to them; and by their verdict they must have found there was no such contributory negligence. The question of negligence is always a question for the jury. *Id.* 18. By the late English cases, contrary to the old rule, it is now held that the burden of proof is upon the defendant to show it; and that, although the plaintiff may have been negligent to some extent, still, if the defendant might have avoided the injury by the use of proper care, the plaintiff is entitled to recover. *Railroad Co. v. Horst*, 93 U. S. 291; Smith, Neg. 226-228. Contributory negligence is matter of defense. *Railroad Co. v. Gladmon*, 15 Wall. 401; Smith, Neg. 231; *Buesching v. Gas-Light Co.*, 39 Amer. Rep. 503; *Hart v. Bridge Co.*, 84 N. Y. 56.

W. ALLEN, J. The plaintiff and the mate were employed by the same master in a common service. They were engaged in getting up the anchor, under the order of the captain to the mate to get the vessel under way; the mate having the direction of the work, and the plaintiff acting under his orders. Unless the case is an exception to the well-established rule in this commonwealth, the plaintiff and the mate were fellow-servants. See *Rogers v. Manufacturing Co.*, 144 Mass. 198, 11 N. E. Rep. 77, and cases cited. The plaintiff contends that the case of mate and common seaman on a merchant vessel is an exception. We can see nothing in the evidence reported which excepts this case from the rule applied to a superintendent of work, and one working under his orders. *The Chandos*, 4 Fed. Rep. 649; *Daub v. Railway Co.*, 18 Fed. Rep. 625, and *The Neptuno*, 30 Fed. Rep. 925, are cited to sustain the ruling of the court that a common sailor and a mate are not fellow-servants. The first case contains, on this point, *dicta*, only, of DEADY, J. The second case contains a report of an oral charge to a jury by the same

Judge, which expressly assumes the responsibility of instructions against the admitted probable weight of authority. The third case was against the owners of a vessel, one of whom was the master, for negligence of the master. Whether a person who was "taking a run" from Bath to New York as a "sailor or runner," without signing shipping articles, would be a common sailor within the meaning of such a rule, we cannot decide, because we do not find any such rule. See *Halverson v. Nisen*, 8 Sawy. 562; *Olson v. Clyde*, 32 Hun, 425; *The City of Alexandria*, 17 Fed. Rep. 390; *Malone v. Transportation Co.*, 5 Biss. 315; *Mathews v. Case*, 61 Wis. 491, 21 N. W. Rep. 513; *Loughlin v. State*, 11 N. E. Rep. 371; *Johnson v. Boat Co.*, 135 Mass. 209. If we are asked to establish a special rule applicable only to mates of vessels and common sailors, on the ground of the peculiar relations between them, the existence and particulars of those relations must be shown. The evidence in the case at bar discloses only facts which, under the decisions of this court, show that the mate and the plaintiff were fellow-servants of the defendant. Exceptions sustained.

(147 Mass. 196)

OSGOOD v. MCGANN.

MCGANN v. OSGOOD.

(Supreme Judicial Court of Massachusetts. Suffolk. June 19, 1888.)

CONTRACTS—CONSTRUCTION—MODIFICATION.

An agreement, under seal, provided that A. should make car-wheels for B. of the "best Babbitt's metal." The agreement provided for making cars according to a plan, and was later indorsed: "The plan is omitted by consent, and for further description of form and style referred to is shown in the car now being made." Certain wheel-makers to whom B. introduced A. as proper persons to make the wheels told A. and B. that the wheels on the car in question were made of the best Babbitt's metal. Held, that there was no evidence that the parties had agreed to adopt the metal in the wheels on the car referred to.

Exceptions from superior court, Suffolk county; ALDRICH, Judge.

These were cross-actions between Byron A. Osgood and Thomas F. McGann to recover damages for breach of a contract by which McGann agreed to furnish 1,000 cash cars for the Osgood Cash-Car Company. Osgood claimed that McGann did not finish the cars in a workman-like manner, and build them of suitable material; especially that he did not make the wheels of the cars of the "best quality of Babbitt's metal," as required by the contract, and he declined to accept more than 409 cars delivered to him, which he sold, after testing the same, for a nominal sum, on account of their alleged imperfection in construction and material. McGann contended that he made and delivered the 409 cars according to the contract, and was ready to furnish the balance, but Osgood refused to receive and pay for the same. The principal question at issue at the trial was in reference to the quality of the materials of which the wheels were made. The evidence upon this point is stated, in substance, in the opinion. At the trial the jury found against Osgood, and he excepted to the rulings, and refusals to rule, of the court.

Rodney Lund and D. F. Crane, for Osgood.

The main question in issue was whether these wheels were made of the best quality of Babbitt's metal. The question is not what the parties selected, but of what did McGann agree to make the wheels. The evidence is that Osgood did not know what Babbitt's metal was,—only that it was better to wear than anything else he could get; and he therefore called for the best quality of it, and McGann agreed to give it to him. McGann says at that time he did not know anything about Babbitt's metal. Then it was his duty to find out before he contracted. *Spurr v. Benedict*, 99 Mass. 463-467; *Kyle v. Kavanagh*, 103 Mass. 359. The fact that the evidence was conflicting did not change the issue, or allow it to be avoided. *Rice v. Manufacturing Co.*, 2

Cush. 80. It was a question of fact solely for the jury whether these wheels were what the contract required.

E. C. Gilman and C. M. Barnes, for McGann.

It is well settled that if, in attempting to apply a contract to its subject-matter, an ambiguity arises, so that it is impossible to give a definite meaning to certain language in the contract, parol evidence is admissible to show what meaning the contracting parties themselves attached to such language, viz., to show the intended meaning of the words. *Stoops v. Smith*, 100 Mass. 63, 66; *Swett v. Shumway*, 102 Mass. 365; *Miller v. Stevens*, 100 Mass. 518; *Hogins v. Plympton*, 11 Pick. 97. In this case the instructions of the court required the jury not simply to infer an intention as to the meaning of ambiguous words from facts and circumstances, but to find an actual agreement of the parties as to such meaning. That the exceptions disclose such an ambiguity as to the meaning of the words, "the best quality of Babbitt's metal," as to bring the case within the rule stated, is clear. The words themselves are not necessarily ambiguous; but, as soon as it appears that there is no one metal, or quality of metal, which alone can be intended by the words, they become ambiguous, and the rule applies. As soon as this ambiguity as to the meaning of the words quoted appeared, evidence as to what the parties intended by the words became admissible.

W. ALLEN, J. The agreement, under seal, provided that the car-wheels should be made of the best quality of Babbitt's metal. There was conflicting evidence as to the meaning of the words "best quality of Babbitt's metal," as used in the contract, and the court, in effect, instructed the jury that it was competent for them to find that the parties adopted the metal of which the wheels of a certain car, which was before them for some purpose, were composed, as the best Babbitt's metal intended by the contract. It is objected that, if there was such ambiguity disclosed in the language as rendered it competent to show that the parties agreed upon and adopted a specimen of metal to be taken as the best Babbitt's metal of the contract, yet there was no evidence that the parties did so, and therefore instructions that the jury might find that they did were erroneous. The contract itself provided that "said cars to be made according to the style shown in a sketch or plan, marked 'A,' hereto annexed." Then follow minute specifications as to the material and construction of the car, and its different parts; that relating to the wheels being that "the wheels are to be three inches in diameter, and made of best quality of Babbitt's metal, and nickel plated." The contract was dated July 10th. Under date of July 30th, this indorsement was made upon it: "The plan described in the within contract, marked 'A,' is omitted by consent of both parties; and for further description of the form and style referred to is shown in the style and form of the cars now in process of manufacture by Thomas F. McGann for the Osgood Cash-Car Company, which style was referred to in said plan." There was evidence tending to prove that, when the indorsement was made, a car, referred to in it, was before the parties. The reference to the car in the indorsement is as a substitute for the plan mentioned in the contract, and is expressly limited to the purpose of showing the style and form of the car; and a construction of the writings that by them the parties adopted the material of the wheel of the car as the material of the wheel of the contract would be clearly erroneous.

The other evidence relating to the point is, in substance, as follows: Morey and Smith contracted to make the wheels for McGann. McGann testified that, before the contract was made, Osgood introduced him to Morey and Smith, saying that he wanted to introduce him "to a concern who had made wheels for him, and who, he thought, were the proper persons." That Osgood said, on introducing him to Smith: "You know just what I want, Mr. Smith, and

I want you to go to work and make wheels for this man;" and told Smith that he wanted them made of the best Babbitt's metal, or something a little harder than the wheels of a car which was before them. That Smith and Osgood came to his place some time in September, after the contract was signed, and Osgood said to Smith: "Mr. Smith, are those wheels made of the best Babbitt's metal?" To which Smith replied: "They are of the very best." It may be assumed that the wheels referred to were those of the car mentioned in the indorsement. Another witness testified that, some time in July or August, he heard Osgood, in McGann's presence, while Osgood was holding a cash car wheel in his hand, ask Smith: "Is this the best Babbitt's metal?" and that Smith said, "Yes," it was. This we understand to be all the evidence which it can be claimed tends to prove that the parties agreed that the "best quality of Babbitt's metal," mentioned in the contract, should be taken to be the metal of which the wheels of the cars referred to in the indorsement were made, or adopted the metal of those wheels as the metal of the contract. Taking this evidence, without regarding the evidence tending to contradict and control it, we think it did not raise or present the particular issue which was submitted upon it to the jury, and that the instructions to the jury were erroneous. Exceptions sustained.

(147 Mass. 231)

LINTON V. ALLEN.

(Supreme Judicial Court of Massachusetts. Suffolk. June 20, 1888.)

VENDOR AND VENDEE—CONSTRUCTION OF CONTRACT—BOND FOR DEED.

A bond recited that the obligor "had sold to the obligee for \$4,000 a certain lot,—\$1,000 in cash; balance on three notes," payable \$1,000 a year for three years; the obligor to receive payments earlier if desired; and was conditioned to be void if the obligor should "deliver a properly executed warranty deed, the obligee demanding the same, and fulfilling all the conditions herein stipulated." The notes were delivered at the same time as the bond. Held, that the obligee could not demand a deed until full payment of the notes, and was then entitled to demand a good title to the land, and not merely a formally executed warranty deed.

Exceptions from superior court, Suffolk county; BLODGETT, Judge.

Action of contract by Rhoda N. Linton against Frank D. Allen, administrator *de bonis non* with the will annexed of the estate of Chloe A. Berry, upon a bond for a deed signed by Chloe A. Berry, and also upon the common counts for money had and received, and on an account annexed to recover money paid on account of the purchase, and for cash expended in repairs on the house, etc., mentioned in the bond. The superior court ruled that the plaintiff could not maintain her action, and she excepted. The material facts are stated in the opinion.

Francis S. Hesseltine, for plaintiff.

In every contract for the sale of land there is an implied warranty on the part of the vendor that he has good title to that which he assumes to sell, unless the warranty is expressly excluded by the terms of the contract. *Stone v. Fowle*, 22 Pick. 173; *Brown v. Gammon*, 14 Me. 276; *Swan v. Drury*, 22 Pick. 485; *Fitch v. Casey*, 2 G. Greene, 300; *Mead v. Fox*, 6 Cush. 199; *Davay v. Cardwell*, 27 Ind. 478; *Packard v. Usher*, 7 Gray, 531; *Greenwood v. Ligon*, 10 Smedes & M. 615; *Roberts v. Bassett*, 105 Mass. 409; *Washington v. Ogden*, 1 Black, 456; *Souter v. Drake*, 5 Barn. & Adol. 992; *Burwell v. Jackson*, 9 N. Y. 535, and cases there cited; *Delavan v. Duncan*, 49 N. Y. 485; *Everson v. Kirtland*, 4 Paige, 628; *Little v. Paddleford*, 13 N. H. 174; *Morgan v. Smith*, 11 Ill. 194; *Wellman v. Dismukes*, 42 Mo. 101; *Fletcher v. Button*, 4 N. Y. 396; *Haynes v. White*, 55 Cal. 38; *Collins v. Delashmutt*, 6 Or. 51; *Holland v. Holmes*, 14 Fla. 390; *Greenwood v. Ligon*, 10 Smedes & M. 615; *Carpenter v. Bailey*, 17 Wend. 247; *Feemster v. May*, 13 Smedes & M. 275; *Vardeman v. Lawson*, 17 Tex. 11; *Hunter v. O'Neil*, 12 Ala. 37;

Penfield v. Clark, 62 Barb. 584; *Wright v. Young*, 6 Wis. 127; *Cunningham v. Sharp*, 11 Humph. 116; *Taft v. Kessel*, 16 Wis. 273; *Owings v. Baldwin*, 8 Gill, 337. The court erred in excluding the evidence of Mr. Smith, and of the plaintiff, as to the interview between the plaintiff and the husband of Mrs. Berry, after the death of his wife, and the interview with him as special administrator of his wife's estate. "It appears that the plaintiff was prepared to pay the purchase money upon the delivery of a deed vesting her with an unincumbered title, but the defendant had not power to give such a deed. The plaintiff, under these circumstances, was not bound to make a tender of the money." *Delavan v. Duncan*, 49 N. Y. 487. The plaintiff having demanded a good title, the defendant not being able to comply with that demand, and not assenting to the plaintiff's demand, but demanding some other or different payment for a good title, she was not bound to make any tender of the money, or offer to perform her part of the contract, but could at once treat the contract as rescinded." *Burwell v. Jackson*, 9 N. Y. 547; *Gornley v. Kyle*, 137 Mass. 190; *Cook v. Doggett*, 2 Allen, 439, and cases there cited. See *Hills v. Bank*, 105 U. S. 329, and cases there cited. The bond in this case is very similar to that in the case of *Healy v. Pfau*, 119 Mass. 589, where the court said that "it is not easy to give a sensible construction to an instrument so illiterate and obscure as the bond in which the parties have undertaken to set forth the terms of their contract."

Gaston & Whitney and Frank D. Allen, for defendant.

The plaintiff was not entitled to maintain her action upon the bond, because there was no evidence of any breach of the condition. The stipulation that Mrs. Berry "shall receive all amounts tendered by the said Linton at any time said Linton may wish," evidently contemplated that the plaintiff was to have no deed until she had paid the notes, and was inserted so that she could get a deed before the maturity of the notes, if she chose to pay them before that time. This case is substantially the same in this respect as the case of *Healy v. Pfau*, 119 Mass. 589. The bond was plainly an executory contract for the sale of land. *Atwood v. Cobb*, 16 Pick. 227; *Jackson v. Myers*, 3 Johns. 388. The plaintiff was entitled to a deed only upon making demand for it; and there was no evidence that she ever demanded one. The condition of the bond was to give a "properly executed warranty deed;" and the condition of the bond would be complied with by giving such a deed, whether Mrs. Berry had a good title to the property or not. *Aiken v. Sanford*, 5 Mass. 494; *Tinney v. Ashley*, 15 Pick. 546; *Gazley v. Price*, 16 Johns. 268; *Parker v. Parmele*, 20 Johns. 130, 135. Neither was the plaintiff entitled to maintain her action on the common counts. If one party to a contract pays certain money in part performance of the contract, and then unjustifiably refuses to proceed with the performance, he cannot recover back the money so paid. *Shaw v. Cabrey*, 13 Allen, 462; *Kenniston v. Blakie*, 121 Mass. 552; *Congdon v. Perry*, 13 Gray, 3. Furthermore, there was not an entire failure of consideration. *Bassett v. Percival*, 5 Allen, 345. She must, moreover, be presumed to have known about the restrictions imposed by the Oaks Bluffs Company; *Begbie v. Sewage Co.*, L. R. 10 Q. B. 491. The circumstances under which the plaintiff occupied the premises, having a bond for a deed, exclude any implied promise on the part of the defendant to repay the \$64.20 paid out for taxes, or the money paid for repairs. *King v. Johnson*, 7 Gray, 239; *Butler v. Page*, 7 Metc. 40. The evidence excluded by the judge was rightly excluded. *Stackpole v. Arnold*, 11 Mass. 33; *Atwood v. Cobb*, 16 Pick. 227, 230.

W. ALLEN, J. The first count of the declaration is upon a bond in the penal sum of \$4,000, given by Mrs. Berry, the defendant's testatrix, to the plaintiff. The condition recites that Mrs. Berry "has this day bargained and sold to the said Linton, for the sum of \$4,000, a certain lot or parcel of land,"

and that it is agreed that Linton shall pay to Berry the sum of \$4,000,—\$1,000 in cash, and "the balance of the \$3,000 on three promissory notes, payable as follows." \$1,000 each year for three years; and proceeds as follows: "The agreement is that the said Berry shall receive all amounts tendered by said Linton at any time said Linton may wish, possession to be given March 1, 1883. Now, therefore, if the said Berry, his heirs, executors, administrators, or assigns shall deliver unto the said Linton a properly executed warranty deed, the said Linton making demand for the same, and fulfilling all the conditions herein stipulated, then," etc. The bond is dated October 3, 1882, and \$1,000 was paid, and three notes of the same date for \$1,000 each, payable to the order of Mrs. Berry in one, two, and three years, respectively, from March 1, 1883, were delivered.

We think that the payment of the notes was a condition upon which the deed was to be delivered. The plaintiff was to pay \$4,000,—\$1,000 in cash, and the balance on notes payable at future times. The condition is not to pay at the time in notes, but on notes at future times. The notes were delivered at the same time as the bond, and, unless the payment of the notes was the condition, there would have been none to be performed by the plaintiff; he would have already "fulfilled all the conditions herein stipulated," and would have had a right to demand a deed on the delivery of the bond without furnishing any security for the payment of the notes. See *Healy v. Pfau*, 119 Mass. 589. The agreement which appears in the condition of the bond was that Mrs. Berry should sell the land to the plaintiff for \$4,000—\$1,000 to be paid down; and \$1,000 within one, \$1,000 within two, and \$1,000 within three, years, for which she was to give notes payable at three dates, but with the privilege of anticipating payments; and that possession should be given on the 1st of March, and the deed should be given upon the payment of the notes. The bond was given upon the payment of the \$1,000, and the delivery of the notes to secure the performance of the agreement by Mrs. Berry. Such a contract would not be performed by Mrs. Berry by tendering a deed which did not convey the title to the land, and her inability and refusal to give a good title would excuse the plaintiff from performing the conditions on her part to be performed, and entitle her to recover back the money paid. *Swan v. Drury*, 22 Pick. 485; *Stone v. Fowle*, Id. 166; *Cook v. Doggett*, 2 Allen, 439; *Howland v. Leach*, 11 Pick. 151; *Gormley v. Kyle*, 137 Mass. 189; *Callaghan v. O'Brien*, 136 Mass. 378; *Delavan v. Duncan*, 49 N. Y. 487. The recital in the condition of the bond, that "the said Berry has this day bargained and sold unto the said Linton," obviously means that Mrs. Berry has contracted to sell; and the contract is recited in the condition. It is argued that the condition of the bond, that Mrs. Berry shall deliver a properly executed warranty deed, shows that the agreement was to deliver a deed, and not to convey a title. But it seems plain, upon the face of the instrument, that the delivery of the deed was not a separate and independent matter, but was to be done in pursuance of and as a part of the agreement to sell the land. The agreement was, on the part of the plaintiff, to pay the money to Mrs. Berry, and, on the part of Mrs. Berry, to sell the land to the plaintiff by a warranty deed. The payment of the money was the express condition upon which the deed should be given; the ability and readiness to give a title by a deed was the implied condition upon which the money should be paid. If Mrs. Berry had no title to the land, she could not recover on the notes. The cases cited by the defendant to sustain the ruling of the court at the trial that the plaintiff was not entitled to claim a good title to the property, but only a properly executed warranty deed, are *Aiken v. Sanford*, 5 Mass. 494; *Tinney v. Ashley*, 15 Pick. 546; *Gazley v. Price*, 16 Johns. 268; *Parker v. Parmele*, 20 Johns. 130, 135. Of the New York cases it is sufficient to say that they are overruled. *Burwell v. Jackson*, 9 N. Y. 535. In *Tinney v. Ashley*, the plaintiff paid to the defendant the price of 750 acres of land, to be selected by the plain-

tiff from a larger quantity; and the defendant gave a bond with the condition that on being notified of the selection of the land, and on the giving up of the bond, he "would execute and deliver to the plaintiff a good and sufficient warranty deed thereof." The fifth and sixth counts of the declaration alleged, as a breach of the condition of the bond, that the defendant had no valid or legal title to the land; alleging an entry by the plaintiff upon the land, and an eviction of him. These counts were held bad on demurrer. The plaintiff had paid the purchase money in full, and the defendant had agreed to give a deed of the land as soon as the plaintiff should select it. The court held that the agreement of the defendant was to give a warranty deed, not to convey a valid title; and that the plaintiff intended to rely upon the covenants in the deed to protect him against defects of title. The only authority cited is *Gazley v. Price, ubi supra*. *Aiken v. Sanford* was an action on a bond conditioned that the defendant, on the payment of certain notes by the plaintiff, should sell and convey to him, by a good and sufficient deed of warranty, certain lands. The defendant pleaded a tender of a deed on the 9th day of September. The plaintiff replied that he paid the notes on the 7th day of June, and on the same day the defendant tendered to him an insufficient deed, which he refused to accept; and that from the time of making the bond until the 3d day of September the land was incumbered by a mortgage. The court held the replication to be good on demurrer, on the ground that the deed tendered on June 7th was insufficient, and that the tender on the 9th of September was not within a reasonable time after the payment. Afterwards, on a hearing in equity to fix the amount for which execution should issue, it appeared that the notes were paid upon an execution issued upon a judgment recovered in a suit upon them, and that a sufficient deed was tendered in July; and the question arose upon granting the defendant leave to plead anew to set up the facts thus appearing. It was objected that the deed was not according to the condition, because, at the time of the tender, the land was incumbered by a mortgage. The court overruled the objection in a *per curiam* decision, saying that "if the deed was of proper form and regularly executed, and the grantor was seized, so that the land was conveyed by it, the condition was, in this case, performed. But the court observed that they did not mean to determine that in no case these words should be considered as applying to the title. If the money was to be paid on receiving the deed, it might be a reasonable construction that a good and sufficient title should be conveyed; otherwise, the purchaser might part with his money, not merely for the land, but for a lawsuit also. In the present case, however, the money was to be first paid, and the plaintiff might as well sue on the covenants in his deed as on his bond." The parties and the court regarded the obligation to pay the notes as absolute and unconditional. Judgment had been recovered upon them, and they had been paid while the breach of the condition of the bond, upon which the plaintiff relied, was in existence, though it was cured before the action on the bond was commenced. We are unable to give such a construction to the bond in suit. The payment of the money, and the delivery of the deed upon demand, were to be concurrent acts, although the one was expressed to be the condition of the other. The right to demand the deed would arise simultaneously with the payment of the money; and it is the common case of mutual conditions or concurrent acts, the refusal to perform which by one party will excuse the other, who is not in default, from performance on his part. See *Tinney v. Ashley, ubi supra*. If the notes had been taken as payment for the land, and the contract had been executed on the part of the plaintiff, so that all that remained to do was the giving of a deed by Mrs. Berry upon demand, the cases cited might be applicable; but, upon the construction which we have given to it, it comes rather within the exception suggested in the earlier cases, and within the general rule that an agreement to sell land, and to give a good and sufficient deed of it, means a

deed that will convey a good title to the land. See, in addition to the cases cited, *Mead v. Fow*, 6 Cush. 199; *Packard v. Usher*, 7 Gray, 529; *Washington v. Ogden*, 1 Black, 456; *Wellman v. Dismukes*, 42 Mo. 101; *Haynes v. White*, 55 Cal. 38; *Taft v. Kessel*, 16 Wis. 273; *Cunningham v. Sharp*, 11 Humph. 116; *Owings v. Baldwin*, 8 Gill, 337.

We find no error in the exclusion of evidence. We think, as the case stood, that the plaintiff was not entitled to demand a deed of the property until she had paid, or was ready to pay, her notes in full; that she was entitled to claim a good title to the property, and not a properly executed warranty deed only; and that there was some evidence that she had demanded a deed, and performed the conditions on her part so far as she was required to. Exceptions sustained.

(147 Mass. 570)

TODD v. SAWYER.

(Supreme Judicial Court of Massachusetts. Suffolk. June 21, 1888.)

WILLS—CONSTRUCTION—ESTATE CONVEYED—RESTRAINT OF ALIENATION.

Property was devised to a woman "to be kept and retained by her as long as she shall live, and be disposed of as to her seems proper at her decease." Held, that she had at least a life-estate, with an absolute power of appointment of the fee by deed or by will, and could therefore convey a fee; for, if the will should be construed as prohibiting the alienation of the life-estate, the restraint would be void.

Appeal from superior court, Suffolk county.

Action of contract by Charlotte Todd against Charles W. Sawyer to recover damages for breach of an agreement to purchase, for \$300, a lot of land in Charlestown. The plaintiff duly tendered to the defendant a deed of the premises, in which she conveys to the grantee all her "right, title, and interest in and to said premises, and likewise, for the consideration aforesaid," granted the said premises "in execution of the power given in and by the will of the late Robert Todd," by whom they were devised to the plaintiff by will. The defendant refused to accept the deed on the ground that it did not convey a fee-simple in the premises, and that, under the will of Robert Todd, the plaintiff did not take and could not convey a fee-simple in the premises. Robert Todd, the father of the plaintiff, died in 1873, seized in fee-simple of the premises described in the deed, and in his will devised the premises in question to the plaintiff by a clause in the will as follows: "After the payment of the sums above named, I hereby give and bequeath to my beloved daughter Charlotte Todd [the real estate in question,] to her own sole and separate use, to be kept and retained by her as long as she shall live, and be disposed of as to her seems proper at her decease." The residue of the testator's estate was given in trust for the benefit of all his children. It was agreed that if the plaintiff took, under the will, an estate in fee-simple, or such an estate, power, or interest as would enable her by her deed to convey or vest in the defendant an estate in fee-simple, then there was a breach by the defendant of his agreement, and the damages for such breach were \$300. The superior court ordered judgment for the defendant, and the plaintiff appealed.

Henry W. Bragg, for plaintiff.

It is not to be presumed that the testator intended to prevent the plaintiff from disposing of her interest in the house, and it is submitted that such an intent does not appear in the bequest. But, assuming such an intent, it cannot prevail; for "a provision, either in deed or will, that a life-tenant shall not alienate or anticipate—that is, a provision, not that he or his assigns shall lose the estate on alienation, but that he shall be compelled to keep it, so that neither his grantors nor his creditors, nor any third person, can get hold of it or enjoy it—is void. This is true, whether the interest be a legal or equitable one, and whether it be realty or personalty." Gray, Rest. Alien. § 134, citing *Brandon v. Robinson*, 18 Ves. 429, 1 Rose, 197; *Graves v. Dolphin*, 1

Sim. 66; *McCleary v. Ellis*, 54 Iowa, 311, 6 N. W. Rep. 571; *Bridge v. Ward*, 35 Wis. 687. To this rule there are two recognized exceptions, neither of which, however, is applicable to this case. The plaintiff's deed purports to convey all her interest, and also to execute the power conferred by the testator. That the plaintiff may execute the power by deed is fully established by the authorities. Where an estate is given to one for life, and "after his death," or "then," or "at his decease," to be disposed of as he thinks best, if the mode of executing the power is not defined, it may be executed by deed. *Tomlinson v. Dighton*, 1 P. Wms. 149; *Northampton's Case*, 8 Leon. 71; *Ex parte Williams*, 1 Jac. & W. 89, 93; Sugd. Powers, c. 7, § 8; *Fairman v. Beal*, 14 Ill. 244; *Christy v. Pulliam*, 17 Ill. 59; *Benesch v. Clark*, 49 Md. 497. There are cases sometimes cited as opposed to the above rule; but an examination shows that they really are not inconsistent with it. For instance, in *Reid v. Reid*, 25 Beav. 469, the point was not involved, and was not argued. In *Kennedy v. Kingston*, 2 Jac. & W. 431, the point was not involved; the only question being who was to participate in a share which had lapsed. In *Doe v. Thorley*, 10 East, 438, the decision is based upon the special significance of the word "leave." In *Archibald v. Wright*, 9 Sim. 161, the devisee died without a will, and without ever having attempted to exercise her power, and the only point determined was that she did not take an absolute interest. The plaintiff's deed conveys his life-interest, and gives the defendant an estate *per autre vie*, which is an estate in freehold, (*Williams, Real Prop.* 22,) and descends as does other real estate, (Pub. St. c. 125, § 1.) By executing the power, the plaintiff's deed vests the reversion in the defendant; and, the greater and less coinciding and uniting in one and the same person, without any intermediate estate, the less is immediately annihilated, and the defendant acquires an estate in fee-simple. 2 Bl. Comm. 177.

Russell Bradford, for defendant.

Testator's intention was to give his daughter a life-estate, with a power of appointment; the power to be exercised only by her last will. In that view of the case, plaintiff cannot recover, for she did not take a fee-simple, (Sugd. Powers, c. 3, § 1; 4 Kent, Comm. 319, 536; *Hatfield v. Sohier*, 114 Mass. 48,) and could not convey the reversion by her deed. The mere circumstance of an estate being limited to one for life, and "after his death," or "then," or "at his decease," to be disposed of as to him seems fit, perhaps may not restrain the execution of the power to a will. But, if there be any *indiciu*m of an intention to tie up the property, the power will be exercisable only by will. Farw. Powers, 42, 44, and cases cited. In this case it would seem that the testator's wish was to make sure that his daughter should always have a home. *Archibald v. Wright*, 9 Sim. 161.

C. ALLEN, J. At the outset, it is apparent that the plaintiff has at least a life-estate. The words, "to be kept and retained by her as long as she shall live," were probably not intended to prohibit an alienation during her life, but were rather expressive of the testator's expectation or wish. But, if intended as a prohibition, no legal effect can be given to them; a provision against alienation being void. *Bank v. Davis*, 21 Pick. 42; *Gleason v. Fayerweather*, 4 Gray, 348, 357. The words, "be disposed of as to her seems proper at her decease," imply a power of disposition either by will or by deed. *Kimball v. Sullivan*, 118 Mass. 345; *Tomlinson v. Dighton*, 1 P. Wms. 149. There was no devise over. Taking the plaintiff's title, therefore, at the lowest, she has a life-estate, with a full power of disposition by deed; and this enables her to convey a good title in fee. And, indeed, there seems to be no good reason for considering her own title as any less than a fee, especially in view of the provisions of Gen. St. c. 92, § 5, that "every devise of land shall be construed to convey all the estate of the devisor therein which he could

lawfully devise, unless it clearly appears by the will that the deviser intended to convey a less estate." *Cummings v. Shaw*, 108 Mass. 159; *Lyon v. Marsh*, 116 Mass. 232; *Bowden v. Dean*, 110 Mass. 438; *Hale v. Marsh*, 100 Mass. 468; *Whitcomb v. Taylor*, 122 Mass. 243, 248; *Gibbins v. Shepard*, 125 Mass. 541, 543; *Kelley v. Meins*, 135 Mass. 231. According to the agreement, judgment must be entered for the plaintiff for \$300. Judgment for the plaintiff.

(147 Mass. 300)

JACKMAN *et al.* v. NELSON.

(Supreme Judicial Court of Massachusetts. Suffolk. June 21, 1888.)

INSURANCE—MUTUAL BENEFIT—DESIGNATION OF BENEFICIARIES.

A certificate of membership in a benefit society which paid death benefits to the widows and orphans of members, and other persons shown to be dependent on members, was payable to the member's widow, "for the benefit of herself and the children of said member." They had one child, and the member also had two children by a former marriage, one of whom was married, and did not live at home at the member's death. *Held*, that the widow and each of the children were severally entitled to one-fourth of the amount each.

Reported case from superior court, Suffolk county; HAMMOND, Judge.

Bill in equity by Ella A. Jackman, Jennie L. Nelson, by her guardian and next friend, and Carrie C. Nelson, by her guardian *ad litem*, against Bertha C. Nelson, to compel the defendant to account for a portion of the amount received by the defendant, wife of Horace Nelson, deceased, from the Supreme Council of the Royal Arcanum, in which the said Horace Nelson held a certificate of membership. The case was heard in the superior court, and reported to the supreme judicial court. The material facts are stated in the opinion.

A. Wellington, for plaintiffs.

The relation by marriage and consanguinity being fully set forth in the certificate of membership, no proof of dependency is required. The word "orphan" is not confined to persons under the age of 21 years, neither is the word "child" so confined. As the money was paid to defendant in accordance with the clause, "for the benefit of herself and the children of said member," and she so received it, she has no right to avail herself of any real or fancied technicality of which said association might have availed itself, if any such technicality in fact existed. The defendant is not lawfully entitled to the custody of said Jennie L., is not by law obliged to support her, and is not entitled to her services. *Com. v. Hamilton*, 6 Mass. 273, 275; *Freto v. Brown*, 4 Mass. 675; *Worcester v. Marchant*, 14 Pick. 510. Jennie L. is not obliged to live with her step-mother in order to receive support or benefit from said fund. *Crocker v. Crocker*, 11 Pick. 252. *Vide* Pub. St. c. 189, § 4.

Wilbur H. Powers, for defendant.

The laws of the society upon this question are final. *Addison v. Association*, 144 Mass. 592, 12 N. E. Rep. 407; *Rood v. Association*, 31 Fed. Rep. 62; *Wendt v. Legion of Honor*, 34 N. W. Rep. 470; *Ballou v. Gile*, 50 Wis. 614, 7 N. W. Rep. 561. The expression, "for the benefit of herself and the children of said member," which appears in the benefit certificate, is a power, (*Hart v. Tribe*, 18 Beav. 215, 32 Beav. 279;) or, at most, is a trust coupled with a power. (*Crockett v. Crockett*, 1 Hare, 451; *White v. White*, 30 Vt. 338; *Raikes v. Ward*, 1 Hare, 445; *Tiff. & B. Trusts*, 217 *et seq.*; *Thorp v. Owen*, 2 Hare, 607; *Hill, Trustees*, 4th Amer. Ed., 101.) If this means other beneficiaries, it is ambulatory. *Daniels v. Pratt*, 143 Mass. 216, 10 N. E. Rep. 166. The defendant has performed her legal duties, and has also fulfilled her moral obligations, in accordance with her husband's desires as intimated in the benefit certificate. "Where a trustee has discretionary power, which he

v.17N.E.no.5—34

honestly exercises, equity will not control his judgment." 3 Wait, Act. & Def. 140. Ella A. Jackman is not entitled to any part of this fund, for special reasons which do not apply to the other children. She was not within the class allowed to be designated as beneficiaries within the meaning of the constitution and laws of the Royal Arcanum. *Saunders v. Robinson*, 144 Mass. 306, 10 N. E. Rep. 815.

C. ALLEN, J. One of the purposes of the Royal Arcanum Society, as expressed in the certificate of incorporation, was "assisting the widows and orphans of deceased members," and establishing a fund for "a widows' and orphans' benefit fund." The constitution specified, as an object of the society, "to assist the widows and orphans of deceased members," and "to establish a widows' and orphans' benefit fund, from which * * * a sum, not exceeding three thousand dollars, shall be paid to his family, or those dependent on him, as he may direct." In the by-laws, it was provided that "each applicant shall enter upon his application the name or names and relationship or dependence of the members of his family," or those dependent upon him, to whom he desires his benefit paid, and the same shall be entered in the benefit certificate according to said direction;" also, "when no relation by marriage or consanguinity is shown in the direction for payment of a benefit, proof of dependency must be furnished," etc. From these various provisions it appears that the word "orphans," as used by the society, means children of deceased members, whether their mother is living or not, and that it is within the plan of the society to assist such children, whether they were dependent upon the member or not. This line of distinction is very carefully shown, both in the provision of the constitution and in the by-laws above copied. It remains to consider the nature of the interest acquired by Mrs. Nelson in the money paid to her by the society. The certificate of Nelson's membership recites that he was a contributor to the widows' and orphans' benefit fund, and the payment upon his death was to be made out of said fund, and it was payable to the wife, "for the benefit of herself and the children of said member." At the time when he became a member of the society he had two children, both of whom were by a former wife; and at his death he left these two children, who are plaintiffs, and one other child, the date of whose birth does not appear, by the present Mrs. Nelson. The eldest child was about 17 when he joined the society and took his certificate, and was 23 when he died. She having been married four years before his death, and having lived with her husband after her marriage, Nelson had a right, under the constitution and by-laws of the society, to change the designation of beneficiaries under his certificate, but he did not do so. In the first place, it is plain that Mrs. Nelson is not entitled to hold this money absolutely. Even under similar language in a will, the children would have a right which they could enforce in a court of equity. *Proctor v. Proctor*, 141 Mass. 165, 6 N. E. Rep. 849; *Loring v. Loring*, 100 Mass. 340; *Williams v. Bradley*, 3 Allen, 270, 281, 285; *Raikes v. Ward*, 1 Hare, 445; *Crockett v. Crockett*, Id. 451, on appeal, 2 Phil. Ch. 553; *In re Harris*, 7 Exch. 344. There is nothing to show that it was intended that the sums to be devoted to the benefit of the children should be, in the first instance, determined by her in her discretion, subject to accountability. There are no words saying that it shall be at her disposal for their benefit, or that she is to maintain or support them. In the purposes of the Royal Arcanum, children are placed on an equality with widows. There is nothing showing any intention to have a permanent or continued trust. The words of the certificate are simple. She is to take the money "for the benefit of herself and the children." In many of the cases under wills, there was something to show some discretion reposed in the primary donee, or some duty of support, or some power of disposal; but here there is nothing of the kind. Several of the cases under wills tend strongly to show

that under language like this the widow and the children would be entitled to share equally: *Jones v. Foote*, 137 Mass. 543; *Loring v. Loring*, 100 Mass. 340; *Proctor v. Proctor*, 141 Mass. 165, 6 N. E. Rep. 849; *Jubber v. Jubber*, 9 Sim. 508. In the present case, in view of the circumstances, and of the bald language used in the certificate, we cannot go behind the plain words, and are of opinion that Mrs. Nelson and three children are each entitled to one-fourth part of the money. The circumstance that Mrs. Jackman was married, and had left her father's house, does not cut her off. It would not necessarily do so under a devise. *Proctor v. Proctor*, *ubi supra*. Under this certificate, her rights do not at all depend upon the question whether she was *fortisfamiliata* or not. Decree for the plaintiffs.

(147 Mass. 315)

GOULD v. SLATER WOOLEN CO.

(Supreme Judicial Court of Massachusetts. Suffolk. June 21, 1888.)

NEGLIGENCE—USE OF POISONS IN MANUFACTURES.

There was evidence that a manufacturer used a common mordant in dyeing certain cloth, by handling which a purchaser was poisoned; but the mordant was not at that time known to be poisonous to handle,—the injury in question being the first instance of injury from it known. *Held*, that this was not sufficient evidence to justify a finding that the manufacturer was negligent in the performance of any duty which he owed to the purchaser.

Exceptions from superior court, Suffolk county; BLODGETT, Judge.

Action of tort by Frances E. Gould against the Slater Woolen Company to recover damages for injuries alleged to have been sustained by the plaintiff in consequence of handling certain cloths purchased of the defendant, and which contained certain poisonous dyes. The superior court ruled that there was no evidence in which the jury could find the defendant liable, directed a verdict for the defendant, and the plaintiff excepted. The facts are stated in the opinion.

E. B. Callender and Louis Girardin, for plaintiff.

Where, in the manufacture of an article, poisonous chemicals and drugs dangerous to health or life are used, it is the duty of the manufacturer to so neutralize the action and counteract the effect of the poisons that the finished article shall not be dangerous to health and life, provided, always, that the use made of the article is one the manufacturer must have intended. *French v. Vinin*, 102 Mass. 132; *Giroux v. Stedman*, 145 Mass. 443, 14 N. E. Rep. 538. The manufacturer must be presumed to have known that bichromate of potash, or the other chrome compounds, were dangerous, if such is a well-known fact; and, knowing it, he was bound to guard against its dangerous influence. *Wellington v. Oil Co.*, 104 Mass. 64; *Minor v. Sharon*, 112 Mass. 487. The court cannot say, as matter of law, that the defendant's duty is simply to the majority,—to the well, to the unimpressionable,—any more than to say, as a matter of law, that it is negligence for a blind man to go about the crowded part of a city. *Smith v. Wildes*, 143 Mass. 556, 10 N. E. Rep. 446.

W. S. B. Hopkins, for defendant.

C. ALLEN, J. The question in this case is whether there was any evidence sufficient to go to the jury to show that the defendant was negligent in the performance of any duty which it owed to the plaintiff, as one of the purchasers of the cloths manufactured by the defendant; and we are of the opinion that there was not. The plaintiff's action was brought on September 22, 1884. According to the testimony of the expert witness introduced by the plaintiff, it had never been shown until 1886 that any cases of poisoning had occurred like the plaintiff's. For all that appears, the plaintiff's was the first instance of injury that ever was known to arise from the cause alleged in the

declaration. All that the plaintiff showed against the defendant was that it used an article for dyeing its cloths which was the most common mordant used in wool dyeing, which was also used very extensively in dyeing cotton stockings black, which, so far as then known, had never caused injury to anybody who merely handled the cloths, and which the defendant did not know or suppose, and had no reason to know or suppose, to be injurious; and under these circumstances, although there was evidence tending to show that, in point of fact, the plaintiff was injured by merely handling the cloths, this was not a result which the defendant was bound or ought to have contemplated as likely to happen. The facts of the present case do not call upon us to go any further than this. See *Com. v. Pierce*, 138 Mass. 175, 179, 180; *Davidson v. Nichols*, 11 Allen, 514; *Wellington v. Oil Co.*, 104 Mass. 64. Exceptions overruled.

(147 Mass. 287)

MOORS et al. v. GODDARD et al.

(Supreme Judicial Court of Massachusetts. Suffolk. June 21, 1888.)

1. GARNISHMENT—CLAIMS BY THIRD PERSONS.

In trustee process, an adverse claimant is not a proper party to the question whether the trustee had funds belonging to the principal defendant; for, by showing that the trustee had no funds, he would show there was nothing for him to claim, his only interest being to claim the fund when there is shown to be one.

2. SAME—PROPERTY SUBJECT TO PROCESS—CONDITIONAL CREDIT.

A person summoned as trustee in trustee process had deposited in bank in his own name certain drafts belonging to the principal defendant. It appeared that he had no right, by usage or otherwise, to draw the money out of the bank before the drafts were collected, though it was credited to him absolutely on the books, and the bank often, relying on the credit of the depositor or drawer, would pay earlier. Held, that he was not chargeable.

Exceptions from superior court, Suffolk county; MASON, Judge.

Action of contract by Joseph B. Moors and others against Benjamin Goddard, in which Richard Stone and Robert M. Morse, Jr., were summoned as trustees of the principal defendant, and Thomas Wigglesworth was claimant of the funds in their hands. The superior court discharged the trustees, and the plaintiffs excepted. The facts material to the decision are stated in the opinion.

W. W. Vaughan, for plaintiffs.

As to the ownership of the check; *i. e.*, the question whether the relation between the bank and its depositor be that of principal and agent, or that of debtor and creditor. The only Massachusetts cases closely involving it are two decisions in the case of *Hancock v. Colyer*, 99 Mass. 187, 188, 103 Mass. 396, 397. The court in this case makes the decision turn on the two points already stated: (1) That the bank is the debtor of the depositor; and (2) that the money is in the actual possession of the trustees, because of the actual ability of the trustees to put their hands upon the money at any time, —and indirectly decide both points in the plaintiffs' favor. As to the act of deposit and the making of the entry. The words "credited conditionally" cannot refer to a condition precedent; for, if they did, they would be self-contradictory. *Foley v. Hill*, 2 H. L. Cas. 28, 39, 44; *Giles v. Perkins*, 9 East, 12, 13; *Ex parte Thompson*, 1 Mont. & M. 102, 110. A "conditional credit," therefore, if it mean anything, can only mean that the condition is a condition subsequent. The deposit of a check, under the circumstances of the case at bar, creates the relation of debtor and creditor between them, not that of agency; and the property in the check deposited passes at once to the bank. *Bank v. Bank*, 2 Wall. 252, 256, 257. In Massachusetts, see *Carr v. Bank*, 107 Mass. 45, 48; *Hancock v. Colyer*, 103 Mass. 396, 397. In the supreme court of the United States, *Bank v. Bank*, 2 Wall. 252; *Bank v. Millard*, 10 Wall. 152, 155; *Thompson v. Riggs*, 5 Wall. 663, 667-680. In New York it is settled

law. In the federal courts, see *Railway Co. v. Johnston*, 27 Fed. Rep. 243. In the state courts, *Scott v. Bank*, 23 N. Y. 289, is sometimes cited as upholding the doctrine of agency. The later cases in New York establish beyond question that the relation is that of debtor and creditor. *Bank v. Loyd*, 90 N. Y. 530, 537; *Cragie v. Hadley*, 99 N. Y. 131, 133, 134, 1 N. E. Rep. 537; *Bank v. Howard*, 3 How. Pr. (N. S.) 511, 512; *Brooks v. Bigelow*, 142 Mass. 6, 8, 6 N. E. Rep. 766. In Pennsylvania, as long ago as 1850, the law was regarded as well settled in this state. *Foulker v. Banking Co.*, 6 Wkly. Notes Cas. 109, 110, 112. Ohio, see *Cornwell v. Kinney*, 1 Handy, 496, 497, 501, which is a case which goes much further than the New York decisions. See, also, *Rathbone v. Sanders*, 9 Ind. 217, 220; *Ayres v. Bank*, 79 Mo. 421, 422, 424, 425; *Bullene v. Coates*, Id. 426, 428; *Bank v. Miller*, 77 Ala. 168-170, 173, 174, 176. The law in California is sometimes supposed to be opposed to that of New York; but in fact it is not so, because, by the peculiar customs of the California banks, a check is never credited at all, but only the actual money which is received for it at the time of its receipt. *Trust Co. v. McDonald*, 51 Cal. 64, 66. The courts of Louisiana seem to stand alone in opposing the principles laid down by all the other courts. *Ice Co. v. Bank*, 1 McGloin, 181, 185, 186. The distinction drawn by the court in its rulings is erroneous, for two reasons. In the first place, the position involves an entire confusion concerning the actual relation between a bank and a depositor. *Clayton's Case*, 1 Meer. 272, 508. It only remains to consider the final position of the learned judge, viz., that whether there is a debt from the bank to the depositor or not, whether that debt be in fact collectible or not, still, if the depositor cannot at any moment after deposit bring a suit to compel the payment of the money to him at once, then that the trustee has nothing of the defendant's "in his hands." This position confuses the relation of the defendant to the trustee with the relation of the trustee to his banker. There are certain rules as to necessary rights of action by a principal defendant against a trustee, to make him chargeable. No rule of law requires a trustee to have a right of action against some third person. Even supposing that the same rules did apply to the relation of the trustees to the bank, the position of the learned judge, that a present immediate right of action by the defendant must exist, is untenable. *Hooper v. Hills*, 9 Pick. 435, 439; *Wentworth v. Whittemore*, 1 Mass. 471, 472; *Barnes v. Treat*, 7 Mass. 271, 274; Rev. St. (Mass.) c. 109, § 62; Pub. St. c. 183, § 22; *Wheeler v. Bowen*, 20 Pick. 563-566; *Holbrook v. Waters*, 19 Pick. 854, 855; *Cady v. Comey*, 10 Metc. 459; *Hoar v. Marshall*, 2 Gray, 251, 253, 254; *Insurance Co. v. Chandler*, 16 Mass. 275, 280; *Webb v. Peele*, 7 Pick. 247, 249; *Thorndike v. De Wolf*, 6 Pick. 120, 122.

Bishop & Wigglesworth, for claimant.

The case now comes before the court on a bill of exceptions brought by the plaintiff because of the refusal of the judge below to rule as requested by the plaintiff. The only question now open is whether the judge erred in so refusing. *Richardson v. Curtis*, 2 Gray, 497; *Wall v. Institution*, 3 Allen, 96, 98; *Jones v. Sisson*, 6 Gray, 288, 294; *Bigelow v. Boston*, 120 Mass. 326; *Association v. Cronin*, 4 Allen, 141; *Ames v. McCamber*, 124 Mass. 85. There was no error in the refusal by the court to rule as requested. See *Lupton v. Cutter*, 8 Pick. 298, 303; *Lane v. Felt*, 7 Gray, 491. See, also, *Hancock v. Colyer*, 99 Mass. 187, 103 Mass. 396, (as reported in the latter citation, the facts had changed from those in the same case in 99 Mass.); *Gore v. Clisby*, 8 Pick. 555, 556; *Insurance Co. v. Weeks*, 7 Mass. 438, 439; *Perry v. Coates*, 9 Mass. 537.

DEVENS, J. While the question raised by the bill of exceptions, viz., whether Mr. Stone is to be held as trustee, has been argued before us and be-

fore the superior court between the plaintiff and the claimant, it is really one between the plaintiff and the trustee. The claimant is only concerned when it is ascertained that there are funds in the hands of the trustee originally belonging to the defendant which, but for the assignment or other title which the plaintiff may have acquired, would be payable to him. An adverse claimant does not come into court for the purpose of showing that there are no goods, effects, and credits of the defendant in the hands of the alleged trustee, which would ordinarily be to prove himself out of court; but for the purpose of showing himself entitled to those funds to which, but for his claim, the plaintiff would be entitled. He can have no judgment in his own favor except in the matter of costs against either plaintiff, defendant, or trustee. *Gifford v. Rockett*, 119 Mass. 71; *Clark v. Gardner*, 123 Mass. 358. It has therefore been held that a statement of facts, signed by plaintiff and claimant only, and not on behalf of the trustees, who are necessary parties to the judgment, must be discharged. *Bank v. Bullock*, 120 Mass. 86; *Gifford v. Rockett*, *ubi supra*. The first question in such case is, therefore, as between plaintiff and the alleged trustee, whether the latter is primarily chargeable; and the second, whether the amount for which he is chargeable has been assigned or is due to any other party, who may then be permitted to present his claim. In practice, these questions undoubtedly are often tried at the same time, if not absolutely together, but they are essentially distinct. In the case at bar, the only question passed upon by the court was whether the trustee was chargeable; and this, in a controversy between the plaintiff and the claimant. The presiding judge deemed that this was sufficient for the purpose of the case as presented to him; and held it to be unnecessary to consider the validity of the assignment to the claimant. The trustee had answered fully, and had no wish, apparently, to be heard, but was prepared to submit the case upon his general answer, and his replies to the interrogatories addressed to him. As the trustee was discharged, if it shall appear, notwithstanding any irregularity of the trial, that the plaintiff, who is the excepting party, was not entitled, as between himself and either of the other parties, to any of the rulings requested by him, no injustice will have been done. It might be said, parenthetically, that it would seem that the questions, upon the one hand, whether the trustee was not entitled to be discharged upon his whole answer, and, upon the other, whether the trustee was not chargeable by reason of the fact that he deposited in the bank the drafts belonging to the defendant as his own, might fairly have arisen at the hearing. But the bill is not so framed as to present them; nor could we assume that it contains all the facts necessary to be stated if they were open for discussion. The questions presented by the bill of exceptions only are before us, and no other part of the case is brought here for revision. This has been so often decided, and the reasons for such a decision are so obvious, that they do not require restatement. *Richardson v. Curtis*, 2 Gray, 497; *Jones v. Sisson*, 6 Gray, 238; *Wall v. Institution*, 3 Allen, 96; *Ames v. McCamber*, 124 Mass. 85.

The defendants had received two treasury drafts, and had indorsed them to Morse & Stone, to be collected and devoted by them to certain purposes specified in a written agreement. They were deposited by Mr. Stone in the Lincoln Bank, in Boston, and he was credited with the amount of them in his pass-book. While these drafts were yet in the bank and unpaid, the plaintiffs' writ was served on the alleged trustees. The validity of an attachment by trustee process must be determined by the state of facts existing at this time.

The rulings requested by the plaintiff vary in form; but they were, in substance, that if, after the deposit of the drafts by Stone, he could or would have received payment for the amount of them by a check drawn upon the bank for the amount of them, the trustees should be charged. The plaintiff did not claim to hold the trustees, as such, on account of their having received and deposited the drafts to their own credit, or because they held drafts be-

longing to the plaintiff, for which, when collected, they were to account. It has often been held that choses in action, as notes, drafts, checks, etc., uncollected, which have been deposited with another to be thereafter collected, do not render him liable to be charged under the trustee process. *Lupton v. Cutter*, 8 Pick. 298; *Lane v. Felt*, 7 Gray, 491; *Hancock v. Colyer*, 99 Mass. 187. The position of the plaintiff was and is that the property in the drafts had passed to the bank; that Stone was a creditor, to the amount of them, of the bank; and that if, in fact, Stone could have collected the money for them whenever he called for it, it is immaterial whether he could have enforced a payment for them from the bank. In reply to the plaintiff's requests, the court ruled that, except as to the alleged assignment to the claimant, on the validity of which it did not pass, "if said Stone could have drawn against said deposit as of right, or if the bank would have paid said Stone's check against said deposit, pursuant to any agreement implied by the course of dealing, or pursuant to any contract obligation, then said Stone was to be charged as trustee; but refused to rule that he was to be charged as trustee if he would have been permitted to draw in the discretion of the bank, and said bank would have paid in its discretion, relying on the responsibility of said Stone, the character of the paper deposited, or both or all the elements which might affect its discretion, when not under obligation to pay." The court further found as a fact "that at the time of service Stone had not control of the credit entered upon his deposit book on account of the draft in question, and could not check or draw upon it as of right;" but did not pass upon the question whether the bank would have paid a draft by said Stone against said deposit. It further ordered the trustee to be discharged. This finding of facts was fully justified by the evidence tending to show that, by the custom of the banks in Boston, checks and drafts were credited conditionally, subject to correction on non-payment; that such deposits were not subject to check of depositors until the check or draft was collected, or sufficient time had elapsed for notice of non-payment in the course of business; that banks did, in certain cases, pay checks drawn immediately against deposits of checks or drafts, and that when they did so the responsibility of the customer, the responsibility of the drawer and drawee of the check, or character of the draft deposited, and various other elements, affected their decision. There was also evidence from other sources that credit for the deposit of checks or drafts was absolute, and not conditional. So far as there was a conflict of evidence on this subject, it was a matter for the final decision of the presiding judge. With the usage of the bank, as it is found by the judge to have existed, with which he dealt, Stone must be held to have been acquainted. The circumstance that, by engaging his personal responsibility, Stone could have obtained the money for these drafts, did not make him liable for the amount of them to the defendant, whose property they were when confided to him. Until the bank was under a legal obligation to pay him, there was no pecuniary legal obligation on his part to the defendant. No person is to be "adjudged a trustee by reason of any money or other thing due from him to the defendant, unless it is, at the time of service of the writ on him, due absolutely, and without depending on any contingency." Pub. St. c. 183, § 34, cl. 4.

It is suggested that a deposit of the drafts, for which credit was given by an entry on the books of the bank in the same manner as deposits of bank-bills, must be held to have vacated the relation of debtor and creditor between the bank and trustee. If so, the trustee would certainly have had at once a right of action for the amount of the drafts; which, by the usage of the banks in regard to such deposits, it is found he did not. The entry made, whether called a memorandum, or by any other name, must be construed with reference to this usage, and did not make the bank liable to the depositor of the drafts at all events.

The plaintiff urges that the case of *Hancock v. Colyer*, 103 Mass. 396, is practically decisive in his favor. We do not so consider it. In that case the trustees had collected the amount of the check in money; had deposited it, subject to their own order, in the bank; and it was liable to be immediately drawn out by them as of right when the trustee process was served. They could not have taken more complete possession of the money. Exceptions overruled.

(147 Mass. 282)

RUSSELL et al. v. PAGE et al.

(Supreme Judicial Court of Massachusetts. Suffolk. June 21, 1888.)

REFERENCE—COMPENSATION OF REFEREES—CONTRIBUTION.

After arbitrators appointed by rule of court, with the consent of the parties, had made their report, but before the final judgment in the suit, the original defendant paid them a reasonable compensation, and sued the original plaintiff therefor in the names of the arbitrators. *Held*, that he was entitled to contribution.

Reported case from superior court, Suffolk county; HAMMOND, Judge.

Contract brought by Tileston & Hollingsworth, in the name of William G. Russell and another, against John B. Page and another, to recover one-half the amount paid by Tileston & Hollingsworth as fees to the nominal plaintiffs, who were referees in a suit between Tileston & Hollingsworth and the present defendants. The superior court found for the plaintiffs for \$275, and reported the case to the supreme judicial court.

L. M. Child, for defendants.

The defendant claims that this action, even if it can be maintained, is prematurely brought, and that it cannot be considered until the original case is fully disposed of. *Haskell v. Whitney*, 12 Mass. 47; *Hogan v. Ward*, 117 Mass. 67; *Woodbury v. Proctor*, 9 Gray, 18. Referees appointed under a rule are officers of the court, and are under the control of the court, and any doings or acts become a part of the case upon their return made to the court. The only place where this question can be properly heard is before the court who had the original jurisdiction of the matter, and that the judgment of that court is the one that has the control of the question of the arbitrators, and no other. *Seavey v. Beckler*, 132 Mass. 203; *Lincoln v. Manufacturing Co.*, 13 Allen, 276; *Bond v. Fay*, 1 Allen, 212. If there was any possible claim to be had against these defendants, it should have been brought by the parties who paid the money, for money paid in behalf of the defendants, but there can be no possible claim that the referees have a cause of action against these defendants. *Willey v. Durgin*, 118 Mass. 64; *Ames v. Stevens*, 120 Mass. 218, 266; *Burghardt v. Owen*, 13 Gray, 300; *Gaylord v. Norton*, 130 Mass. 74; *Maynard v. Frederick*, 7 Cush. 247.

A. & J. R. Churchill, for plaintiff.

In England, it was formerly, at least, doubtful whether arbitrators and referees could recover for their services. Their compensation, like that of counsel and physicians, was an *honorarium*, and purely voluntary. *Hardres v. Proude*, Style, 465, (1655); *Virany v. Warne*, 4 Esp. 47, (1801); *Swinford v. Burn*, Gow. 7, (1818); *Hicks v. Richardson*, 1 Bos. & P. 98. While this in a great measure accounts for the referee's common and prudent practice of withholding the award until payment of fees, yet it will hardly be contended that in this commonwealth such services are gratuitous, or that no action can be maintained to recover compensation therefor. See *Butman v. Abbot*, 2 Greenl. 361; *Hinman v. Hapgood*, 1 Denio, 188; *Adams v. Stevens*, 26 Wend. 452, 455; *Young v. Starkey*, 1 Cal. 426. "The power of arbitrators appointed under a rule of court to award on the subject of costs is perfectly well settled, * * * and includes an authority to determine concerning the

costs of arbitration as well as the costs of court." *Jones v. Carter*, 8 Allen, 431; *Vose v. How*, 13 Metc. 244. The accountant's payments may be disallowed as to him; but the strangers receiving such payments, like the sheriff, and in the case at bar the arbitrators, were, it is submitted, *coram non judice* in the original proceeding. *Dossett v. Gingell*, 2 Man. & G. 870; Wats. Arb. 109, 110. Referees may recover, though their fees have not been "ascertained and allowed by the court," and their report not accepted. *Potter v. Hazard*, 11 Allen, 187, 192. "The fees of arbitrators, and the expenses, * * * are the necessary costs of the cause incurred by the consent of parties before the tribunal of their own selection," etc. *Jones v. Carter*, *supra*. See, also, *Potter v. Hazard*, *supra*, *passim*; *South Scituate v. Hanover*, 9 Gray, 420, 421.

DEVENS, J. It may be that the plaintiffs would have had a remedy for the non-payment of their fees by some interlocutory order of the court passed upon their application, and compulsory upon the parties to the suit. The defendants urge that such is their only remedy. Their contention is that there is no contract which can be implied between themselves and the referees; that the referees were not performing any services for them, but were complying with an order of the court; and that all which they can obtain for their services must be obtained through the intervention of that court. That arbitrators may retain in their own hands their award until their proper charges for services are paid, has never been doubted, and such is a common practice. This must rest upon the ground that they have rendered services for both parties in making their award, and that before delivering the result of their work they are entitled to receive the value of them. Nor is this inconsistent with a right on the part of the court to control the matter if their demand is excessive and exorbitant. While in *Virany v. Warne*, 4 Esp. 47, it was held by Lord KENYON that an arbitrator could not recover against the parties to the arbitration, this cannot be considered the law in England or America at the present time. The rule has been repeatedly stated that both parties are liable to the arbitrators for their reasonable charges. Where one has paid the whole amount, it has also been held that he might recover a moiety thereof from the other; the payment not being on his part deemed to be an officious and voluntary one, but the payment of a sum for which both were liable, and entitling the party paying to contribution from the other. "Where two parties agree to employ an arbitrator, and one pays a sum of money to take up the award," says Baron MARTIN in *Marsack v. Webber*, 6 Hurl. & N. 1, "in reason, justice, and law he is entitled to recover of the other a moiety of the sum so paid." *Swinford v. Burn*, Gow. 7; *Hicks v. Richardson*, 1 Bos. & P. 93; *In re Coombs*, 4 Exch. 839; *Threlfall v. Fanshawe*, 19 Law J. Q. B. 334; *Young v. Starkey*, 1 Cal. 426; *Hinman v. Hapgood*, 1 Denio, 188. It was held in *South Scituate v. Hanover*, 9 Gray, 420, that where commissioners were appointed to establish the boundary line between two towns, under a resolve providing that the fees of the commissioners should be paid one-half by each, that one town could not pay the whole fees, and recover the half from the other town. But this was the payment by one town of a liability which the statute had distinctly imposed upon another. The service rendered was not to the two towns, who were not together primarily liable as to referees or arbitrators as for services performed on their behalf and at their request. The commonwealth had imposed a definite liability on each on account of their interest in the transaction, which would not be affected by any judgment the commissioners might render. The duty which the commissioners owed to establish the boundary was not owing to the towns, but to the commonwealth. It was an officious and voluntary act on the part of the plaintiff town to discharge the liability of the defendant town, as it would have been to have discharged any other liability properly imposed on it by law. The de-

fendants urge that, even if both parties would be liable to the arbitrators, or if this were the case of an arbitration at common law, there is a clear difference in their liability arising from the fact that these were referees under a rule of court. But a reference by rule of court rests upon the agreement of parties. The fact that such agreement has been sanctioned, and that the arbitration thus derives its legal force, effect, and validity from the order of the court, does not change the relation of the parties to the referees in this respect: that they are rendering services to the parties which entitle them to compensation. Even if the court might have ordered the award to be filed on payment of a reasonable sum, it is found that the sum charged by the referees was reasonable, and the court accepted the award, so that the defendants do not have on this account any just ground of complaint. If the original suit is still to be treated as pending in the superior court by reason of the motion to set aside the judgment which has been rendered upon the award of the referees on the question of costs, however this may affect the rights of the parties *inter se*, the rights of the referees to recover their reasonable fees from them will not be thereby affected. In certain cases, as where commissioners are appointed under a petition to the judge of probate for a partition of real estate, these officers are treated as employed by the party petitioning, and as rendering their services at his request. *Potter v. Hazard*, 11 Allen, 187; *Butman v. Abbot*, 2 Greenl. 361. Contribution can then only be obtained from other parties after decree and allowance by the court. These cases depend on the statutory provisions applicable to them, and certainly do not aid the defendants, who were the actors in the original suit. In the case at bar Tileston & Hollingsworth, who were the defendants in the original suit, have actually paid the fees of the referees, and received from them an assignment of their claim against the defendants. It is certainly no more than just, when a plaintiff who has seen fit to submit to a reference under a rule of court does not see fit to pay the referees the sum necessary to obtain the award, that the defendant should be allowed to do so, and to treat one-half the sum as paid on behalf of the adverse party. Whether, upon the facts existing, the action should more properly have been brought by Tileston & Hollingsworth in their own names against the defendants for money paid on their behalf, or whether it may be brought in the name of the referees, is a question not raised upon the report. *Kennedy v. Owen*, 131 Mass. 431. The ground upon which the defendants have placed their case, viz., that they are under no liability to pay for the services performed by them, is untenable. Had they objected that the suit should have been brought in the name of Tileston & Hollingsworth, undoubtedly a formal amendment would have been permitted, had such been deemed necessary. Judgment on finding.

(147 Mass. 245)

PRATT v. TOWN OF WEYMOUTH.

(*Supreme Judicial Court of Massachusetts. Norfolk. June 20, 1888.*)

1. HIGHWAYS—DEFECTS—ACCIDENT CAUSED BY HUMAN AGENCY.

An insecurely fastened derrick standing in the highway for use in repairing a culvert in the highway fell under the weight of a stone which was being lifted, and injured a passer-by. *Held*, that the town was not liable as for a defect in the highway; the accident being caused by purely human agency.

2. SAME—ROAD OFFICERS—LIABILITY OF TOWN FOR TORTS OF AGENTS.

A person passing along the highway was injured by the fall of a negligently secured derrick which had been erected to use in repairing a culvert in the highway. The work was being done by the highway surveyor under a vote of the town to raise money to repair the culvert. One of the selectmen told him to do it when the time should arrive for the general work, or when he saw fit. *Held*, that the surveyor was not acting as a special agent of the town or the selectmen, but in his public capacity, so that the town was not liable for his negligence.

Reported case from superior court, Norfolk county; BLODGETT, Judge.

Action of tort by Russell B. Pratt, *per pro. ami*, against the inhabitants of the town of Weymouth, to recover damages for personal injuries sustained by the plaintiff through an alleged defect of one of the highways of the said town. The superior court, upon facts which appear in the opinion, ruled that the action could not be maintained, directed a verdict for the defendant, and reported the case to the supreme judicial court.

R. D. Smith, C. Q. Tirrell, and N. H. Pratt, for plaintiff.

A derrick defectively supported, and standing in the highway, so that it falls when in use, is a defect for which a town is or may be liable. See *Barber v. Roxbury*, 11 Allen, 318; *Drake v. Lowell*, 13 Metc. 292; *Day v. Milford*, 5 Allen, 98; *Pedrick v. Bailey*, 12 Gray, 163; *West v. Lynn*, 110 Mass. 514. The case of snow projecting beyond a roof of a church, held not to be a defect, is easily distinguishable. *Hixon v. Lowell*, 13 Gray, 59. See, also, *Jones v. Boston*, 104 Mass. 77. It is for the jury upon all the evidence whether the derrick placed and supported as proved, did not render the way dangerous for travelers, and therefore constitute a defect. *Ghenn v. Provincetown*, 105 Mass. 316; *Dowd v. Chicopee*, 116 Mass. 93. A stone may be a defect for which the town is liable, though moved from place to place in the highway within 24 hours before the accident. *Maccurty v. Brookline*, 114 Mass. 527. See, also, *Graves v. Shattuck*, 35 N. H. 257; *Smith v. Railroad Co.*, 120 Mass. 491. If a stranger had exerted a force upon the derrick, or upon the handle of the windlass of the derrick, which caused it to fall upon the plaintiff, it might be a question of *proxima causa*, as in *Marble v. Worcester*, 4 Gray, 395. The town is to keep the highway safe and convenient for the use of travelers. See Pub. St. c. 52, § 18. The question whether plaintiff was a traveler was for the jury. He may be a traveler under *Gulline v. Lowell*, 144 Mass. 491, 11 N. E. Rep. 723; *Hunt v. Salem*, 121 Mass. 294; *Britton v. Cummington*, 107 Mass. 347; *Bliss v. South Hadley*, 145 Mass. 91, 13 N. E. Rep. 352; *O'Shaughnessy v. Brewing Co.*, 145 Mass. 569, 14 N. E. Rep. 779. The words of the statute apply which provide that the town shall be liable "if the damage or injury might have been prevented by reasonable care and diligence on the part of the defendants." See Pub. St. c. 52, § 18. The words in quotations have not received full interpretation as yet. See *Hayes v. Cambridge*, 136 Mass. 402. Under the last count, the town may be liable for an injury caused by the carelessness of persons employed by the town to do work which it is bound to do, or which it assumes to do. *Deane v. Randolph*, 132 Mass. 475; *Waldron v. Haverhill*, 143 Mass. 582, 10 N. E. Rep. 481. The highway surveyor was employed in *Deane v. Randolph*, *supra*; *Hawks v. Charlemont*, 107 Mass. 414. The distinction is obvious between the work done in this case and the work which a highway surveyor (in his capacity) is bound to do,—which the town cannot hinder him from doing, and in doing which the town has no control over him. *Walcott v. Swampscott*, 1 Allen, 102; *Barney v. Lowell*, 98 Mass. 570. When the work to be done is not work which the surveyor is bound to do as such public officer, but which he may be employed by the town to do, and which he does acting under the direction and control of the town officers, then the town is liable. The thing done in this case was not a work within the ordinary scope of a surveyor's duty. See Pub. St. c. 52, §§ 7-12; *Jones v. Lancaster*, 4 Pick. 149. It is clear that the voters did not contemplate doing this work at all by the surveyor, as they contemplated doing their ordinary repairs in part by each surveyor and the rest by the selectmen. It is also plain that the selectmen were not themselves to do the work of enlarging the drain by their own hands, but to employ some suitable person in that behalf; and this was done, as probably was and is commonly the case, by the employment of the surveyor as workman or superintendent for the town. See Pub. St. c. 52, §§ 3, 6, 8, 13, defining the regular duties of a surveyor of highways. See *Day v. Caton*, 119 Mass. 513; *Brigham v. Fester*,

7 Allen, 419. It may be interesting to inquire how far a highway surveyor may go beneath the surface of highways, or disturb existing structures like bridges, under the pretense of repairs. *Callender v. Marsh*, 1 Pick. 421; *Loker v. Brookline*, 13 Pick. 343.

R. M. Morse, Jr., James Humphrey, and Horatio E. Swasey, for defendant.

To hold that a derrick actually in use at the time, controlled and worked by human agency, is a defect, would extend the liability of cities and towns far beyond any limit yet reached, and beyond any limit which can be established by a reasonable construction of the statute. 2 Dill. Mun. Corp. (3d Ed.) § 1004. The cases of *Drake v. Lowell*, 13 Metc. 292, *Day v. Milford*, 5 Allen, 98, and *West v. Lynn*, 110 Mass. 514, are clearly distinguishable from the case at bar. See *Hixon v. Lowell*, 13 Gray, 59; *Jones v. Boston*, 104 Mass. 75; *Barber v. Roxbury*, 11 Allen, 318. See, also, 2 Dill. Mun. Corp. (3d Ed.) § 1013, note 2. The derrick in this case was a machine or implement in actual use, in distinction from a structure permanent in its character, and connected with, attached to, and adapted to the use of the way. There is no case in this commonwealth in which anything in the nature of a structure in the highway, insecure and likely to fall, has been held to be a defect when the danger arose from any other than a natural cause operating it. *Keith v. Euston*, 2 Allen, 552; *Vinal v. Dorchester*, 7 Gray, 423; *Pierce v. New Bedford*, 129 Mass. 534; *Kingsbury v. Dedham*, 13 Allen, 186; *Cook v. Charlestown*, Id. 190, note; *Cook v. Montague*, 115 Mass. 571; *Stanton v. Springfield*, 12 Allen, 566; *Morton v. Frankfort*, 55 Me. 46; *Davis v. Bangor*, 42 Me. 522; *Hewison v. New Haven*, 84 Conn. 136; *Edgerly v. Concord*, 59 N. H. 78. As to the question raised here, it makes no difference whether the use of the highway is legal or illegal, and that the same principle applies where an implement or machine is being used in or upon the highway, controlled and moved by human will and direction, as applies to any of the cases referred to by GRAY, J., in *Barber v. Roxbury*, *supra*, and as to which he says that there is no precedent for holding such to be defects or wants of repair for which a city or town is liable; and it makes no difference whether it is some object being propelled along and over the highway by human agency, or a machine temporarily fixed in its position, but manipulated and worked by human hands. The term "natural causes," as used in the cases, means the storms, the winds, the rains, the snows, and the other operations of nature. The cases of *Maccarty v. Brookline*, 114 Mass. 527, and *Neuert v. Boston*, 120 Mass. 338, are not in point. It is held in Maine that such a state of repair in a road as would free a town from exposure to indictment and conviction would protect it also against a claim for damages for an injury sustained by an individual while traveling thereon. *Merritt v. Hampden*, 26 Me. 234. It is submitted that such is the law in Massachusetts. *Howard v. North Bridgewater*, 16 Pick. 189. The cases in which the "contributing cause" was really one affecting simply the question of the plaintiff's own care are to be carefully distinguished from those in which the "contributing cause" proceeded from the act of a third party, or a physical condition distinct from the defect itself. *Lyons v. Brookline*, 119 Mass. 491; *Marble v. Worcester*, 4 Gray, 395; *Rouell v. Lowell*, 7 Gray, 100; *Kidder v. Dunstable*, Id. 104; *Shepard v. Chelsea*, 4 Allen, 113; *Moore v. Abbot*, 32 Me. 46; *Moulton v. Sanford*, 51 Me. 127. It must be that where the third party is acting at the time, actually engaged in active effort or work, and his act is an immediate and primary cause of the accident, the act need be neither unlawful nor careless in order to preclude a recovery. But we need not go to this extent in the application of the rule to the case at bar. To hold this derrick to be a defect in the highway, when the direct and active co-operation of human agency at the time of the injury is necessarily involved as an immediate and

proximate cause, seems a legal absurdity. With the exception of *Hardy v. Keene*, 52 N. H. 370, no case can be found in which it has been attempted to hold a town responsible, under a highway liability statute, for a defect or want of repair in the way where the traveler was injured in consequence of a defective machine, implement, structure, or other thing at the time under the control and direction of human agency, and being manipulated, moved, worked, or used. We submit that so far as *Hardy v. Keene* attempts to establish the proposition that a derrick under the active manipulation of human agency is a defect in the highway, it is entitled to no respect. See *Johnson v. Haverhill*, 35 N. H. 74; *Wheeler v. Troy*, 20 N. H. 77; *Gilman v. Laconia*, 55 N. H. 130. The plaintiff cannot recover under his second count, because a town is not liable for the careless acts of a public officer. Pub. St. c. 27, §§ 78, 126-128; Pub. St. c. 52, §§ 1, 3-6, 8-13; *Walcott v. Swampscott*, 1 Allen, 101; *Barney v. Lowell*, 98 Mass. 570; *Hafford v. New Bedford*, 16 Gray, 297; *Cushing v. Bedford*, 125 Mass. 526; *Tindley v. Salem*, 137 Mass. 171, *White v. Phillipston*, 10 Metc. 108; *Manners v. Haverhill*, 135 Mass. 165; *Getchell v. Wells*, 55 Me. 483; *McKenna v. Kimball*, 145 Mass. 555, 14 N. E. Rep. 789; *Clark v. Town of Easton*, 146 Mass. 43, 14 N. E. Rep. 795. The fact that a special appropriation was made for the repair of this culvert is of no significance, for the town did not undertake to make the specific repairs through any particular agent or person selected and chosen for the purpose. See *Benjamin v. Wheeler*, 15 Gray, 490. The testimony of Gardner and Asa B. Pratt was competent simply as affecting the credibility of Cushing, and had no legal tendency to establish the truth of the subject-matter of the statement. *Batchelder v. Batchelder*, 139 Mass. 1. A brief statement of fact, conclusive against the plaintiff's right to recover under his second count, is this: (1) The work itself was the repair of a highway. (2) The work was within the scope of the highway surveyor's authority and duty as a public officer. (3) The work was done by a public officer acting and assuming to act as such. (4) The town selected and appointed no agent to do the work, but left it "to be performed by the officers, and in the methods provided by the general laws." *Waldron v. Haverhill*, 143 Mass. 582, 10 N. E. Rep. 481. In *Deane v. Randolph*, 132 Mass. 475, the work was the construction of a highway laid out by the county commissioners; in *Hawkes v. Charlemont*, 107 Mass. 414, "extraordinary measures" were necessary, and the town voted that "the selectmen be the agents of the town" to do the work; and in *Waldron v. Haverhill*, *supra*, the superintendent of highways was removable at the pleasure of the city council, and acted under the direction of a committee of the city council, according to special provisions of the city ordinances.

DEVENS, J. The superior court having ruled, upon the evidence offered by the plaintiff, that he was not entitled to recover, and having ordered a verdict for defendant, the question is presented whether, upon either of the two causes of action set forth in the different counts of the plaintiff's declaration, he was entitled to have the case submitted to the jury. We shall not have occasion to consider whether the plaintiff was to be deemed a traveler upon the highway which the defendant was bound to keep in repair, or whether, if the cause of the injury to the plaintiff was a defect therein for which defendant was responsible, it had sufficient notice thereof, or whether proper notice of the injury, as required by statute, was given to defendant before the action was brought, but shall assume that these subsidiary or preliminary inquiries should be answered in favor of the plaintiff. The ground upon which the plaintiff sought to recover under his first count was, by virtue of the statute, for an injury received through a defect or want of repair in the highway, which defendants were bound to maintain. Pub. St. c. 52, § 18. There was evidence that a derrick was erected and standing in the traveled part of the road to be used in repairing a culvert which extended

across the road, which derrick was insufficiently and insecurely supported; one of the guy-ropes extending into a neighboring meadow, and being there attached to a railroad sleeper buried in the ground, but so defectively fixed that it was pulled from its position by the weight of the derrick, and that of the stone lifted thereby. By reason of this, the derrick, while thus in use by the workmen, fell upon the plaintiff, then passing in the highway, and injured him. Whether a derrick standing in the highway, and impeding travelers thereon, if one had actually collided with it, or whether a derrick thus situated, and so insecurely fixed that it was liable to and did fall from its own weight or from purely natural causes, could be held to be a defect for which a town would be responsible, are questions not necessary now to discuss. The position of the plaintiff is that "a derrick defectively supported and standing in the highway, so that it falls when in use, is a defect for which the town is or may be liable;" and thus that a machine used on the highway for the purpose of repairing it, controlled, worked, and manipulated at the time by workmen, becomes a defect if, by reason that it is thus operated, and that it is not sufficiently supported, injury is occasioned by its fall to one lawfully on the highway. To maintain his proposition, the plaintiff relies much on *Drake v. Lowell*, 13 Metc. 292; *Day v. Milford*, 5 Allen, 98; and *Pedrick v. Bailey*, 12 Gray, 163,—sometimes familiarly known as the "*Awning Cases*." These decisions were put exclusively on the ground of the insufficient strength or defective condition of structures which were not mere incidents or attachments of the building, but were adapted to the sidewalk, and were a part of its construction and arrangement for use as such. It was deemed that danger from their insecure condition might properly be treated as arising from a defective or unsafe condition of the sidewalk. Where a sign, attached to the building only, fell, it was held, as in the case where ice overhung the sidewalk, that there was no liability of the town as for a defective highway, (*Jones v. Boston*, 104 Mass. 75; *Hixon v. Lowell*, 13 Gray, 59;) while in a case where a sign or transparency was supported above the sidewalk by a pole or post placed thereon, and injury was occasioned by the fall of the pole, it was held to come within the cases in regard to awnings above cited, (*West v. Lynn*, 110 Mass. 514.) This class of cases has been repeatedly said to express the extreme limit, in this direction, to which the liability of towns should be extended. *Barber v. Roxbury*, 11 Allen, 318; *Jones v. Boston*, *ubi supra*. In all of them, the injury done was occasioned by the operation of purely natural causes, and did not proceed from any human agencies, as where a machine is controlled and managed by the laborers engaged thereon. In *Barber v. Roxbury*, *ubi supra*, a rope was stretched across a highway, attached at each end to objects outside the limits of the highway, and when not in use lay loosely on the ground, not forming any obstruction to public travel until the men engaged in moving stone by means of the derrick raised the rope gradually by turning the crank to which it was attached, so as to lift the rope from the ground across the traveled space. The rope, while being so raised, struck the plaintiff's carriage, and injured her. It was held that such injury could not be said to have been caused by any defect or want of repair in the highway. The liability for defective highways is a limited one. It has long been settled that a plaintiff cannot recover unless the defect is the sole cause of the injury. Where this follows from a defect, united with some distinct, efficient concurring cause, without which it would not have happened, unless, as suggested by Chief Justice SHAW in *Marble v. Worcester*, 4 Gray, 395, such concurring cause be pure accident, the plaintiff cannot recover. *Rowell v. Lowell*, 7 Gray, 100; *Kidder v. Dunstable*, Id. 104; *Lyons v. Brookline*, 119 Mass. 491. Even if it be conceded, therefore, that the derrick was such a defect in the highway that if the plaintiff had collided with it, himself exercising due care, or if, by its own weight, or from any natural cause, by reason that it was insufficiently secured, it had fallen upon and in-

jured him, he might have recovered, such is not the case at bar. It was the act of the workmen who employed the machine in lifting weights for which it was not properly constructed that contributed to the plaintiff's injury, and was the immediate moving cause of it. But for this there is no reason, from the evidence, to suppose it would have occurred. If the defendant is responsible for the act of those who were managing the machine, that would be a liability entirely different from that arising from its obligation to maintain the way, which we shall have occasion hereafter to consider. The derrick did not thereby become a defect in the highway, by the fall of which the defendant was subjected to the statutory liability. The only case to which we have been referred, or which we have found, where a town has been held responsible, under a statutory liability for a defect in the highway, to a traveler injured therein in consequence of a defective structure under the control of human agency, and being thus used and worked, is *Hardy v. Keene*, 52 N. H. 370. Apparently the rule in New Hampshire is different from that established in this commonwealth, and towns are held liable for defects in a highway even where a distinct and independent cause contributes to the injury, unless the traveler's own carelessness is also a contributory cause. The cases in other states, where legislation or judicial decisions differ, cannot always be safely followed. We are not disposed to accept the proposition that a machine under the active charge of individuals is to be treated as a defect in the highway if injury results from its operation, and not merely from its presence there.

If the defendant was not under a statute liability to the plaintiff because of a defect or want of repair in the highway, the plaintiff also sought to recover against it upon a common-law liability for the negligence of its agents and servants employed by it in doing certain work which it had undertaken. This cause of action is set forth in the second count of the plaintiff's declaration; and there was evidence that in the erection of the derrick insufficiently supported, and in the operation of it in lifting weights which it was inadequate to sustain, there was negligence on the part of those doing the work of making or repairing the culvert across the road, in which they were engaged. The question is therefore presented whether, upon the evidence, Cushing, the person doing the work and those engaged with him, are to be treated as the agents or servants of the defendant. Cushing was the highway surveyor, regularly chosen as such by the town, and the work was being done within the district assigned to him. That a town is not responsible for the acts of highway surveyors, or the men employed by them in doing duty imposed upon them by law in the repair of highways, has been repeatedly decided, and the reasons for this exemption have often been stated. *Hafford v. New Bedford*, 16 Gray, 297; *Barney v. Lowell*, 98 Mass. 570; *Walcott v. Swampscott*, 1 Allen, 101; *Tindley v. Salem*, 137 Mass. 171; *Cushing v. Bedford*, 125 Mass. 526; *Manners v. Haverhill*, 135 Mass. 171; *McKenna v. Kimball*, 145 Mass. 555, 14 N. E. Rep. 789; *Clark v. Town of Easton*, 146 Mass. 43, 14 N. E. Rep. 795. That a town, although it has duly chosen surveyors of highways, may, from time to time, or for special reasons or occasions, undertake to repair its ways and bridges in some other than the regular and ordinary manner, and may select and employ men as its agents for this purpose, in which case it would be responsible for torts committed by them, must also be conceded. *Hawks v. Charlemont*, 107 Mass. 414; *Deane v. Randolph*, 132 Mass. 475; *Sullivan v. Holyoke*, 135 Mass. 273; *Tindley v. Salem*, *ubi supra*; *Waldron v. Haverhill*, 143 Mass. 582, 10 N. E. Rep. 481. Nor if the town had undertaken to make the repair of the drain or culvert through an agent selected for the purpose, whom it was entitled to control in the performance of his work, would it be, perhaps, important that such agent was also a highway surveyor. But in the case at bar the town selected no agent to do this work. It did, indeed, pass a vote "to raise and appropriate \$200 to en-

large the drain across Broad street; * * * also the drain across Commercial street;" in the performance of which latter work the injury complained of by the plaintiff occurred. But there is nothing to show that it was not left to be performed by the public officers whom it had chosen according to law, and on their official responsibility as such. The work was itself the repair of a highway, within the scope of Cushing's authority and duty as highway surveyor. In performing it, he had no authority from the town to act otherwise than as a public officer, nor did he attempt to do so, so far as the evidence shows. If he had done so, it would not be important, as it would not be in his power alone to divest himself of his public character, and constitute himself the servant of the town. Nor if it were possible to construe the appropriation for enlarging the drain on Commercial street, as the plaintiff urges it may be, (in which position we do not concur,) as requiring the selectmen to do this work by employing some suitable person as a servant of the town, does the case afford any evidence that Cushing was thus employed. A general direction is given to the selectmen, over the work of the highway surveyor in their respective districts, to see that the money appropriated to such districts is carefully and judiciously expended. Pub. St. c. 52, § 3; *Benjamin v. Wheeler*, 15 Gray, 490. The responsibility of doing the work, directing the laborers, and taking charge of the repairs, is that of the highway surveyor. The facts that Humphrey, one of the selectmen, told Cushing that there was an appropriation of \$200 to spend in widening the drain across Commercial street, and that it would come in with the general work when it was the proper time to do it, or when Cushing "saw fit to do it;" or that, as Cushing afterwards states, "In substance, Humphrey told me the work was for me to do when the proper time arrived for the general work,"—furnish no evidence of any engagement or contract with Cushing as the agent of the town or of the selectmen, even if the selectmen had authority to make such an engagement. Judgment on the verdict.

(147 Mass. 304)

MANSFIELD v. HODGDON et al.

(Supreme Judicial Court of Massachusetts. Suffolk. June 21, 1883.)

1. SPECIFIC PERFORMANCE—REQUISITES OF CONTRACT—CONSIDERATION—PURCHASER WITH NOTICE—DOWER.

A land-owner, without any actual consideration paid, covenanted to sell land to plaintiff at any time within 30 days. The plaintiff expressed his election to purchase, but did not tender the price within the time, the land-owner refusing to convey on the ground that his wife would not sign the deed, and the plaintiff not making his tender owing to negotiations with the land-owner to induce the wife to sign the deed. Afterwards the land was conveyed by deed, in which the wife joined to release dower, to a person who took with notice of plaintiff's rights, though in the belief that plaintiff would sue for damages instead of specific performance. *Held*, that plaintiff was entitled to a conveyance of the land clear of dower.

2. SAME—DESCRIPTION OF LAND.

Defendant contracted to sell to plaintiff "the farm in that part of Mount Desert called 'Pretty Marsh,' and consisting of between 260 and 270 acres." He owned three lots in Mount Desert, making together 210 acres, which he had acquired by one deed, and had previously offered to others as 260 acres. Plaintiff was introduced to defendant by a letter saying he wished a refusal of the property "down east." When signing the contract, defendant said that he did not have so much land, having only the three lots, which did not amount to that; and he had made a deed of the three lots to plaintiff, which was not delivered. *Held*, that all the lots were included in the contract.

Appeal from supreme judicial court, Suffolk county.

Bill in equity by Nathaniel B. Mansfield against Benjamin E. Hodgdon, Clara E. Allen, and William H. Allen, to enforce a covenant to sell certain land. The case was heard in the supreme judicial court before a single justice, who entered a decree for the plaintiff, and the defendants appealed. The facts are stated in the opinion.

Francis S. Hessel tine, for defendants.

The instrument on which the plaintiff seeks to enforce the conveyance of the three lots of land to himself was a voluntary offer by Hodgdon, without consideration. It is claimed by the defendant that the seals were attached to the said writing after the signature by Hodgdon, and the appearance of the paper would seem to substantiate this; but this is immaterial, as in equity a seal does not import a consideration. Wat. Spec. Perf. § 186, p. 247, and cases cited in notes; Fry, Spec. Perf. (3d Amer. Ed.) § 92, p. 45, and cases cited in notes; *Jefferys v. Jefferys*, Craig & P. 138; *Ellison v. Ellison*, 6 Ves. 662, and cases cited in note a; *Houghton v. Lees*, 1 Jur. (N. S.) 862; *Burford's Heirs v. McKee*, 1 Dana, 107; *Short v. Price*, 17 Tex. 397, and cases cited therein; *Smith v. Reynolds*, 8 McCrary, 157, 8 Fed. Rep. 696. A court in equity will not enforce the specific performance of a voluntary offer of sale without consideration. *Black v. Cord*, 2 Har. & G. 100; *Tumlinson v. York*, 20 Tex. 698; *Minturn v. Seymour*, 4 Johns. Ch. 500; *Thompson v. Atfield*, 1 Vern. 40; *Longdale v. Longdale*, Id. 456, and cases cited above; *Smith v. Reynolds*, 8 McCrary, 157, 8 Fed. Rep. 696; *Hanson v. Michelson*, 19 Wis. 499; *Eaton v. Eaton*, 15 Wis. 259; *Stone v. Hackett*, 12 Gray, 230; *Bowman v. Cunningham*, 78 Ill. 48; *Vasser v. Vasser*, 23 Miss. 378; *Dodd v. Seymour*, 21 Conn. 479; *Evins v. Gordon*, 49 N. H. 444. This offer to sell being voluntary, without consideration, could be retracted by Hodgdon at any time before a full, unconditional acceptance by Mansfield. He could vary his offer at any time before such acceptance. *Railroad Co. v. Bartlett*, 3 Cush. 226; *Foster v. Boston*, 22 Pick. 33; Fry, Spec. Perf. (3d Amer. Ed.) §§ 285, 286, 290, and cases there cited. The statement of Hodgdon, when the deed was left, on January 29th, for his examination, that he rejected the deed, which included the mountain lot, and that the same was not to be understood as included in his agreement, was a retraction of his offer, and a withdrawal of the same if it did ever include or ever was understood to include the mountain lot, as there was up to that time no acceptance; and, there being no consideration, he had a right to withdraw it. Fry, Spec. Perf. § 287. No formal notice of the retraction of a mere voluntary offer is necessary. Id. Equity will not enforce an offer of sale made under a mistake of parties, where the agreement is not certain, and their minds do not meet. *Railroad Co. v. Babcock*, 3 Cush. 228; 2 Story, Eq. Jur. 66; Fry, Spec. Perf. (3d Amer. Ed.) §§ 739, 751, 754, 774, and notes; *Lynes v. Hayden*, 119 Mass. 482, and cases cited; 2 Story, Eq. Jur. 78. The controlling words and description are, "The farm situate," etc., which words are definite, and prevail over the statement of the number of acres, and over parol evidence of one of the parties that it included something else. *Winn v. Cabot*, 18 Pick. 553; *Melvin v. Proprietors*, 5 Metc. 30; *Worthington v. Hylyer*, 4 Mass. 195; Bouv. Law Dict. tit. "Farm;" *Doolittle v. Blakesley*, 4 Day, 265. The specific performance of a contract in writing, concerning land, cannot be compelled in a court of equity, if the description of the land is so vague and uncertain as to require the receipt of parol evidence, and there is no reference in the memorandum to the other description which would make it certain. *Jordan v. Fay*, 40 Me. 130; *Whiteaker v. Vanscholack*, 5 Or. 118; *Allen v. Webb*, 64 Ill. 344; *Blanchard v. Railroad Co.*, 31 Mich. 53; *Coles v. Bowne*, 10 Paige, 537. Hodgdon retracted his offer to 30 days. He intended, and it appears to have been understood, that it was limited to 30 days, and that the time was an essential part of the offer. *Goldsmith v. Guild*, 10 Allen, 239; *Barnard v. Lee*, 97 Mass. 92. This being a mere voluntary offer of sale, it was not binding upon Hodgdon until the full, distinct, unequivocal, and unconditional acceptance by Mansfield. *Railroad Co. v. Bartlett*, 3 Cush. 226; *Foster v. Boston*, 22 Pick. 33; Fry, Spec. Perf. § 271, and sections following; *Warner v. Willington*, 3 Drew. 523; *Gaskarth v. Lord Lowther*, 12 Ves. 107; *Thomas v.*

v.17N.E.no.5—35

Blackman, 1 Colly. 301; *Hazard v. Insurance Co.*, 1 Sum. 218; *Carr v. Duval*, 14 Pet. 77; *Crossley v. Maycock*, L. R. 18 Eq. 180. The leaving of a warranty deed at Hodgdon's house by Chapin was not a valid binding acceptance. *Warner v. Willington*, 4 Drew. 523, and cases cited above. The signing and leaving a deed by Hodgdon with Chapin, who in this matter was acting for Hodgdon, which was soon afterwards withdrawn, there being no delivery, and no payment of money, did not operate as an acceptance by Mansfield, and conferred no right upon Mansfield and Wood, under the offer of Hodgdon to Mansfield, which a court of equity will enforce. After the withdrawal of the offer by Hodgdon, and after his sale and conveyance to Allen, and after a suit at law for damages had been brought by Mansfield against Hodgdon, it was too late. A decree for specific performance is not a matter of strict right, but is discretionary with the court, in view of all the circumstances; and a decree will not be granted unless, upon all the facts disclosed, it is manifestly just and equitable to do so between all the parties before the court. *Curran v. Water-Power Co.*, 116 Mass. 90.

George Putnam and Jabez Fox, for plaintiff.

The fact that the land lies in Maine is no objection to the jurisdiction. *Brown v. Desmond*, 100 Mass. 267, 269. Nor is it an objection to a bill for specific performance that suits at law for breach of the agreement have been begun. *Connihan v. Thompson*, 111 Mass. 270. Nor is it an objection that the obligation of the bond is purely unilateral. *Railroad Corp. v. Babcock*, 6 Metc. 346; *Iroin v. Gregory*, 13 Gray, 215; *Eastman v. Simpson*, 139 Mass. 348, 349, 1 N. E. Rep. 346. It is no objection that the plaintiff, after the agreement, conceded a strip of three acres to the defendant by parol. He is entitled to a conveyance of the rest. *Park v. Johnson*, 4 Allen, 259. An agreement to sell is an agreement to convey a good title free from all incumbrances. *Swan v. Drury*, 22 Pick. 485; *Hurley v. Brown*, 98 Mass. 545, 549; *Linton v. Hichborn*, 126 Mass. 32. An agreement in the singular number, signed by two persons, is the several agreement of each. In this case the agreement of "Nahum Chapin, mortgagee," would probably be held to extend only to his mortgage title. *Hemmenway v. Stone*, 7 Mass. 58; *Bank v. Willis*, 8 Metc. 504; *Hooker v. Pyncheon*, 8 Gray, 550. As to sufficiency of description, see *Mead v. Parker*, 115 Mass. 418; *Rankin v. Wood*, 12 Gray, 34; *Bacon v. Leonard*, 4 Pick. 277. See, also, *Aldrich v. Gaskill*, 10 Cush. 155. We submit that the present case is fully covered by the decisions of this court. *Carpenter v. Holcomb*, 105 Mass. 280; *Gormley v. Kyle*, 137 Mass. 189; *Lowe v. Harwood*, 139 Mass. 138; *Palmer v. Stockwell*, 9 Gray, 237; *Gage v. Coal Co.*, 124 Mass. 442; *Todd v. Taft*, 7 Allen, 371; 1 Benj. Sales, § 566; Sugd. Vend. (8th Amer. Ed.) 265. See, also, *Webb v. Hughes*, L. R. 10 Eq. 281. *Barnard v. Lee*, 97 Mass. 92, affirms the doctrine that in a case of this kind time will not ordinarily be treated as of the essence of the contract. One who buys land with notice that the seller has agreed to sell it to another, takes it, in equity, subject to such agreement, although he has no actual notice that the agreement is in writing. *Connihan v. Thompson*, 111 Mass. 270, 271; *Bancroft v. Consen*, 18 Allen, 50, 51; *Hardy v. Reeves*, 4 Ves. 466; *Hansard v. Hardy*, 18 Ves. 456. See, also, *Hayward v. Cain*, 110 Mass. 273.

HOLMES, J. This is a bill to enforce a covenant to sell the plaintiff "the farm situated in that part of Mount Desert island called 'Pretty Marsh,' and consisting of between two hundred and sixty and two hundred and seventy acres, and standing in the name of Benjamin Hodgdon, for the sum of fifteen hundred dollars cash, at any time within thirty days from the date hereof." The instrument is dated January 15, 1887, and is signed by the defendant Hodgdon. The defendant Clara E. Allen is a subsequent grantee of the prem-

ises. The judge who heard the witnesses made a decree for the plaintiff, and, the evidence having been reported, the defendants appealed.

Giving to the finding of the judge the weight which it must have, we think the evidence must be taken to establish the following facts: The instrument was sealed by Hodgdon, and has not been altered. The plaintiff expressed his election to purchase within the 30 days allowed. There was evidence of a message to that effect having been left at Hodgdon's house within 10 days. It appears that a blank deed to the plaintiff and another was left there about the same time, and there was evidence that a message was sent to Hodgdon to execute it if he found it correct. There was also evidence that the deed was returned unexecuted, with the message that Mrs. Hodgdon refused to sign it, and with no other objection in the first instance. These facts warranted a finding that sending the deed implied, and was understood to imply, notice that the plaintiff intended to buy, at least if the deed corresponded to the contract, (see *Warner v. Willington*, 3 Drew. 523, 533;) and perhaps whether it corresponded or not, as the message, even as testified to by Hodgdon, imported a willingness to correct mistakes. The defendant takes the ground that this deed did not correspond to the contract because the deed included a mountain lot which is alleged not to be included in the land described by the contract. The question whether that lot is included in the contract is also important, of course, in deciding what land, if any, the defendant should be required to convey. The words used must be construed in the light of the circumstances, and, thus construed, they might well have been found to import, and to have warranted the plaintiff in understanding that they imported, all the defendant's land in Mount Desert. Hodgdon owned only three lots in Mount Desert. Two, of 70 and 80 acres, respectively, are admitted to be embraced in the contract. The mountain lot, seemingly then regarded as of little or no value, and said to contain 60 acres, brings the total up to 210 acres. The contract was for between 260 and 270 acres. Hodgdon says that the plaintiff was introduced to him by a letter saying that he wished the refusal of the property down east for 30 days, evidently suggesting a bargain for the whole. The plaintiff testifies that, before signing, Hodgdon said that he had not so much land as was mentioned, but had so many acres in one lot, so many in another, and so many in a third, amounting in all to 215 acres; that that was all he owned; that the plaintiff said it did not make any difference whether it was 215 or 260 or 270 acres, and that thereupon Hodgdon signed. Hodgdon acquired all the land by one deed; had previously offered the whole land as 260 acres to others. Subsequently he made a deed of the three lots to the plaintiff, which was not delivered, and conveyed them by a similar deed to the defendant Mrs. Allen. It is suggested that Hodgdon understood that the plaintiff was to pay him \$1,500 for the land, subject to a mortgage. But the agreement contains no such qualification, and must be construed as an agreement to convey a good title free from incumbrances, which there is evidence tending to show was the meaning of the parties. *Linton v. Hichborn*, 126 Mass. 32. If, without the plaintiff's knowledge, Hodgdon did understand the transaction to be different from that which his words plainly expressed, it is immaterial, as his obligations must be measured by his overt acts. *O'Donnell v. Clinton*, 145 Mass. 461, 463, 14 N. E. Rep. 747; *Railroad Corp. v. Babcock*, 6 Metc. 346, 352.

The plaintiff, although he signified his election to take the land within 30 days, did not pay or tender the money within that time. But there is evidence that Hodgdon was responsible for this. At or soon after the time when word was sent that Mrs. Hodgdon refused to sign, a demand or request was made that Mrs. Hodgdon should have three acres out of one of the other lots as a consideration for her signing the deed. Of course, under the contract, the plaintiff had a right to call upon Mr. Hodgdon to give a good title to the whole, but he was disposed to yield something. A discussion ensued, of

course, on the footing that the plaintiff was desirous of making the purchase, which of itself was evidence that the defendant had notice of the fact, and this was prolonged beyond the 30 days. When the parties came to terms, a new deed was prepared and tendered, was executed by the Hodgsons, and was handed to a Mr. Chapin, who had acted as a go-between. But, later in the same day, Chapin was ordered not to deliver the deed, and the bargain with the plaintiff was repudiated. There is no dispute that the plaintiff was ready to pay for the land at any time when he could get a conveyance. Afterwards Hodgdon conveyed to Mrs. Allen, Mrs. Hodgdon releasing dower. But Mrs. Allen had full notice of the agreement with the plaintiff before the conveyance to her, and before any agreement was made with her or her husband; and, although informed that the 30 days had gone by, she had notice that the plaintiff was expecting a conveyance, and that Mr. Hodgdon might have trouble by reason of his refusal to convey to the plaintiff. *Connihan v. Thompson*, 111 Mass. 270; *Hansard v. Hardy*, 18 Ves. 455, 462. Mr. Allen was asked whether he knew that plaintiff had sued Hodgdon for damages before the purchase. This must have meant before the final conveyance to Mrs. Allen, as Mrs. Allen was a party to getting the deed back from Mr. Chapin, and had notice of the plaintiff's rights at that time, before any suit was begun. But the evidence was excluded, and Mr. Allen's answer properly is not before us. He did not suggest that he was led by his knowledge to assume that the plaintiff would not seek specific performance, and must be taken to have known that the plaintiff still had the right to do so. *Connihan v. Thompson*, *ubi supra*. The defendant's undertaking not having been a mere offer, but a conditional covenant, to sell, bound the defendant irrevocably to sell in case the plaintiff should elect to buy, and should pay the price within 30 days. The usual doctrine as to conditions applies to such a covenant; and as the covenantor, by his own conduct, caused a failure to comply with the condition in respect of time, he waived it to that extent. And upon the same principle he exonerated the plaintiff from making any tender, when the new terms had been agreed upon, by wholly repudiating the contract. *Carpenter v. Holcomb*, 105 Mass. 280, 282; *Ballou v. Billings*, 136 Mass. 307; *Gormley v. Kyle*, 137 Mass. 189; *Lowe v. Harwood*, 139 Mass. 133, 136. If it be true, as testified for the defendant, that he also objected to signing a deed conveying the mountain lot, this was a further excuse for the delay. *Galvin v. Collins*, 128 Mass. 525, 527. A covenant to sell is not voluntary in such a sense that equity will refuse specific performance. If the defendant conveys, he will get *quid pro quo*. *Railroad Corp. v. Babcock*, 6 Metc. 346; *Irvin v. Gregory*, 13 Gray, 215; *Eastman v. Simpson*, 139 Mass. 348, 349, 1 N. E. Rep. 346. The description in the contract, embracing all the land owned by the defendant at Mount Desert, was sufficient. *Bacon v. Leonard*, 4 Pick. 277; *Hurley v. Brown*, 98 Mass. 545; *Rankin v. Wood*, 12 Gray, 34; *Mead v. Parker*, 115 Mass. 413; *Doherty v. Hull*, 144 Mass. 465, 11 N. E. Rep. 581.

It is objected that the decree gives the plaintiff a title free from Mrs. Hodgdon's right of dower, and that, as Mrs. Hodgdon was not bound to release her dower to him, he ought not to profit by her release to Mrs. Allen. But who suffers injustice or has a right to complain? Not Mrs. Hodgdon, who is not a party to or interested in these proceedings. She has released and extinguished her dower, and she retains the consideration which she received for it, as the three acres demanded by her are excepted from the conveyance ordered by the decree. Mr. Hodgdon cannot complain, as he contracted to convey a clear title; and the defendant Mrs. Allen, having taken Hodgdon's title with notice of the plaintiff's rights, and therefore charged with a trust in his favor, of course is bound to convey that title. The release of dower extinguished Mrs. Hodgdon's inchoate right, and did not convey a distinct interest to Mrs. Allen. *Learned v. Cutler*, 18 Pick. 9, 11; *Tirrell v. Kenney*, 137 Mass. 30, 32. Without considering whether, if justice required it,

the defendant Allen might not be protected by treating the incumbrance as if it still existed, there is no ground for doing so in this case. Mrs. Allen, through her husband, actively promoted Hodgdon's breach of agreement. If she receives back from him the consideration which she paid in excess of that ordered to be paid to her by the plaintiff, she will be *in statu quo*, and the loss will fall on Hodgdon, as it ought to do, unless there was some arrangement by which the Allens were to indemnify him. In any event, no wrong will be suffered by any one, and the plaintiff gets what he contracted for. Decree affirmed.

(147 Mass. 236)

FIRST AFRICAN M. E. CHURCH v. BROWN.

(Supreme Judicial Court of Massachusetts. Suffolk. June 21, 1888.)

SPECIFIC PERFORMANCE—CONTRACT TO PURCHASE LAND—REASONABLE DOUBT OF TITLE.

A grantor of land filed in the registry of deeds a paper alleging that the deed was obtained from him by fraud and covin, but for six years took no steps to recover the land. *Held*, that it did not constitute a sufficient cloud on the title of his grantee to defeat a bill by the latter for specific performance of a contract for the purchase of the land by a third person.

Reported case from supreme judicial court, Suffolk county; C. ALLEN, Judge.

Bill in equity by the First African Methodist Episcopal Church against Benjamin F. Brown, to enforce the performance by the defendant of an agreement to buy a piece of land of the plaintiff. The defendant refused to accept the deed on the ground that one John Scott, plaintiff's grantor, had filed in the registry of deeds of the county where the land was situated a *caveat* setting forth that the deed of the premises from him to the plaintiff was obtained from him by fraud and covin, that he never intended to convey said property to the society, and notified any person taking title from the society that he should dispute the validity of the deed. This, the defendant contended, constituted a cloud upon the title. In the supreme judicial court, before C. ALLEN, J., the bill was dismissed, and the case reported to the full court.

Moulton, Loring & Loring, for plaintiff.

In all cases of alleged fraud, equity requires that the party alleging fraud should proceed to establish it within a reasonable time after he has knowledge of the same, and, if he does not, he is guilty of laches, and equity will not help him, and especially where more than six years has elapsed since the fraud was known. In such case, equity will adopt the statute of limitations as a bar to recovery, if he should begin a suit. *Evans v. Bacon*, 99 Mass. 213. A suit to set aside the deed to plaintiff must be brought within a reasonable time, and we submit an unreasonable time has elapsed, and therefore the *caveat* he filed is now utterly without effect and invalid, and in no way an incumbrance upon this property, even if it ever had any validity as an incumbrance, which we submit it never had. Said *caveat*, as filed, is not a paper or writing required by law, or proper, to be filed in the registry of deeds, and made a part of the record thereof; and is not, therefore, and never was, an incumbrance upon the record title of said estate. *Nickerson v. Loud*, 115 Mass. 94; *Petrsoll v. Elliott*, 6 Pet. 95; *Hayes v. Cemetery*, 108 Mass. 400; Pub. St. c. 126, § 18.

A. J. Pratt, for defendant.

A court of equity will not compel a person who has agreed to purchase land to accept a title so doubtful that it may be exposed to litigation. *Bisp. Eq.* 378; *Richmond v. Gray*, 3 Allen, 25; *Davis v. Parker*, 14 Allen, 94; *Sturtevant v. Jaques*, Id. 523; *Pyrke v. Waddingham*, 10 Hare, 1. Like an attachment, the *caveat* is a cloud and an incumbrance. To compel the defendant to

accept this title will be simply to transfer from the plaintiff to the defendant whatever risk or inconvenience there may be from such cloud, and it may be reasonably expected that the defendant may be exposed to controversy to maintain his title. The defendant ought not to be subjected, against his agreement or consent, to the necessity of litigation to remove even that which is only a cloud upon the title. *Jeffries v. Jeffries*, 117 Mass. 184; *Cunningham v. Blake*, 121 Mass. 333. Where the cloud to the title is such that the damage to the title can be definitely estimated, the court will sometimes decree specific performance; deducting from the purchase price the damages to the title. *Davis v. Parker*, *supra*. A court of equity will not decide that the title is a clear and good one when the parties who may be entitled to take advantage of the *caveat* are not before it, and when the court has no information of the facts which caused the *caveat* to be recorded. *Chesman v. Cummings*, 142 Mass. 65, 7 N. E. Rep. 13; *Butts v. Andrews*, 136 Mass. 222; *Noyes v. Johnson*, 139 Mass. 436.

DEVENS, J. There is no provision by statute for filing in the registry of deeds any document of a character similar to that which Scott was permitted there to place upon record. It acquired no greater importance from being thus filed; nor did it, for this reason, constitute a cloud upon the title of the plaintiff. Pub. St. c. 126, § 13; *Nickerson v. Loud*, 115 Mass. 94. The question presented by the case at bar is, therefore, whether a mere assertion by the plaintiff's grantor, some seven years since, unsupported by any evidence or any subsequent action on his part, that the deed from him to the plaintiff was obtained from him by fraud, and that he shall dispute its validity, renders the plaintiff's title so doubtful that the defendant will not be compelled to accept it, and comply with his contract to pay for the land. In *Nickerson v. Loud*, *ubi supra*, a paper signed and recorded in the registry of deeds by A., who was not the plaintiff's grantor, stating that certain real estate, the record title to which was in B., was held by B., subject to a trust in favor of A. and others, and that A. would dispute any title that B. might attempt to make, was held not to constitute a cloud on the title. Whether recorded or unrecorded, such statements could not, under such circumstances, be evidence against B., or in favor of A., and it was held that B. was not entitled to an order directing the paper to be withdrawn by A. from the registry or surrendered to him. The general rule is well settled that, in order to maintain a bill for specific performance of a purchase of land, the plaintiff must show that the title tendered by him is good beyond reasonable doubt. But a doubt must be reasonable, and such as would cause a prudent man to pause and hesitate before investing his money. It would be seldom that a case could occur where some state of facts might not be imagined which, if it existed, would defeat a title. When questions as to the validity of a title are settled beyond reasonable doubt, although there may be still the possibility of a defect, such mere possibility will not exempt one from his liability to complete the purchase he has made. *Hayes v. Cemetery*, 108 Mass. 400. Thus it might be conceived, in a case similar to that at bar, that plaintiff's grantor, from infancy, insanity, or similar cause, was without legal capacity to have conveyed to him; but that plaintiff would not, therefore, be required to prove affirmatively the existence of such capacity before he could insist on the performance by defendant of his contract. It would be often practically impossible for a party to negative all objections which might be imagined, and which, if they existed, would defeat his title. Whether a party shall be compelled to perform a contract for the purchase of land is often, therefore, a matter within the discretion of the court; not, certainly, of arbitrary or capricious discretion, but, as said Mr. Justice Story, "of that sound and reasonable discretion which governs itself as far as it may by general rules and principles, but which at the same time withholds or grants relief according to the circumstances of each

particular case, when these rules and principles will not furnish any exact measure of justice between the parties." 2 Story, Eq. Jur. § 742, and authorities cited. Where an appointment was made by a husband and wife to their eldest daughter, under a settlement giving them successive life-estates, with remainder to their children as they should appoint, and, in default of such appointment between their children, the husband and wife appointed the whole estate to their eldest daughter, and, a short time after such appointment, with the eldest daughter, made a mortgage, under the foreclosure of which the plaintiff claimed title, one of the younger children had given notice to the plaintiff not to complete his title, nor to pay the purchase money, as the appointment and mortgage had been made in fraud of the settlement. It was held that a mere allegation of this sort, which was only a statement of a possibility which every one could see, on looking at the transaction, might have existed without a single fact being brought forward to impeach the deeds, and which had not been followed by any proceedings to set them aside, did not afford any reason why the contract of purchase should not be performed. *Green v. Puleford*, 2 Beav. 71. This case is restated with approval, and followed, by Lord Chancellor TRURO in *Grove v. Bastard*, 1 De Gex, M. & G. 69, where the inquiry suggested by it arose incidentally on a question of costs.

The precise question here discussed has never been decided in this court; but an examination of our cases on the general subject will show that, in all in which a defendant in a bill for specific performance has been held not bound to accept a title, facts have appeared showing that the property was or might be subjected to adverse claims, such as might reasonably be expected to expose the purchaser to controversy in order to maintain his title. *Jeffries v. Jeffries*, 117 Mass. 184. "A doubt," says Lord ELDON, "must be considerable, rational, and such as would induce a prudent man to pause and hesitate." *Stapylton v. Scott*, 16 Ves. 272. Although the remark is made with reference to a doubt as to the construction of a deed, it has equal application where it arises from a possible or conceivable state of facts. We have found no case where a stranger to a contract, even if the grantor from whom the party seeking to enforce it derives title, has been able by mere assertion to practically destroy the marketability of the title which he has granted, and thus to throw such a stain upon it that for purposes of sale it is valueless. *Kostenbader v. Spotts*, 80 Pa. St. 430; *Vreeland v. Blauvelt*, 23 N. J. Eq. 483. But even if, in any case, we should be willing to hold that mere threats would make a title doubtful, the case at bar has this peculiar feature: that for more than six years the injured party, as he alleges himself to be, has slept upon his rights, and made no attempt to assert them. Where one takes a fraudulent title with notice thereof, or of facts and circumstances which fairly put him on his inquiry as to whether a fraud has not been committed, he is not, indeed, held to be an innocent purchaser, even if he has paid full value. But where no facts or circumstances, either of suspicion or doubt, have been brought to his attention, he cannot be deemed to have lost that character, even if he has heard of an assertion, made more than six years ago, like that of the plaintiff's grantor, unsupported by any evidence, and unsustained during that time by any proceedings to avoid or annul the conveyance. *Carroll v. Hayward*, 124 Mass. 120; *Hopkins v. Langton*, 30 Wis. 379; Bump, Fraud. Conv. pp. 201, 202, 494. Decree for plaintiff.

(147 Mass. 324)

DEXTER et al. v. INCHES et al.

(Supreme Judicial Court of Massachusetts. Suffolk. June 22, 1888.)

WILLS—CONSTRUCTION—DESCRIPTION OF DEVISEES—ISSUE.

A testator left property to his son for life, with a remainder, after a life-estate to the son's wife, "equally to and among the issue." The son left children and their descendants. The property given by the will to other children of the testator

MASS. DEC. 15-18 N.E.—43

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was given outright, and the will provided that if any of the testator's children, including this son, should die before the testator, the child's issue should take their parent's share by right of representation. *Held* that, upon considering the whole will, the property should be divided among the son's issue by right of representation.

Reserved case from supreme judicial court, Suffolk county; W. ALLEN, Judge.

Bill in equity by William S. Dexter and James J. Storrow, trustees under the will of Henderson Inches, late of Boston, for instructions as to who are the parties entitled, under a certain clause in the will, to certain property left by the testator. The case was heard in the supreme judicial court on bill and answers, and reserved for the full court. The facts are stated in the opinion.

R. H. Gardiner, for children.

In the events that have happened, the clause to be construed is: "If said Charles shall leave no widow, and shall leave issue, then, at his decease, the principal or capital sum shall be paid and distributed equally to and among the issue of said Charles." Our contention is that these words should be construed in a sense which we suppose no one, whether lawyer or layman, doubts was really testator's intention, and which the court has ascribed to similar language. *Bowers v. Porter*, 4 Pick. 208; 4 Kent, Comm. 278, note b; also 1 Bl. Comm. 447. The argument against us rests only on the fact that "issue" is used oftener than "children" to denote descendants of every degree. But "children" often has that meaning. See *Houghton v. Kendall*, 7 Allen, 76; *Royle v. Hamilton*, 4 Ves. 437. And see, also, *Thompson v. Simpson*, 1 Dru. & War. 459; *Sibley v. Perry*, 7 Ves. 522. We think that the construction to be given to the gift to the issue of Charles Inches is that they take *per stirpes*, and that the English cases on which the other side rely are neither consistent with modern principles, nor applicable to the conditions of our law. It is well settled that where a testator has made a gift to "issue," and has, in a subsequent part of the will, defined issue by directing, as here, that the issue shall take their parent's share, the word "parents" shows that by issue he meant children. *King v. Savage*, 121 Mass. 303; *Sibley v. Perry*, 7 Ves. 522; *Pruen v. Osborne*, 11 Sim. 132; *McGregor v. McGregor*, 1 De Gex, F. & J. 63; *Robinson v. Sykes*, 23 Beav. 40; *Taylor v. Taylor*, 63 Pa. St. 481. See, also, *Ralph v. Carrick*, 5 Ch. Div. 984, 11 Ch. Div. 873. The word "issue" was used in this will either in express reliance on *Ellis v. Bridge*, 2 Pick. 248, and *Bowers v. Porter*, 4 Pick. 198, which are recognized and followed in *Haley v. Boston*, 108 Mass. 576, or because the scrivener attached the same meaning to the word that the court did in those cases. Issue taking by force of the statute take *per stirpes*. *Tillinghast v. Cook*, 9 Metc. 148. We must try, as was said in *Hall v. Hall*, 140 Mass. 270, 2 N. E. Rep. 700, "to extract a meaning likely to meet what the testator would have desired." See *In re Sibley's Trusts*, 5 Ch. Div. 494; *Cancellor v. Cancellor*, 2 Drew & S. 194; *White v. Stanfield*, 146 Mass. —, 15 N. E. Rep. 919; *Minter's Appeal*, 40 Pa. St. 111. The only cases where the construction for which we contend was suggested, but not followed, are *Freeman v. Parsley*, 3 Ves. 421, and *Cancellor v. Cancellor*, *supra*, and the latter is of no authority even in England. See *Carter v. Bentall*, 2 Beav. 551; *Swift v. Swift*, 8 Sim. 168; *Goldie v. Greaves*, 14 Sim. 348; *Bryden v. Willett*, L. R. 7 Eq. 472; *North v. Martin*, 6 Sim. 266; *In re Hopkin's Trusts*, 9 Ch. Div. 131; *Pope v. Pope*, 14 Beav. 593; *Williams v. Teale*, 6 Hare, 239; *Fairfield v. Bushell*, 32 Beav. 158.

R. F. Sturgis, for certain minor defendants.

The word "issue," applied to personal property, has received a construction equally extensive with "descendants," and comprehends descendants of every degree. 1 Jarm. Wills, (5th Amer. Ed. 101;) 1 Pow. Dev. (Jarm. Ed.) 278;

Theob. Wills, (3d Ed.) 241; *Haydon v. Wilshire*, 3 Term R. 372; *Hockley v. Mawbey*, 1 Ves. Jr. 143; *Freeman v. Parsley*, 3 Ves. 421; *Davenport v. Hanbury*, Id. 257; *Leigh v. Norbury*, 13 Ves. 340; *Maddock v. Legg*, 25 Beav. 531; *Weldon v. Hoyland*, 4 De Gex, F. & J. 564. The principle established by these cases has been approved and followed both in the more recent English cases, and also by decisions in this country. *Hobgen v. Neale*, L. R. 13 Eq. 48; *In re Corlass*, 1 Ch. Div. 460; *Ferry Co. v. Sisson*, 17 N. J. Eq. 475; *Allender v. Keplinger*, 62 Md. 7; *Wistar v. Scott*, 105 Pa. St. 200. In the case at bar there are no words to restrict the true legal meaning of the word "issue." *Roddy v. Fitzgerald*, 6 H. L. Cas. 823, 876; *Cancellor v. Canceller*, 2 Drew & S. 194; *King v. Savage*, 121 Mass. 303; *Hall v. Hall*, 140 Mass. 267, 2 N. E. Rep. 700; 2 Williams, Ex'rs, 1115. See *Ralph v. Carrick*, 11 Ch. Div. 873. It is submitted that in this will not a word can be found to show that the testator meant to restrict the meaning of "issue" in any way. The provision at the close of the will, "in case of the decease of any or either of my children before the receipt of his or her share, leaving issue him or her surviving, such issue shall represent and take the parent's share," cannot be held to bring the case within the rule in *Sibley v. Perry*, *supra*, for this phrase was simply in accord with the provisions of Rev. St. c. 62, § 22, and was clearly intended to prevent an intestacy as to a portion of the estate if any of the testator's children died before him. It cannot be made to relate back, and control the meaning of a word used in another clause, where it is surrounded by a different text. 2 Williams, Ex'rs, 1112, note b. The rule in *Sibley v. Perry*, *supra*, should not be regarded as an absolute rule of construction, but as merely showing that the word "issue" can be controlled by certain other words; and where there is a gift over in which the same word is used, as in the previous gift, the meaning should be the same. *Ralph v. Carrick*, 11 Ch. Div. 873. See *Ross v. Ross*, 20 Beav. 645. It is submitted that, in this commonwealth, the word "issue" has been given its true meaning by statute, and cannot be given a more restricted meaning than "issue *per stirpes*;" and, as has been said, there are no words used in the will to give "issue" any such meaning. "The word 'issue,' as applied to descent of estates, shall include all the lineal descendants of the ancestor." Pub. St. c. 3, § 3, cl. 11; Rev. St. c. 61, § 13. See *Bigelow v. Morong*, 103 Mass. 288.

HOLMES, J. This is a bill brought by trustees under the will of Henderson Inches for instructions as to who are the parties entitled under a clause leaving one-eighth of the residue in trust for the testator's son Charles for life, and then proceeding as follows: "At and after the decease of said Charles, if he shall leave a widow and issue, the income of said fund shall be paid, one moiety for the use of the relict of said Charles, and the other moiety to his issue during the life of such relict. If said Charles shall leave no widow, and shall leave issue, then, at his decease, the principal or capital sum shall be paid and distributed equally to and among the issue of said Charles; and if said Charles shall die leaving a widow, and no issue, then the widow shall enjoy the whole income during her life. If, at the decease of said Charles and his widow, (if one shall survive him,) there shall be no issue of said Charles then living, the principal sum or trust fund shall go to my other children in equal parts or shares." Charles died, leaving no widow, but leaving three children, and also grandchildren and great-grandchildren, descendants of two of these three children; and the question is whether the grandchildren and great-grandchildren are entitled to share with the children from whom they are descended. The testator gave the residue of his property to his eight children in equal shares, seven of them taking their shares outright, but Charles' share being put in trust for him by a subsequent clause, with the above-recited limitation over, which we have to construe. The will further provides that "in case of the decease of either or any of my children before the receipt of his or her share, leaving issue

him or her surviving, such issue shall represent and take the parent's share." The general scheme of the will, then, was one of equal division, in which the issue of any of the other seven children who died intestate would have taken by way of representation, and the issue of any child, including Charles, would have taken by way of representation, if that child had died "before the receipt of his share." However the English courts would construe the word "issue" in the clause before us, occurring in such a will, we cannot bring our minds to doubt that the testator intended issue to take in a representative or *quasi* representative way, and we think that the intention fairly appears from the will itself, in the circumstances to which we have adverted. The difficulty which was felt by Lord LOUGHBOROUGH, in *Freeman v. Parsley*, 3 Ves. 421, in finding a medium between total exclusion of grandchildren and the admission of them to share with their parents, does not strike us as insuperable, supposing that he would have felt it in such a case as this. Nor do we think that a difficulty in stating a conclusion justifies a construction which the language used, as well as the probabilities, show to be contrary to what the testator could have meant. Undoubtedly "issue" may mean, and in this clause does mean, more than "children." If one child of Charles had died at any time leaving children living at Charles' death, we will assume that they would not have been excluded. See *Ralph v. Carrick*, 11 Ch. Div. 873, 882. But "issue" is a word which lends itself very easily to the expression of representation. *Ross v. Ross*, 20 Beav. 645; *Robinson v. Sykes*, 23 Beav. 40, 51; *In re Orton's Trust*, L. R. 3 Eq. 375, 380. The issue of Charles would have taken by way of representation in one event. If Charles had died "before the receipt of his share," his issue would have "represented" him, by the words of the will. There is no reason for "issue" (the same word) taking the same sum otherwise in the other event, which has happened. If the context of the clause which we have to construe does not of itself show clearly in what sense the testator used the word, the alternative limitation makes it plain. We are of opinion that the word "issue," as here used, means descendants taking by way of representation. What the principle of division would have been had there been no descendants alive nearer than grandchildren, we need not discuss. Possibly, in that case, each grandchild would have formed a new *stirpes*, after the analogy of the statutes. Pub. St. c. 125, § 1, cl. 1. See, further, *King v. Savage*, 121 Mass. 303; *Hall v. Hall*, 140 Mass. 267, 2 N. E. Rep. 700; *Bowers v. Porter*, 4 Pick. 198, 208, 210, 211; construction of Rev. St. c. 62, § 24, Pub. St. c. 127, § 23, in *Tillinghast v. Cook*, 9 Metc. 143, 148. Decree for the children.

(147 Mass. 312)

PAPER STOCK DISINFECTING CO. v. BOSTON DISINFECTING CO.

(Supreme Judicial Court of Massachusetts. Suffolk. June 23, 1888.)

PATENTS FOR INVENTIONS—LICENSES—IMPLIED CONTRACT TO PAY ROYALTIES.

A license to use a patent was given by deed-poll "in consideration of one-dollar, and of a royalty of one dollar per ton, to be hereafter paid by the licensee, his heirs, executors, administrators, and assigns," with a condition for revocation of the license if the royalty was not paid. The licensee assigned the license by deed-poll "subject to the limitations, conditions, stipulations, covenants, and agreements therein." Held, that the licensee was liable on an implied contract to pay the royalty on work done by him, and that, by accepting the assignment, the assignee became liable on a similar implied contract with the licensor to pay the royalty on the work done under the assignment.

Exceptions from superior court, Suffolk county; MASON, Judge.

Contract, by the Paper Stock Disinfecting Company against the Boston Disinfecting Company, on an account annexed, for a royalty for the use of a certain steam patented process for the disinfection of rags. The plaintiff had granted a license to one John W. Holmes to use the invention upon the payment of a royalty to the plaintiff, and the defendant was the assignee of

Holmes. The superior court, hearing the case without a jury, found for the plaintiff for \$1,625.70, and the defendant excepted. Other material facts appear in the opinion.

Charles A. Prince, for defendant.

The form of the action is implied *assumpsit*, and it is essential, to entitle him to maintain his action, that privity of contract should be established between the plaintiff and defendant. *Carter v. Gault*, 13 Pick. 531; *Hills v. Snell*, 104 Mass. 173; *Ladd v. Rogers*, 11 Allen, 209; *Railroad Co. v. Sanders*, 134 Mass. 53. No such privity is established in the present case. The facts do not support an implied *assumpsit*. No contract will be implied in addition to an express contract. *Brown v. Fales*, 139 Mass. 21, 28; 1 Chit. Cont. (11th Amer. Ed.) 89. No contract will be implied against the express declaration of a person upon whom no duty is imposed by law. *Earle v. Coburn*, 130 Mass. 596. So no contract will be implied where no such contract is plainly intended. Curt. Pat. § 212; Walk. Pat. § 287; *Potter v. Holland*, 4 Blatchf. 206, 211. "The general rule of law is that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another for the benefit of a third person who is a stranger to the consideration will not support an action by the latter." See, also, *Rogers v. Stone Co.*, 130 Mass. 581; and *Morse v. Adams*, and *Clement v. Earle*, reported with above case. The exceptions to this rule are: (1) Where one person receives from another money or property as a fund from which certain creditors of the depositors are to be paid; (2) where a promise has been made to a father for the benefit of a son. The plaintiff comes within none of these exceptions. A third class formerly existed, (*Brewer v. Dyer*, 7 Cush. 387,) where a lessor was allowed to maintain an action for rent against a party who had promised in writing the lessee of the shop to take his lease, (which was under seal,) and pay the rent to the lessor according to its terms. *Brewer v. Dyer* is probably no longer law in this commonwealth. See *Bank v. Rice*, 107 Mass. 43; Tayl. Landl. & Ten. (7th Ed.) § 155, note. Again, a patent-right is personal property. *Valve Co. v. City of New Bedford*, 19 Fed. Rep. 753. It is well settled that if a man leases personal goods, and the lessee covenants, for him and his assigns, to pay the rent, and then assigns, the covenant does not bind his assignee, as a contract cannot be annexed to goods so as to follow the goods, either at common law or in equity. *Spencer's Case*, 1 Smith, Lead. Cas. (8th Ed.) pt. 1, *68, *103; Wald's Pol. Cont. 224; *Wilde v. Smith*, 8 Daly, 196, 202; *Bally v. Wells*, Wilm. 344, 345; *Vernon v. Smith*, 5 Barn. & Ald. 1; Platt, Cov. 473; 2 Platt, Leases, 413, and cases cited. Again, no promise can be implied from the fact that the defendant had the use of the process. *Hills v. Snell*, 104 Mass. 173; *Ice Co. v. Potter*, 123 Mass. 28. The plaintiff's remedy (if he has any) must therefore be on such express contract itself, and not in *assumpsit*; for the law is clear that, where an express contract still remains open, the remedy is on it, and the plaintiff cannot recover on an implied contract. *Canal Co. v. Knapp*, 9 Pet. 541, 565; *Hawkins v. U. S.*, 96 U. S. 689, 697; *Moulton v. Trask*, 9 Metc. 577; *Fitzgerald v. Allen*, 128 Mass. 232.

J. R. Reed, for plaintiff.

A license to use a patented article or process is a contract under which, according to the nature of its terms, the licensee generally becomes liable in proportion to the amount of use he makes of the article or process, and this principle of patent or license rent is recognized in all cases bearing on the subject. *McBurney v. Goodyear*, 11 Cush. 569; *Machine Co. v. Machine Co.*, 110 Mass. 70. In the case at bar the original license is specifically granted to Holmes, "his heirs, executors, administrators, and assigns;" and he therefore had a

perfect right to make an assignment of it. The defendant, in taking from Holmes, by assignment, the license granted by the plaintiff to Holmes, took it with an incumbrance attached. This incumbrance was the duty and obligation to pay to the plaintiff one dollar for every ton of rags disinfected by defendant under the process by virtue of the license. *Goodyear v. Rubber Co.*, 3 Blatchf. 449, 455.

W. ALLEN, J. The license was by deed-poll to "John W. Holmes, his heirs, executors, administrators, and assigns," in consideration of the one dollar in hand paid, "and of a royalty of one dollar per ton" on all rags disinfected by the use of the invention, "to be hereafter, and during the full term of said letters patent, * * * well and truly paid to it by said John W. Holmes, his heirs and executors, administrators and assigns." There was added a condition in the form of a covenant by Holmes, his representatives or assigns, that, if they did not account for or pay the royalty, the license should be of no force or effect, and might be revoked. Holmes subsequently, by deed-poll, assigned the license to the defendant, "subject, however, to the limitations, conditions, stipulations, covenants, and agreements therein contained." The action is brought to recover royalties which have become due from the use of the patent by the defendant.

The first objection is that there is no agreement or promise to pay the royalties; that the plaintiffs' only remedy to enforce their payment is to revoke the license for breach of the condition. The license was expressed to be given in consideration of payments to be made by Holmes; and its acceptance by him raised an implied promise by him to pay the consideration. *Pike v. Brown*, 7 Cush. 133; *Locke v. Homer*, 131 Mass. 93, and cases cited.

The other objection is that there is no privity of contract between the plaintiff and the defendant. We think this objection cannot be sustained. The plaintiff had the exclusive right to permit the use of the invention by others. It might permit the use by Holmes personally, or by him and such persons as he should designate. The license was to him, and to any person whom he might substitute for himself as assignee. An assignee of Holmes would use the invention by permission of the plaintiff, and under its license. *Bower v. Hodges*, 13 C. B. 765. The assigns of Holmes are designated as licensees, and are named as parties who are to pay the consideration and perform the condition. The obvious meaning of the instrument is that the consideration shall be paid, and the conditions performed, by the party who shall use the invention under the license by the original licensee when it is used by him, and by the assignee, the substituted licensee, when he becomes a party. It provides for licensing assignees in consideration of a royalty to be paid by them to the licensor, as truly as it licensed Holmes in consideration of a royalty to be paid by him; and a promise by the assignee to the licensor to pay the consideration is implied from the acceptance of the license by the assignee, as a promise by the original licensee is implied from the acceptance by him. The question does not arise whether the assignee would have been bound by the covenants of the licensee if he had executed the instrument of license with covenants. No question in regard to maintaining an action upon a promise made to a third person is involved. The proposition that a person receiving property from an owner who holds it subject to a condition to pay money to a third person comes under obligation to the third person to pay the money to him, does not fully express the liability of the defendant. The case may be stated thus: An owner of a patented invention licenses A. to use the invention in consideration of a royalty to be paid to the licensor, and on condition that the license may be revoked if the royalty shall not be paid, and authorizes A. to assign the license in consideration of the payment of the royalty by the assignee to the licensor. A. assigns the license to B., subject to all the conditions and agreements therein contained, and B. uses the invention under

the license. By accepting the assignment, B. must be held to have accepted the license, and promised the licensor to pay the royalty to him. *Goodyear v. Rubber Co.*, 3 Blatchf. 449. See *Felch v. Taylor*, 13 Pick. 133; *Maine v. Cumston*, 98 Mass. 317; *Swasey v. Little*, 7 Pick. 296; *Brewer v. Dyer*, 7 Cush. 337; *Bank v. Rice*, 107 Mass. 37, 42; *Barney v. Newcomb*, 9 Cush. 46; *Lowry v. Adams*, 22 Vt. 160. Exceptions overruled.

(45 Ohio St. 631)

BURKE v. RAILWAY CO.

(*Supreme Court of Ohio. May 22, 1888.*)

Error to circuit court, Franklin county.

Harrison, Olds & Marsh and Burke, Ingersoll & Sanders, for plaintiff in error. *George Hoadly, Simpson, Thacher & Barnum*, and *Earnhart, Hunter & Butler*, for defendant in error.

PER CURIAM. An order of the court of common pleas overruling a motion to dissolve an injunction is an order affecting a substantial right, made in a special proceeding, which may be reviewed on error by the circuit court. Judgment reversed, and cause remanded.

(45 Ohio St. 700)

KAUFMANN v. VILLAGE OF HILLSBORO.

(*Supreme Court of Ohio. May 22, 1888.*)

Motion for leave to file petition in error to the circuit court of Highland county.

The plaintiff in error was convicted before the mayor of Hillsboro on a complaint, under oath, charging him with keeping a place in said village where intoxicating liquors, to-wit, beer, are sold, contrary to the ordinance of said village. The ordinance was adopted under the provisions of the act known as the "Dow Law," authorizing town councils to prohibit the keeping of places within their limits where intoxicating liquors are sold in any quantities, at retail, other than as permitted by said law. The proof was that K. sold 25 quarts of beer at one time to one Rhoades, put up in quart bottles; that he was not a manufacturer of it; and that it was sold to Rhoades, not for any mechanical, pharmaceutical, or sacramental purpose, nor upon the prescription of any physician, but was sold to him to be drank as a beverage. There was also proof that K. kept a place where he was in the habit of selling beer in such quantities; and the claim is made that such sales do not constitute a selling at retail within the meaning of the ordinance, or of the statute conferring the power to adopt it.

Sloane, Gardner & Hire, for the motion. *D. Q. Morrow, contra.*

PER CURIAM. A sale, by one who is not a manufacturer, of 25 quarts of beer, put up in bottles of one quart each, not upon a prescription of a physician, nor for any known mechanical, pharmaceutical, or sacramental purpose, but to be drank by the person to whom sold, is a sale at retail within the meaning of the eleventh section of the act known as the "Dow Law;" and the keeping of a place where such sales are made is a violation of the ordinance of a village prohibiting ale, beer, and porter houses, and other places where intoxicating liquors are sold at retail, for any purpose or in any quantity, other than as permitted by the eighth section of said act. 83 Ohio L. 157. Motion overruled.

(46 Ohio St. 702)

HIETT v. NEBERGALL.

(Supreme Court of Ohio. June 19, 1888.)

Error to circuit court, Anglaize county.

Ferrall & Ohler, for plaintiff in error. *Brotherton & Davis* and *Layton & Stueve*, for defendant in error.

PER CURIAM. An appeal will lie from an order of a probate court overruling a motion of an imbecile ward to terminate the guardianship upon the grounds (1) that letters of guardianship were in the first instance improperly issued; and (2) that, if he was an imbecile at the time such letters were issued, he has since been fully restored to reason. Judgment affirmed.

(46 Ohio St. 1)

MORGAN v. LEWIS.

(Supreme Court of Ohio. June 26, 1888.)

1. CORPORATIONS—ACTION TO ENFORCE STOCKHOLDERS' LIABILITY—PLEADING.

In an action by creditors to enforce the statutory liability of stockholders for debts contracted by a corporation, where it is alleged that the company is insolvent; that it has entirely ceased to do business; and that it has made an assignment for the benefit of creditors, having neither money, credit, nor materials with which to transact business,—it is not necessary further to allege that the plaintiff had recovered a judgment against the corporation upon which an execution had been returned unsatisfied.

2. SAME—OWNERSHIP OF STOCK—EVIDENCE.

Upon the trial of the action, one of the defendants, an alleged stockholder, offered to prove that he originally became a stockholder by receiving from the corporation its stock in exchange for his interest in a furnace of which he was principal owner; that thereafter, the furnace not proving as successful and profitable as had been expected, some of the stockholders were dissatisfied with the purchase, and contentions arose among them; that defendant was blamed by many of them for having induced the company to make the purchase, and was requested to take the furnace back, and transfer to the company the stock he had received for it; that to settle such contention and dissatisfaction he complied with this request, transferred his stock to the company, and accepted therefor a deed for the furnace. *Held*, the evidence was admissible. *SPEAR, J.*, dissenting.

(Syllabus by the Court.)

Case reserved from district court, Stark county.

The action below was commenced by *Lewis*, one of the defendants in error, against the *Alliance Rolling Mill Company* and other defendants, alleged to be stockholders in or creditors of the company, for the purpose of enforcing the statutory liability of the stockholders to contribute to the payment of the debts of the corporation, which was alleged to be insolvent, and to have assigned its property and ceased to do business. The case was referred. There was a trial before the referee, and *Morgan*, the plaintiff in error, was held as a stockholder. He excepted, and had a bill of exceptions signed by the referee. On hearing, the court of common pleas affirmed the referee's report, *Morgan* excepting. He then presented a petition in error in the district court, where the case was reserved for decision in this court. In *Morgan's* answer he says "that many years ago, to-wit, about the year 1870, he owned about two hundred shares of stock in said company, and no more. That soon thereafter, to-wit, on or about January 1, 1871, he sold and disposed of all of his stock in said company, and ceased to be a stockholder therein. He denies that the indebtedness described in the petition, or any portion thereof, was contracted while he was a stockholder in said company; and he denies that any indebtedness held by the defendants, who claim to be creditors of said company, or by any other person making claims in this action to be a creditor or creditors of said company, was contracted during the time that he was a stockholder in said company, or until many years after he had ceased to be such stockholder. He alleges the fact to be that all debts existing against said company during

the whole time that he was a stockholder therein have long since been fully paid." Issue was joined with these averments. Upon the trial before the referee, Morgan offered to prove that, prior to the time the Alliance Rolling Mill Company acquired title to the furnace property, the property was principally owned by the defendant Morgan, and that for his interest in the furnace property the Alliance Rolling Mill Company issued to the defendant Morgan stock in the Rolling Mill Company, which stock was the same stock which was afterwards transferred by the defendant Morgan to the Alliance Rolling Mill Company in consideration of the retransfer to him of the furnace property. And further offered to prove that, after the Alliance Rolling Mill Company acquired title to the furnace property, the furnace not proving as successful and profitable as had been expected, some of the stockholders were dissatisfied with the purchase from Morgan, and contentions arose among them, and the defendant Morgan was blamed by many of them for having gotten the company into the purchase, and was requested to take the property off their hands, and pay for it in stock of the company; and that Morgan, for the sake of settling such contentions and dissatisfaction, did purchase the furnace and pay for it in stock which had previously been issued to him as shown by the record. And thereupon the referee sustained the objection to evidence so offered, and defendant Morgan excepted. It was testified to before the referee, and not contradicted, that Morgan transferred his stock to the company, and the latter deeded to him the furnace property, of which he took immediate possession, and which he continued to hold and use as his own. No action has been taken looking to the subjection of this furnace property to the payment of the claims of any creditors, but all parties have treated it as if it were the property of Morgan since it was so deeded to him.

In his report the referee finds that between February 5, 1867, and January 2, 1871, Morgan became the legal owner and holder of \$116,583 worth (at par value) of stock in the company. That on the 17th of January, 1872, "by a resolution of said board of directors, the president of the corporation, by deed duly executed, deeded the furnace property mentioned in said proposition to said David Morgan; and on the same day said David Morgan signed powers of attorney in blank transferring said stock, and delivered up certificates of the same to the secretary of said corporation, who wrote the word 'canceled' on the face of each certificate, and inserted said certificates in the stock certificate book of the corporation as surrendered stock. That at the time of said delivery of said certificates of stock to said corporation said David Morgan was the legal owner of said stock represented thereby. That said stock so delivered and intended to be surrendered to said corporation was never afterwards represented, and the same was completely merged in said corporation, and the capital stock of said corporation was treated by the directors as reduced by the amount of \$116,583. Said transaction was with the directors of said corporation alone, and without any submission of the same to or vote on the same by the general stockholders of said corporation, and without any knowledge or assent of the general stockholders; and that no certificate of decrease was filed with the secretary of state as required by statute, nor was any notice of the action of the directors ever given. That at the time of said attempted surrender said corporation was reported to be solvent. That said David Morgan bought said property from, and intended to transfer said stock to, said corporation in good faith, and without fraudulent intent.

"Conclusions of Law. The transfer of this stock to the corporation had the effect of reducing the capital stock of the corporation. The directors of the corporation did not have the power to thus reduce the capital stock, and such transfer is void and of no effect, and left the title to said \$116,583 of stock precisely where it had been, and the same as if no effort had been made to transfer the same. Unless the power to buy its own stock is expressly conferred in its charter, a corporation cannot deal in its own stock, and such

transactions are void. The fund arising from the individual liability of stockholders is a trust fund, set apart under our constitution and statutes for the benefit of creditors, and the directors by no arrangement or dealing whatever can affect or impair this fund. I find David Morgan liable, on account of said stock, to contribute to the payment of the claims of the creditors of said corporation to the amount of \$116,583." The referee finds, in another connection, that the capital stock of the company was increased from time to time, until in December, 1870, when it was increased to \$450,000. The fact that Morgan took immediate possession of the furnace property upon its conveyance to him is not found by the referee, and does not seem to have entered into the consideration of the case by him or by the court of common pleas. It also appeared in the case that the claims of creditors all accrued after the transfer by Morgan of his stock to the company, and of the furnace property by the latter to him.

Stevenson Burke and William B. Sanders, for plaintiff in error. *W. A. Walden and J. F. Hoffman*, for defendant in error.

OWEN, C. J., (*after stating the facts as above.*) 1. The theory upon which the referee and the court of common pleas must have proceeded was that the entire transaction by which Morgan acquired the furnace and the company acquired his stock was void; that it was beyond the power of the company to engage in the transaction, and that consequently the company acquired no title to the stock, and Morgan acquired none to the furnace property. If this conclusion is sound, the inevitable consequence is that the company still owns the furnace, and it is assets in the hands of the assignee for the payment of the company's debts. It is an absurdity to assume that Morgan is still the owner of both the furnace and the stock. If he is still liable to creditors as a holder of this stock, the company, by the same reasoning, is the owner of the furnace. It is conceded that the proceeding to subject the liability of stockholders to the satisfaction of the claims of creditors has throughout ignored this property. It does not appear but that this property alone would satisfy creditors, or to what extent it would exonerate stockholders from the liability which it is now sought to subject to the satisfaction of creditors' claims. If we were in accord with the referee and the court of common pleas upon the main proposition of the case, still it would be our duty to send the case back for proceedings to subject this property of the company to the satisfaction, *pro tanto*, of its debts.

2. We are of the opinion, however, that the referee erred in excluding the evidence which Morgan offered to throw light upon the transaction by which he assumed to acquire the furnace and transfer his stock to the company. The contention of Morgan, in this respect, is not answered by the proposition that the only purpose of offering the rejected proof was to show that the transaction was in good faith, and that this already sufficiently appeared. We have no disposition to call in question the general and well-recognized principle that a corporation cannot buy its own stock. It is conceded that this principle proceeds upon a want of power, rather than upon any express prohibition in its charter. With this general principle conceded, however, the right of a corporation to take its own stock in satisfaction of a debt due to it has long been recognized in this state. This has been recognized as an exception, supposed to rest on the necessity of avoiding loss. *Coppin v. Greenlees*, 38 Ohio St. 279. It is nevertheless a relaxation of the general rule. It is of course because of the necessity of avoiding loss, and not because it is for the satisfaction of a debt, that the exception is recognized. If the same or a like necessity of avoiding loss should arise in any of the transactions of the company, it could not, with any show of reason, be contended that the application of this principle of necessity should be limited by any iron rule to the case of taking stock for an otherwise hopeless debt. The evidence which Morgan

offered, and the referee rejected, tended to establish, in substance, that Morgan had traded to the company this furnace property for stock; that the furnace promised to prove a failure, or at best a disappointing and unsatisfactory venture. Contentions arose over the transaction between Morgan and some of the stockholders. Many of them blamed him for having induced the company to make the purchase. Thereupon they—"many stockholders"—simply proposed a rescission of the contract of purchase,—to take back the furnace, and restore to the company the stock he had received for it. The company was out of debt. Nobody could possibly be hurt by a rescission of this contract which had caused so much discontent and contention, and which promised to prove a losing venture for the company and Morgan's fellow-stockholders. This proof would have established something beyond mere good faith of the transaction. It would have tended to establish the fact that Morgan yielded to the importunities of many stockholders to rescind a bargain, and set at rest an unfortunate controversy which was rapidly breeding discord among the stockholders. The finding of the referee that this transaction of itself worked a reduction of the capital stock of the company is not tenable. There was nothing in the way of the company reissuing this stock or its equivalent to others who may have desired it. There was nothing in the fact that these certificates were marked "canceled" on the face by the secretary of the company, and by him treated as surrendered stock, to authorize the finding that the capital stock of the company was reduced. This was no part of the transaction with Morgan, and there was nothing in the fact of the re-exchange of the stock for the furnace which called upon the officers of the company to treat the stock as canceled or the capital *pro tanto* reduced. Green's Brice, *Ultra Vires*, (2d Ed.) 191, 192. This conclusion is not qualified by the fact that the stock was not in fact thereafter represented. Then, we should not lose sight of the fact that here was an executed transaction. The exchange, or the re-exchange, rather, had been made, possession of the furnace taken by Morgan, and retained by him for years before the transaction was questioned by any one. To this day it has remained free from direct attack. Certainly the possession by Morgan of this property, which had theretofore been in the possession of the company, was a circumstance proper to be considered with other facts in the case. It at least helps us to distinguish it from the case of *Coppin v. Greenlees*, 88 Ohio St. 275, relied upon by defendants in error. In that case it was held that "an executory agreement between a manufacturing corporation of this state and one of its stockholders, for the purchase of the stock of such corporation by the former from the latter, cannot be enforced either by action for specific performance or for damages." That this presents a very different case from one of an executed contract is emphasized by the following language of MOLLVAINE, J., by whom the opinion was prepared: "If it were averred that the plaintiff had purchased this stock from the defendant, or from others, under an agreement with the company that it would buy the same from him when he quit its employment, or if the contract of purchase by the defendant had been executed, very different questions would arise." In *State v. Association*, 35 Ohio St. 263, the general principle that corporations may not traffic in its own stock is recognized. Yet in the same connection it is said: "We do not deny that a corporation has power to receive shares of its stock as security for a debt or other similar purposes." It is apparent from the foregoing that no inflexible rule has been recognized by this court that a corporation may not in any case, nor for any purpose, receive its own stock. On the contrary, the way is left open for the application of exceptions to the general rule in proper cases. It is one of the established facts in the case that all the debts which are sought to be satisfied by this proceeding were contracted subsequent to the transaction which is assailed. The transfer of the furnace property from the possession of the company to that of Morgan was a fact to which persons giving credit

to the company could not safely close their eyes. The inquiry which it would naturally excite would have led to the information that the trade by which the company secured the furnace and Morgan the stock had simply been rescinded, and the property—stock and furnace—re-exchanged. It being the law of our state that there are exceptions to the general rule that corporations may not deal in their own stock, all persons dealing with this company must be held to have done so in the light of this state of the law. All persons are as much presumed to know of exceptions to a principle as of the principle itself. The slightest inquiry would have revealed the fact that, as between himself and the company, Morgan did not sustain the relation of stockholder at the time these debts were contracted. In the light of this state of adjudication in this court, we do not hesitate to say that the peculiar state of circumstances which Morgan offered to prove before the referee ought to have been received in evidence and considered in the light of the other facts which did appear, in order that the referee and the courts could have had an opportunity to say whether they did not bring the case within some well-founded exception to the wise and well-established general rule.

3. The facts alleged in the petition concerning the insolvency, etc., of the company, were sufficient to dispense with an averment of the recovery of a judgment against it as a prerequisite to the proceeding to subject the liability of the stockholders to the satisfaction of the corporate debts. Judgment reversed, and cause remanded.

SPEAR, J., dissents from the second proposition of the syllabus and the judgment of reversal.

(114 Ind. 484)

PLUNKETT v. PLUNKETT et al.

(Supreme Court of Indiana. June 26, 1888.)

1. DIVORCE—ALIMONY—ACTION TO SUBJECT PROPERTY HELD FOR USE OF HUSBAND.
Under the creditor's general right to reach property held for his debtor's use, and Rev. St. Ind. 1881, § 4921, providing that all transfers of goods or other things in action, made in trust for the use of the person making the same, shall be void against creditors, antecedent or subsequent, a wife, alleging that her husband has conveyed his real estate to a third person to hold for his benefit, in fraud of his creditors, may subject such property to the satisfaction of a judgment obtained by her after his conveyance, without alleging a fraudulent intention therein on his part to defraud his subsequent creditors; that section including, also, conveyances of real estate in trust for the grantor.
2. SAME—FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE.
Under Rev. St. Ind. 1881, § 4920, providing that fraudulent conveyances shall be held void "as to persons sought to be defrauded," a wife who obtains a judgment for alimony after a conveyance by her husband of his property, to set aside such conveyance as fraudulent, must, as a subsequent creditor, allege a fraudulent intention therein on his part to defraud his subsequent creditors.

On petition for rehearing. For former opinion, see 16 N. E. Rep. 612.

Will. H. Thompson and *J. West*, for appellants. *Paul & Humphries* and *W. H. Reeves*, for appellee.

NIBLACK, C. J. The point is made, upon a petition for a rehearing, that the conclusion reached in this cause is inconsistent with the case of *Pennington v. Flock*, 93 Ind. 378, and others of our cases on the subject of fraudulent conveyance; also that we erred in holding that section 4921, Rev. St. 1881, embraces conveyances of real estate. If the complaint in this case had been an attack upon a conveyance upon the ground that it was fraudulent as against creditors existing at the time it was made, then the first point would be well taken, and a rehearing ought to be granted. But a careful inspection of the opinion complained of will disclose the fact that the complaint was not treated as an attack of that kind, but regarded as an application to reach property held in trust, for the satisfaction of a debt subsequently contracted, under the

provisions of section 4921, above referred to. We thought then, and still believe, that the fair inference from all the facts averred is that Hamilton held, and still holds, the real estate in controversy in trust for the appellee, and not as an absolute and unconditional grantee under a fraudulent conveyance. As we intimated, we reached that conclusion in part from what the complaint in some respects implies, rather than directly avers. Upon further consideration, we feel quite assured that section 4921 includes conveyances of real estate held in trust for the grantor, or for him who causes the conveyance to be made.

The petition for a rehearing is overruled.

(115 Ind. 253)

INDIANA, B. & W. RY. CO. v. WHEELER.

(*Supreme Court of Indiana. June 19, 1888.*)

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS.

In an action for the killing of plaintiff's son at a railroad crossing, evidence that the boy, engaged in hauling wheat, was reclining, apparently asleep, upon the wagon, slowly approaching up hill towards the railroad; that he was well acquainted with the crossing, where trains were visible from the road for 1,000 feet; that the engineer, not seeing any driver, gave the danger signals, and, when he apprehended that the wagon would not be halted, used every endeavor to stop the train, in which he succeeded so far that the train ran past the crossing only about 50 yards,—does not present a case either of willful injury or of negligence on the part of the railroad.¹

Appeal from circuit court, Parke county; JOSHUA JUMP, Judge.

Action by Samuel Wheeler against the Indiana, Bloomington & Western Railway Company for the killing of his son. Judgment was for plaintiff, and defendant appeals.

Kennedy & Kennedy and *C. W. Fairbanks*, for appellant. *V. Carter* and *Puett & Hadley*, for appellee.

MITCHELL, J. This was a suit by Samuel Wheeler against the Indiana, Bloomington & Western Railway Company, the *gravamen* of the complaint being that the defendant company wrongfully caused the death of the plaintiff's minor son, Walter N. Wheeler, on the 9th day of September, 1884, by "willfully, knowingly, and with gross negligence" running one of its engines and trains upon him at a highway crossing. The pleading, which is in one paragraph, seems to have been framed with the purpose that it should be good, either as a complaint for willfully and intentionally causing the death of the plaintiff's son, or for wrongfully causing his death by the negligent conduct of the defendant's agents and servants. In some respects the complaint proceeds upon both theories. For the appellant it is insisted that it fails to state facts sufficient to constitute a cause of action on either theory. See *Gregory v. Railroad Co.*, 112 Ind. 385, 14 N. E. Rep. 228. Without pausing to consider the complaint, it is quite certain, assuming it to have been sufficient in both its features, that the evidence fails entirely to make a case against the appellant in either. There is no substantial disagreement between the witnesses in respect to the material facts. The testimony shows that on the 9th day of September,

¹Respecting the duty of the traveler at railroad crossings, see *Durbin v. Navigation Co.*, (Or.) 17 Pac. Rep. 5, and note; *Powell v. Railroad Co.*, (N. Y.) 15 N. E. Rep. 891, and note; *Schilling v. Railroad Co.*, (Wis.) 37 N. W. Rep. 414, and note; *Allerton v. Railroad Co.*, (Mass.) 15 N. E. Rep. 621; *Matti v. Railway Co.*, (Mich.) 37 N. W. Rep. 54; *Hamilton v. Railroad Co.*, (N. J.) 18 Atl. Rep. 29; *Reed v. Railway Co.*, (Iowa,) 37 N. W. Rep. 149; *Railroad Co. v. Lee*, (Tex.) 7 S. W. Rep. 857; *Railroad Co. v. Townsend*, (Kan.) 17 Pac. Rep. 804; *Railway Co. v. Greenlee*, (Tex.) 8 S. W. Rep. 129; *Cones v. Railway Co.*, (Ind.) 16 N. E. Rep. 638; *Bloomfield v. Railway Co.*, (Iowa,) 38 N. W. Rep. 431; *Wooster v. Railroad Co.*, Id. 425; *Railroad Co. v. Perkins*, (Ill.) 17 N. E. Rep. 1. Respecting the duty of railroad companies at crossings, see *Railroad Co. v. Schuster*, (Ky.) 7 S. W. Rep. 874, and note; *Railway Co. v. Boozer*, (Tex.) 8 S. W. Rep. 119; *Railroad Co. v. Lee*, (Tex.) 7 S. W. Rep. 857.

1884, the plaintiff's son, 20 years of age, was engaged, as he had been for several days prior thereto, in hauling wheat from the farm where it was being threshed to the elevator at a station on the appellant's line. The boy was well acquainted with the crossing, having been raised in the vicinity, and having passed over it a great many times. Trains approaching on the railway track could be seen without difficulty for a distance of from 900 to 1,000 feet from the highway over which the young man was proceeding, on a loaded wagon, up a rising grade towards the crossing of the railway track. A passenger train, running at the usual rate of about 30 miles an hour, approached the highway. The highway crossing signals were given as the statute requires. The whistle was next sounded for the station. Seeing a team approaching the railway, apparently without a driver, the engine-driver gave the usual danger signals. Observing that the team kept on its way regardless of the signals, which were continued, the engineer, when several feet from the crossing, and as soon as he apprehended that the team might not be halted, made every effort in his power to stop his engine so as to avoid a collision. A lady near by the highway, seeing the boy lying upon the top of the loaded wagon, asleep, as she supposed, tried to arouse him by making outcry. A moment before the engine came into collision with the wagon, the boy raised up. The engine came upon the wagon with such force as to shatter it to pieces, notwithstanding the efforts of the engine-driver to stop his engine. The boy only survived the collision about two hours, during all of which time he was apparently unconscious. The evidence tended to show that the young man had been languid and indisposed for several days prior to the accident, but not to such an extent as to be apparently unable to perform his customary work. The engineer testified that he saw no one on the wagon, and supposed the driver of the team was walking on the opposite side. When he discovered that the team kept on its way notwithstanding the danger signals, he at once reversed his engine, and employed the air-brakes, and every other method and appliance at hand, to stop the train. He had its speed so checked when the collision occurred that the train only ran over the crossing about 50 yards when it was stopped. A baggage-man, who looked out of the car door when the danger signals were sounded, saw a person, as he supposed, lying on top of the loaded wagon.

It is contended, in support of the finding and judgment, that it was the duty of the engineer to have looked out for and seen the boy, and to have apprehended or known of his unconscious or helpless condition in time, so that he might have arrested the motion of the train and prevented the collision. Having failed to stop the train when he must have known there was some one upon the loaded wagon, it is said, evinced such a reckless disregard of human life on the part of the engineer as justified the jury in drawing the inference that there was a constructive intent to inflict injury. We can find nothing in the record to justify or sustain the views thus urged. What is essential to constitute a sufficient averment or finding of a willful injury has been so fully discussed in recent decisions of this court that it would involve only useless repetition to elaborate the subject here. *Palmer v. Railroad Co.*, 112 Ind. 250, 14 N. E. Rep. 70, and cases cited; *Gregory v. Railroad Co.*, *supra*, and cases cited. It is enough to say, the admitted facts come far short of making the present case one of willful injury. It is well settled that those who have the control and management of trains must be on the lookout for persons at highway crossings, and that it is their duty to use all reasonable efforts to avoid injuring persons who are on, or about to come upon, the track, where there is reasonable ground to apprehend that such persons are unconscious, or are in such a situation as to be unable to escape. An engineer is not bound to anticipate that the driver of a team, which is seen slowly approaching the track, is asleep; nor is he bound to stop his train, or even to check its speed, the moment he sees a team approaching, even though he might

see the driver reclining on the load. He has a right, having signaled his coming, and his train being in plain sight from the highway, to assume that the team will be halted before it reaches the track. *Railway Co. v. Long*, 112 Ind. 166, 18 N. E. Rep. 659, and cases cited. This is especially so in a case like the present, where the advancing team was pulling a loaded wagon up grade towards the railroad track. *Railway Co. v. Hammock*, 113 Ind. 11, 14 N. E. Rep. 737. There is no dispute but that the engineer made every effort to stop the train as soon as he discovered that the team was keeping on its way. He says he did not see the boy on the loaded wagon. It would not be strange, having the engine in charge, and exerting himself to the utmost to stop the train, if the engineer failed to see the boy as soon as others who were looking on. There is absolutely no ground whatever for the assumption that the engine-driver either purposely, intentionally, or recklessly ran upon the boy. That the unfortunate lad was on the highway, intrusted with a team, while in such a condition of health or unconsciousness that all efforts to arouse him to a sense of the impending peril into which he was being carried, failed until it was too late, was the gross fault of some one besides the railway company. There is nothing in the evidence which even tends to support the theory that the engineer purposely ran his engine upon the boy, or that he acted recklessly, in disregard of human life.

The judgment is reversed, with costs, with instructions to the court below to sustain the appellant's motion for a new trial.

(115 Ind. 245)

MANNIX v. STATE *ex rel.* MITCHELL.

(*Supreme Court of Indiana. June 19, 1888.*)

1. MANDAMUS—TO PUBLIC OFFICERS—TO PUT SUCCESSOR IN POSSESSION.

Although a writ of mandate cannot be invoked to settle adverse claims to an office, still, after final judgment rendered by agreement in an election contest, an alternative writ of mandate which avers that relator's title to the office in contest had been passed upon and established by the circuit court, that the incumbent had refused to recognize the validity of the same, and continues in adverse possession, may properly be issued to put relator in possession.

2. JUDGMENT—COLLATERAL ATTACK—RENDITION ON CORRUPT AGREEMENT.

After judgment in an election contest, rendered by agreement between the claimants, and giving possession to relator, defendant, in his answer to relator's alternative writ of mandate demanding possession, cannot assail the judgment on the ground that, being rendered by agreement, and in consideration of a sum paid to defendant, it was corrupt and fraudulent, and is therefore void.¹

3. APPEAL—REVIEW—IRREGULARITIES—MATERIALITY.

Erroneous refusals to grant a continuance and to order a change of venue are irregularities within the meaning of Rev. St. Ind. 1881, § 559, allowing a new trial for irregularities in the proceedings of the court by which a party is prevented from having a fair trial, and so are not available on appeal from a judgment rendered without a trial, especially where, the judgment having been rendered on the pleadings only, the irregularities, if any, are immaterial to the merits of the appeal.

4. VENUE IN CIVIL CASES—CHANGE OF VENUE—WAIVER OF IRREGULARITIES.

Defendant's motion for a continuance after the venue has been changed, is a recognition of the jurisdiction of the court to which the case has been removed, and a waiver of mere irregularities in the manner in which the transcript has reached that court.

Appeal from circuit court, Henry county; D. W. COMSTOCK, Special Judge.

¹ Respecting the grounds on which a judgment may be collaterally attacked, see *Mo. Carter v. Neil*, (Ark.) 6 S. W. Rep. 781, and note; *Nicholson v. Nicholson*, (Ind.) 15 N. E. Rep. 223; *Decker v. Decker*, (N. Y.) Id. 307; *Comer v. Bray*, (Ala.) 3 South. Rep. 554; *In re Newman's Estate*, (Cal.) 16 Pac. Rep. 887; *Davis v. Robinson*, (Tex.) 7 S. W. Rep. 749; *Fowler v. Brooks*, (N. H.) 18 Atl. Rep. 417; *Harwood v. Wylie*, (Tex.) 7 S. W. Rep. 789; *Lyons v. Hamner*, (Ala.) 4 South. Rep. 26; *Brittain v. Mull*, (N. C.) 6 S. E. Rep. 382; *Johnson v. Johnson*, (Mich.) 37 N. W. Rep. 712; *Hodgdon v. Railroad Co.*, (Cal.) 17 Pac. Rep. 923.

Writ of mandate was issued upon complaint of the relator, James L. Mitchell, to James Mannix to put the relator in possession of the office of auditor of Hancock county. The defendant appeals.

David Turpie and W. F. McBane, for appellant. *Wm. R. Hough, C. G. Offutt*, and *J. H. Mellett*, for appellee.

NIBLACK, C. J. The judgment appealed from in this cause was based upon a complaint filed in the Hancock circuit court by the state, on the relation of James L. Mitchell, against James Mannix, to obtain possession of the office of auditor of Hancock county. The complaint stated that at the general election held in this state on the 2d day of November, 1886, for the election of state and county officers, the relator and the said Mannix and one Baker were candidates, and the only candidates for whom votes were cast, for the office of auditor of Hancock county; that the relator received the highest number of votes cast for that office at that election; that afterwards, on the 4th day of the same month, the board of canvassers appointed to canvass the returns of that election met at the court-house of said county of Hancock, and after having examined such returns, and estimated the votes which had been cast, declared the relator to have been elected to said office of auditor; that Mannix, not being satisfied with the result as declared by the board of canvassers, proceeded to contest the election before the board of commissioners of said county of Hancock; that said board made a finding that Mannix had been duly elected auditor of said county, and entered judgment accordingly; that the relator appealed from that finding and judgment to the Hancock circuit court, where such proceedings were thereafter had as resulted in a judgment declaring that he, the relator, had received the highest number of legal votes cast at such contested election for the office of auditor, and that he had, in consequence, been duly elected to that office for the term of four years from the 2d day of November, 1887; also directing the clerk of that court to issue to the relator a certificate of his election in accordance with such declaration, which was done as directed; that afterwards the relator was duly commissioned by the governor to serve as such auditor for the term of four years from said 2d day of November, 1887; that, on the day last named, the relator executed his official bond, and took the required oath of office; that the said Mannix had been auditor of said county of Hancock for the immediately preceding term of four years, and still continued to be in the possession of the office; that on the 3d day of November, 1887, the relator entered said office, and demanded of Mannix the possession of the office, and of the books, papers, and other property pertaining to the same; but that he (Mannix) refused to surrender the possession of the office, or of anything connected therewith. Wherefore an alternative writ of mandate requiring Mannix to surrender the possession of said office of auditor to the relator, or show cause why he should not do so, was demanded. An alternative writ of mandate was accordingly issued. Mannix demurred to the alternative writ of mandate upon the ground that, upon the facts stated, the relator was not entitled to the relief demanded, but his demurrer was overruled. Mannix then, by way of a return to the writ, answered—*First*, in general denial. *Secondly*, that, at the general election held in this state for the year 1882, he was elected to the office of auditor of Hancock county for the term of four years, commencing on the 3d day of November, 1883; that, after having duly qualified, he, on that day, entered into the possession and upon the duties of that office; that he was still in the possession and in the lawful discharge of the duties of the office; that, after the board of commissioners of Hancock county had decided that he had been re-elected to the office at the general election in 1886, and the matter of the contest of such election had been appealed to the Hancock circuit court, a pretended and false, fictitious, and fraudulent judgment, as if by agreement, was entered in said circuit court, without any trial, and without the decision of any issue, either

of law or fact, formed between the parties; that it was on that simulated judgment that the pretended certificate of election by the clerk and the commission from the governor were issued, as claimed in the alternative writ, and upon which the relator based his claim to the office in question; that the so-called judgment upon which the relator's claim to the office is founded, was procured by the fraud of the relator, and is wholly void by reason of fraud in the procurement and in the rendition thereof; that on or about the 18th day of June, 1887, and while the appeal involving the contest for the office was pending in the Hancock circuit court, the relator and his attorneys entered into a negotiation with him, the said Mannix, and his attorneys, concerning such contest; that it was finally agreed between the parties that the relator should pay to him, the said Mannix, the sum of \$1,250, in consideration of which the latter's right to the office in contest, including the right to hold the same, to discharge its duties, and to receive the emoluments thereof, should be transferred to, and recognized as existing in, the relator; that the relator thereupon paid to him, the said Mannix, the said sum of \$1,250, after which the judgment declaring the relator to have been duly elected, as above stated, being the same judgment described in the alternative writ of mandate, was entered as if by agreement of parties; that such judgment was therefore procured to be entered by the relator in pursuance of such fraudulent agreement, and by the payment of the sum of money named, and for no other reason; that said agreement for the sale and transfer of said office of county auditor was not only against public policy, but was also corrupt, fraudulent, and void as between the parties thereto, as well as to all other persons; and that hence he, the said Mannix, was not bound or concluded by the judgment rendered thereon, nor was the relator thereby lawfully adjudged to be entitled to hold said office. A demurrer was sustained to this second paragraph of answer, and the venue of the cause was then changed to the Henry circuit court. A transcript of the proceedings above set forth was filed in the office of the clerk of the Henry circuit court on the 12th day of November, 1887, and the November term, 1887, of that court began on the 21st day of that month. On the second day of the term the cause was set down for trial before the judge of another circuit, specially called to try it, on the thirteenth judicial day of the same term. On the day last named, Mannix entered a special appearance, and moved for a continuance of the cause upon the ground that the transcript had not been filed in that court 10 days before the term began, but his motion was overruled. He then, continuing his special appearance, moved for an order remanding the cause to the Hancock circuit court. This motion was supported by his affidavit, alleging that the cause was ordered to be sent to Henry county over his objection; that, in consequence, he had abandoned his application for a change of the venue of the cause, and did not either pay or promise to pay the costs which would have been required to perfect the change, and never ordered the clerk of the Hancock circuit court either to make out a transcript of the proceedings in that court, or to transmit the papers in the cause to Henry county. This motion was likewise overruled. Mannix then withdrew the first paragraph of his answer to the alternative writ of mandate, and, declining to answer further, it was ordered that a peremptory writ of mandate should be issued to him, commanding him forthwith to surrender to the relator the possession of the office of auditor of Hancock county, and all the books, papers, and other property pertaining to that office.

The objection made to the sufficiency of the writ of mandate is founded upon the claim that, upon the facts recited by it, the real object in procuring it to be issued was to try the title of the relator, Mitchell, to the office of auditor of Hancock county, and that a writ of mandate cannot be either granted or sustained for such a purpose. It is true that such a writ cannot be rightfully invoked to settle a doubtful claim to an office, or to have the title to an office adjudicated upon as between adverse claimants. In such a case an informa-

tion in the nature of a *quo warranto* affords the proper remedy. But where the relator holds a *prima facie* and uncontested title to the office, or his title has been adjudicated upon and finally established by a competent tribunal, a writ of mandate may be issued to put him in possession of the office, as well as of the books, papers, and other property pertaining to it. On this subject see High, Extr. Rem. § 73 *et seq.*; Wood, Mand. 17; *McGee v. State*, 103 Ind. 444, 3 N. E. Rep. 139. As has been shown, the alternative writ, as well as the complaint upon which it was issued, averred that Mitchell's title to the office of auditor had been passed upon and established by the Hancock circuit court, and that Mannix had nevertheless refused to recognize the validity of his title, and had continued in the adverse possession of the office. This was sufficient to entitle Mitchell to a writ of mandate to obtain possession of the office.

In the absence of an affirmative showing to the contrary, the presumption is that whatever a court has done in a proceeding of which it had jurisdiction has been correctly done. The reasonable inference from the allegations of the second paragraph of the answer, therefore, is that the judgment of the Hancock circuit court complained of was regular upon its face, and that it had been, as it purported to have been, entered by agreement of parties. Such a judgment is binding upon the parties to it until reversed upon an appeal, or until annulled or set aside by some direct proceeding instituted for that purpose. It is impervious to a collateral attack from a party to it, however corrupt or unlawful the agreement may have been which led to its rendition. Freem. Judgm. § 334; *Earle v. Earle*, 91 Ind. 27; *Smith v. Hess*, 91 Ind. 424; *Reid v. Mitchell*, 93 Ind. 469. It is, as contended, a well-established rule of law that the courts will not aid in the enforcement of a corrupt or unlawful contract, but will permit the parties to remain in the relative positions in which they have placed themselves; but that rule has no application to a judgment which, by inadvertence or collusion, may have been rendered upon such a contract. Such a judgment, as regards a collateral attack upon it, stands upon the same footing with other judgments rendered in the usual course of legal proceedings, and is as binding upon the parties as any other judgment so long as it remains unreversed, and not vacated by some direct proceeding. There was consequently no error in holding the second paragraph of the answer to have been insufficient upon demurrer.

Under section 559, Rev. St. 1881, irregularity in the proceedings of the court, by which a party was prevented from having a fair trial, affords a cause for a new trial. The erroneous refusal of a court to grant a continuance, and a similar refusal to order a change of venue, in a cause, are both deemed to be irregularities in the proceedings of a court, within the meaning of that provision of the statute, and upon an appeal from a final judgment such irregularities can only be made available when they have been assigned as causes for a new trial. Busk. Pr. 224; *Westerfield v. Spencer*, 61 Ind. 339; *Morgan v. Hyatt*, 62 Ind. 560; *Walker v. Heller*, 73 Ind. 46. Upon an appeal from a merely interlocutory order a different rule will sometimes be applied, but a case of that kind constitutes a rare exception to the general rule announced as above. *Shoemaker v. Smith*, 74 Ind. 71. The improper refusal to remand a cause to the court whence it came, on account of some irregularity in the manner in which the venue was assumed to be changed, must, in ordinary cases and for a similar reason, be treated as affording only a good cause for a new trial. In the case before us there was no trial, and hence no opportunity of assigning causes for a new trial. Moreover, as final judgment was rendered on the pleadings only, it is quite immaterial to the merits of this appeal whether a continuance of the anticipated trial of the cause was wrongfully denied, or whether there were some irregularities in the mere manner in which the venue was seemingly changed. Besides, the motion to remand the cause to the Hancock circuit court came too late. To have made it effective

in any event, it should have been made on Mannix's first appearance in the Henry circuit court. His previous motion for a continuance carried with it the implication that the cause was properly within the jurisdiction of the latter court, and amounted to a waiver of all mere irregularities in the manner in which the transcript had reached that court. The judgment is affirmed, with costs.

(115 Ind. 270)

NELSON v. WELCH.

(*Supreme Court of Indiana*. June 19, 1888.)

APPEAL—REVIEW—HARMLESS ERROR—PRESUMPTIONS—MISCONDUCT OF COUNSEL.

In the absence of the evidence, the court's refusal to interfere when counsel makes a material statement, in addressing the jury, that he has no right to make, will be presumed prejudicial to appellant, although counsel retracted the statement; the presumption in favor of the trial court not applying where material error appears on the record.

Appeal from circuit court, Ohio county.

On petition for rehearing. For former opinion, see 16 N. E. Rep. 684.

John W. Nelson and *S. R. Downey*, for appellant. *J. B. Coles*, for appellee.

ELLIOTT, J. Where an attorney, in addressing a jury, makes a statement that he has no right to make, and that statement is of a material character, there is more than a harmless error. The error of the court in declining to interfere will require a reversal, unless it clearly appears that the verdict is right on the evidence. Where there is a conflict of evidence, the error must be deemed prejudicial; and this must be presumed in the absence of the evidence. The rule that presumptions will be made in favor of the trial court does not apply where the record affirmatively shows a material error. The case of *Shular v. State*, 105 Ind. 289, 4 N. E. Rep. 870, is not in point. Where counsel make an improper statement of a material character, the only method by which its influence can be neutralized is by the prompt and decided interference of the court. A mere retraction by counsel is not enough where the opposing counsel properly invokes the aid of the court. Petition overruled.

(115 Ind. 331)

TROYER v. STATE ex rel. NICHOLS.

(*Supreme Court of Indiana*. June 22, 1888.)

BASTARDY—TRIAL—REMARKS OF COUNSEL—REFERENCE TO SIMILAR CASE.

In an action of bastardy, it having been contended that defendant could not have had illicit intercourse with the relatrix without detection, plaintiff's counsel, in his closing argument, stated to the jury that he well remembered how defendant's attorney, when acting as attorney for plaintiff in a former similar case, had told the jury how defendant in that case got up out of bed and slipped into the room of the relatrix. One of the jury in the present case had also been a juror in the former case. An objection to counsel's remark was unheeded by the court. Held to be reversible error, since the remark both implied inconsistency in the position of defendant's counsel, and also tended to impress the above juror that his consistency was involved in the verdict.

Appeal from circuit court, Howard county; **DAN WAUGH**, Judge.

Blackledge, Blackledge & Moon and *Bell & Purdum*, for appellant. *Jas. M. Fippen*, *B. F. Harness*, and *D. A. Woods*, for appellee.

MITCHELL, J. The relatrix complained of Joseph E. Troyer, and charged that she had been delivered of a bastard child on the 3d day of September, 1885, of which the defendant was the putative father. The trial in the circuit court resulted in a finding and judgment against the appellant. The relatrix testified, at the trial, that the appellant was the father of the child of which she had been delivered, and that she was a domestic residing in his

family at the time it was begotten. She testified, further, that illicit relations existed between herself and the appellant during a considerable portion of the time she resided in his family, and that the appellant was in the habit of leaving the bed and room in which he and his wife slept, and coming to her bed in a room near by. The appellant persistently and emphatically denied having had any improper relations with the relatrix at any time or place. It appeared that there were but four apartments, and those on the same floor, in the house temporarily occupied by the appellant and his family and hired help. The defense insisted that illicit intercourse could not have been had and carried on by the appellant with the relatrix, in the manner and under the circumstances detailed by her, without detection, owing to the proximity of the appellant's wife and other members of the family. There was reasonable ground to suspect the truth of the relatrix's story. A bill of exceptions recites that the plaintiff's counsel, during his closing argument to the jury, used the following language: "I well recollect how Mr. Bell told a jury of Howard county, when he was attorney for the plaintiff, how Joshua Freeman got up out of his bed and slipped into the room of Mary Sleeth." This statement was objected to, but the court seems not to have given the objection any attention. The bill of exception shows, further, that another bastardy suit had been tried at the same term of court, in which Mary Sleeth appeared as the relatrix and Joshua Freeman as defendant; and that a Mr. Lindley, one of the jurors in the case on trial, was also a juror in the case referred to; and that the Mr. Bell referred to by counsel was the attorney for the relatrix in the former case, and was one of the defendant's attorneys in the present case. It also appeared that counsel made the statement above set out in illustration of how the defendant in the case on trial went from the room occupied by him to that of the relatrix. The reference made by plaintiff's counsel to the line of argument pursued by counsel for the defendant in a similar case previously tried, was certainly improper; and while, under ordinary circumstances it might have been harmless, it was liable to be injurious under the circumstances disclosed in the present case. It was, in effect, saying to the jury that counsel for the defense in the case on trial was occupying a position inconsistent with that contended for by him on the trial of a previous case. The worst feature of the statement, however, was that it was well calculated to remind Juror Lindley of the result arrived at in the case referred to, and to impress upon him that his own consistency might be involved in the verdict to be returned, or conclusion to be arrived at, in the case then under consideration. Lindley, as well as the other jurors, should have been left free to decide the case in hearing without any reference to the evidence or argument in another similar case. The case was close and doubtful on the evidence as it stood. The improper statement of counsel, made seemingly with the approbation of the court, may have turned the scale. When counsel abandon the evidence, and the wide range of argument and illustration which it affords, and seek by a side wind to bridge over or supply what may seem a close point, by bringing forward matter not in evidence, and commenting upon it, they take the hazard of showing that such conduct was fully set right by the court, or that it was harmless. *Nelson v. Welch*, ante, 569, (present term.) That has not been done in the present case; rather, the bill of exception discloses other violations of the rules of debate, which need not be referred to, which should have received the attention of the court. The judgment is reversed, with costs.

(115 Ind. 297)

PEOPLE'S S., L. & B. ASS'N v. SPEARS *et al.*

(Supreme Court of Indiana. June 20, 1888.)

1. JUDGMENT—CORRECTION—MOTION FOR NEW TRIAL.

Where judgment is rendered against one defendant, but as against another it is recited that there has been no adjudication, the error in refusing to adjudicate all

the issues raised, as it goes only to the form and sufficiency of the judgment, cannot be taken advantage of by motion for new trial, but should be raised by motion to correct; and, such latter motion not having been made, the judgment, being valid in part, will not be reversed.

2. **MECHANIC'S LIEN—CONTRACT WITH VENDOR IN POSSESSION—INTEREST OF VENDOR.**

A mechanic's lien on real estate for the value of improvements and repairs thereon, made by one in possession under contract of purchase, does not bind the interest of the vendor, although the work was done with his consent.

Appeal from circuit court, Clark county; CHARLES P. FERGUSON, Judge. *Willis B. Goodwin*, for appellant. *J. B. Meriwether*, for appellee.

MITCHELL, J. Action by the above-named corporation against Andrew J. Spears, William Fawcett, and Mary Jane Fawcett, to recover the possession of, and quiet title to, certain described real estate in the city of Jeffersonville. It is averred that the plaintiff is the owner of the land described in the complaint in fee-simple, and entitled to the possession thereof, which is wrongfully withheld by Spears, and that all the defendants claim some interest in the real estate adverse to the right and title of the plaintiff. The defendants answered jointly by a general denial. Mrs. Fawcett filed a cross-complaint, in which she alleged, among other matters not material to be stated, that in July, 1882, the defendant Spears, while in possession of the premises in controversy under a contract of purchase, and while exercising control and ownership over the property, with the knowledge and consent of plaintiff, employed the defendant William Fawcett to make some additions to or repairs upon a building situate on the premises, and that the latter had, by due compliance with the statute, acquired a mechanic's lien upon the land and building for the amount of the repairs so made. It is averred that the lien had been foreclosed, and the property sold to the cross-complainant, in pursuance of a decree of foreclosure taken by Fawcett against Spears, and that the cross-complainant had no notice of the claim or ownership of the plaintiff at the time she purchased at the foreclosure sale. She asked as relief that the interest thus acquired by her be declared superior to the plaintiff's title. The court sustained a demurrer to the cross-complaint, whereupon, after taking an exception, leave was taken to amend. So far as appears, nothing further was done in respect to the cross-complaint. Subsequently, the cause was tried without the intervention of a jury, on the issue made by the general denial to the complaint. The court found, generally, that the plaintiff was the owner in fee-simple, and entitled to the possession, of the real estate described in the complaint, and that the possession was unlawfully withheld by Spears. Judgment against Spears for possession. There is the following recital after the judgment: "It is therefore considered, ordered, and adjudged that there has been in this action no adjudication as to any alleged or supposed right, title, or interest of the other defendants, William Fawcett and Mary J. Fawcett, of any interest or claim which they, or either of them, may have to the real estate described in the complaint in this action." The plaintiff moved the court for a new trial, assigning as ground therefor "that the decision of the court, refusing to adjudicate and determine the matter in controversy between the plaintiff and the defendants William Fawcett and Mary Jane Fawcett, is contrary to law." This motion was overruled, and this ruling is the only error assigned by the appellant. Mary Jane Fawcett assigns as cross-error the ruling of the court in sustaining the demurrer to her cross-complaint.

In respect to the error assigned by the appellant, it may be remarked that it does not appear, by bill of exceptions or otherwise, that any objection was made in the court below to the form or substance of the finding and judgment, or that there was any effort, by motion or otherwise, to secure any amendment to or modification of the judgment. All that appears to have been done was to move for a new trial, assigning as cause therefor that the refusal of

the court to adjudicate, etc., was contrary to law. The sufficiency of a finding of judgment as regards mere matter of form cannot be questioned by a motion for a new trial, assigning as a cause therefor that the finding or decision is contrary to law; nor is a motion for a new trial the proper method by which to secure the modification or amendment of a finding or judgment. *Bosseker v. Cramer*, 18 Ind. 44; *Machine-Works v. Chandler*, 56 Ind. 575; Work, Pr. § 916. If a finding is imperfect by reason of an uncertainty or ambiguity, or by finding less than the whole matter put in issue, or by not assessing damages, a *venire de novo* may be awarded. *Railway Co. v. Hixon*, 110 Ind. 225, 11 N. E. Rep. 285; 2 Tidd, Pr. 922. In case the judgment fails to follow the finding, it may be corrected, modified, or amended on motion for that purpose. Questions on such motions are saved by bills of exceptions. *Forsythe v. Kreuter*, 100 Ind. 27; *Adams v. La Rose*, 75 Ind. 471. "Where any part of a judgment is valid, it will stand, unless proper steps have been taken by objection duly presented to the court below, to secure its modification or amendment, by amending or rejecting the part which is wrong." *Bayless v. Glenn*, 72 Ind. 5; *Teal v. Spangler*, Id. 380; *Becknell v. Becknell*, 110 Ind. 42, 10 N. E. Rep. 414. The recital in the record or order-book entry upon the subject of what had or had not been adjudicated in respect to the rights of William and Mary Jane Fawcett, is not conclusive. A judgment is, or ought to be, conclusive upon the matters put in issue by the pleadings in the case. The general rule is that the issuable facts or matters upon which the plaintiff's case proceeded determine what was in issue. *McFadden v. Ross*, 108 Ind. 512, 8 N. E. Rep. 161; *McFadden v. Fritz*, 110 Ind. 1, 10 N. E. Rep. 121; *Kilander v. Hoover*, 111 Ind. 10, 11 N. E. Rep. 796, and cases cited. The findings should cover the whole issue, and the judgment should follow the finding. If less than the whole issue was found in the present case, the court would doubtless have corrected or amended its finding, on motion; and, if the judgment did not follow the finding, a motion to amend or modify would have been available. So far as the entry on the order book assumes, by a recital, to determine what was or was not adjudicated, its effect is to be determined by the issues and finding in the case. There appears to be a general finding for the plaintiff, so far as the title and right of possession are concerned; but as the effect of the finding, and extent and conclusiveness of the judgment actually rendered, are not before us, we decide nothing upon that subject now.

The demurrer to the cross-complaint was properly sustained. The fact that Spears was in possession under a contract of purchase gave him no authority to overreach the plaintiff's title by contracting for repairs. Spears could bind his interest under his contract of purchase, and no more. Presumably, the plaintiff's title was of record. That the purchaser in possession under a contract of purchase made improvements or repairs, with the knowledge and consent of the vendor, did not estop the latter to assert its prior title. Something more than mere inactive consent is necessary in order that a lien may be acquired against the owner of property. *Neeley v. Searight*, 113 Ind. 316, 15 N. E. Rep. 598; *Hopkins v. Hudson*, 107 Ind. 191, 8 N. E. Rep. 91; *Wilkinson v. Rust*, 57 Ind. 172; *McCarley v. Burnet*, 84 Ind. 23. As has been intimated, the cross-complaint does not seem to have been finally disposed of in the court below, and it is therefore doubtful whether the cross-error assigned presents any question for decision. It seems pertinent to suggest that after sustaining the demurrer to the cross-complaint, the complainant having failed to avail herself of the leave to amend, the court would doubtless have sustained a motion for judgment upon the demurrer. *Hunter v. Pfeiffer*, 108 Ind. 197, 9 N. E. Rep. 124; Bick. Crim. Pr. 107. There was no available error. The judgment is affirmed, with costs.

(115 Ind. 308)

GIESEKE v. JOHNSON.

(Supreme Court of Indiana. June 22, 1888.)

PRINCIPAL AND SURETY — REMEDY OF SURETY AGAINST PRINCIPAL — STIPULATION IN NOTE FOR ATTORNEY'S FEES.

A surety, paying a note which contained a stipulation for attorney's fees for collection, cannot recover of his principal such attorney's fees when he did not himself pay them; the measure of his recovery being the amount actually paid out, with interest.

Appeal from circuit court, Knox county; GEORGE A. BICKNELL, Judge.

Henry S. Canthorne and John M. Boyle, for appellant. *Cobb & Cobb*, for appellee.

ZOLLARS, J. J. H. Gieseke and appellee executed a promissory note to the First National Bank of Vincennes, in which was a stipulation for the payment of attorney's fees for collection. Although not shown upon the face of the note, appellee was surety for Gieseke. Before the maturity of the note, Gieseke died, and appellant was appointed administrator of his estate. After the maturity of the note, appellee paid it, but paid no attorney's fees. Subsequently, he filed his claim against the estate of Gieseke, stating therein the amount thus paid, setting out a copy of the note, and claiming attorney's fees for its collection. The court below allowed the claim, and included in its judgment \$15 as such attorney's fees.

Is appellee entitled to recover such attorney's fees? That is the only question for decision here. We are satisfied that he is not. One sufficient reason why he is not is that he is entitled to recover the amount paid to the bank, with interest, and no more. His right of action is for indemnity only, and rests upon an implied promise on the part of the principal. Hence it is that a surety cannot maintain an action against his principal until he has paid something, and then only for the amount paid, with interest. In this state the rate of such interest is regulated by statute. Rev. St. 1881, § 1219; Brandt, Sur. §§ 176-178; *Bonney v. Seely*, 2 Wend. 482; *Eaton v. Lambert*, 1 Neb. 339; *Blake v. Downey*, 51 Mo. 437; *Succession of Dinkgrave*, 31 La. Ann. 703; *Kendrick v. Forney*, 22 Grat. 753; 1 White & T. Lead. Cas. 225, and cases there cited, and 156, and cases there cited. To say that upon, and by reason of, the payment of the note by the surety, equity subrogated him to the rights of the creditors, and to go further, and say that, by reason of such subrogation, he might maintain an action upon the note against the principal, would not aid the appellee in this case; for the action would still be for indemnity, and the amount of his recovery, the amount which he paid to the bank, with interest. Sheld. Sub. § 105, and cases there cited. It is there said: "The subrogation of a surety will not be carried further than is necessary for his indemnity. If he buys up the security at a discount, or makes his payment in a depreciated currency, he can enforce it only for what it cost him." In the case of *Kendrick v. Forney*, *supra*, in speaking of the rights of a surety to be subrogated to the rights and securities of the creditor, it was said: "He has no equity to be subrogated to the rights and securities of the creditor against the debtor for what he has not paid for him, but only for what he has paid for him. So that, upon the principal of subrogation, as upon the implied contract of indemnity, the surety is not entitled to recover from the principal a greater amount than he has paid for him. He has an equity to be subrogated only for his indemnity in cases where the doctrine of subrogation will apply."

There was no subrogation or equitable assignment in the case before us, for the one sufficient reason, without attempting to give others, that there is no equity requiring either, as the bank held no securities, funds, liens, or equities against the principal debtor, or as a means of enforcing payment from him;

and as we have said, in substance, in this case, appellee could not be benefited by any supposable subrogation, for the reason that he could recover nothing but a personal judgment against the principal maker of the note, and such judgment could not exceed in amount the sum paid by him to the bank, with interest. By the terms of the note, the makers agreed to pay to the bank reasonable attorney's fees for its collection; but the principal maker of the note did not thereby agree to pay to appellee, as his surety, such attorney's fees, nor any other amount. As already stated, the rights of the surety, and the obligation of the principal, as between themselves, in a case like this, rests upon an implied promise, on the part of the principal maker, which arises under the law for the indemnity of the surety. The action by appellee, the surety, against the principal maker, is not upon the note, but upon the implied promise of indemnity; and hence it is that his right of action is not limited by the statute of limitations applicable to the note, but by the statute of limitations applicable to accounts and contracts not in writing, which, in this state, is six years; and hence, too, it is not necessary, in a case like this, under our statute, which requires that when any pleading is founded on a written instrument, or on account, the original or a copy must be filed with the pleading, that the note paid by the surety, or a copy, shall be filed with the complaint in an action by him against the principal for indemnity. See *Sexton v. Sexton*, 35 Ind. 88; *Arbogast v. Hays*, 98 Ind. 26; *Lilly v. Dunn*, 96 Ind. 220-227; *Harker v. Glidewell*, 23 Ind. 219; *Cameron v. Warbritton*, 9 Ind. 351; *White v. Miller*, 47 Ind. 385; 1 White & T. Lead. Cas. 145; *Neilson v. Fry*, 16 Ohio St. 552. Upon any view that may be taken of the case, the attorney's fees should not have been allowed, and to that extent the judgment is too large.

If within 60 days appellee shall enter a remittal of \$15 as of the date of the judgment, the judgment will stand affirmed, at his costs; otherwise, reversed, at his costs.

(115 Ind. 257)

STATE *ex rel.* BALDWIN, Atty. Gen., *v.* INSURANCE CO. NORTH AMERICA.

(Supreme Court of Indiana. June 20, 1888.)

1. APPEAL—REVIEW—PRESUMPTIONS—RULING ON DEMURRER.

Where a demurrer assigning several grounds of objection to a complaint, one of which is that two separate causes of action are improperly united, is sustained, the judgment not indicating on what ground, but separate actions were not docketed between the parties as required by Rev. St. Ind. 1881, § 840, when a demurrer is sustained because of the misjoinder of causes of action, it will be assumed that the demurrer was not sustained on that ground.

2. INSURANCE—FOREIGN COMPANIES—LICENSE—FEES—ACTION TO RECOVER.

Rev. St. Ind. 1881, § 3772, providing that "the auditor of state shall have power to institute suit and prosecutions, either by the attorney general or such other attorneys as he may designate, for any violation of any of the provisions of the act" relating to foreign insurance companies doing business in the state, does not repeal section 5668, providing that the attorney general shall institute suit for the recovery of amounts due to the state from any source, but is simply cumulative; and an action against a foreign insurance company to recover taxes and license fees due the state is properly brought by the state on the relation of the attorney general, although the obligation being to the state, and no individual having an interest therein, no relator is necessary.

3. SAME—RETALIATORY ACT—CONSTITUTIONAL LAW—EQUAL TAXATION.

Rev. St. Ind. 1883, § 3773, providing that "when, by the laws of any other state, any taxes, fines, penalties, licenses, fees, deposits of money or securities, or other obligations or prohibitions, are imposed upon insurance companies of this or other states, or their agents, greater than are required by the laws of this state, then the same obligations and prohibitions, of whatever kind, shall, in like manner for like purposes, be imposed upon all insurance companies of such states, and their agents; all insurance companies of other nations, under this section, shall be held as of the state where they have elected to make their deposit and establish their principal agency in the United States,"—is not unconstitutional, as attempting to levy different fees for the same privilege from different members of the same class.

4. SAME—ENACTING LAWS OF ANOTHER STATE.

Neither is such section unconstitutional as attempting to enact the laws of another state on the subject of insurance into the statutes of Indiana on that subject.

5. SAME—CERTAINTY.

Neither is such section void for uncertainty.

Appeal from circuit court, Marion county; J. G. ADAMS, Judge.

D. P. Baldwin, Atty. Gen., and *David Turpie*, for appellant. *Harris & Calkins* and *Finch & Finch*, for appellee.

HOWK, J. In this case the only error assigned here by the state of Indiana, plaintiff below, is the sustaining of defendant's demurrer to plaintiff's complaint herein. In its complaint the state alleged that defendant was an insurance company organized in the state of Pennsylvania, and doing business within the state of Indiana, and as such governed by the laws of this state. That on March 3, 1877, an act was duly passed by the legislature, and approved by the governor of this state, entitled "An act to amend section 1 of an act entitled 'An act regulating foreign insurance companies doing business in this state, prescribing the duties of the agents thereof, and of the auditor of state in connection therewith, and prescribing penalties for the violation of the provisions of this act,' approved December 21, 1865, and adding supplemental sections thereto." That section 3 of the above-entitled act of March 3, 1877, reads as follows: "When, by the laws of any other state, any taxes, fines, penalties, licenses, fees, deposits of money or securities, or other obligations or prohibitions, are imposed upon insurance companies of this or other states, or their agents, greater than are required by the laws of this state, then the same obligations and prohibitions, of whatever kind, shall in like manner, for like purposes, be imposed upon all insurance companies of such states, and their agents. All insurance companies of other nations, under this section, shall be held as of the state where they have elected to make their deposit and establish their principal agency in the United States." Now known as section 3778, Rev. St. 1881. And plaintiff averred that on the day and year last named, and ever since, the law of this state for the taxation of foreign insurance companies has been as follows: "Sec. 8. Every insurance company not organized under the laws of this state, and doing business therein, shall, in the months of January and July of each year, report to the auditor of state, under oath of the president and secretary, the gross amount of all receipts received in the state of Indiana, on account of insurance premiums for the six months last preceding, ending on the last days of December and June of each year, and shall, at the time of making such report, pay into the treasury of the state the sum of three dollars on every one hundred dollars of such receipts, less losses actually paid within the state." That the section last quoted is section 8 of "An act supplementary and amendatory of 'An act to provide for a uniform assessment of property, and for the collection and return of taxes thereon,' approved December 21, 1872," approved March 8, 1873. That the license fee required of foreign corporations doing business within this state is \$30 per annum. That since the passage of the aforesaid act of March 3, 1877, the license fee imposed by the legislature of the state of Pennsylvania upon foreign insurance companies doing business within that state had been \$500 per annum, as shown by the statute of that state entitled "An act to revise, amend, and consolidate the several laws regulating the licensing of foreign insurance companies," approved April 11, 1868, of which so much as pertained to license, being section 6 of such act, was pleaded specially, and set out at length in plaintiff's complaint herein. That by an act of the legislature of the state of Pennsylvania entitled "An act to establish an insurance department," approved March 8, 1873, the following is the rule of taxation of foreign insurance companies doing business in the state of Pennsylvania, to-wit: "No person shall act as agent or solicitor in this state of any foreign

insurance company of another state or foreign government, in any manner whatever relating to risks, until the provisions of this act have been complied with on the part of the company or association, and there has been granted to said company or association, by the commissioner, a certificate of authority showing that the company or association is authorized to transact business in this state, and it shall be the duty of every such company or association, authorized to transact business in this state, to make report to the commissioner in the month of January of each year, under oath of the president or secretary thereof, showing the entire amount of premiums of every character and description received by said company or association in this state during the year or fraction of a year ending with the 31st day of December preceding, whether said premiums were received in money or in the form of notes, credits, or any other substitute for money, and pay into the state treasury a tax of three per centum upon said premiums, and the commissioners shall not have power to grant a renewal of the certificate of said company or association until the tax aforesaid is paid into the state treasury." And plaintiff further averred that defendant had wholly failed and refused to comply with the provisions of the statute of this state above set forth, in this, to-wit, defendant had failed to pay into the treasury of this state, since March 3, 1873, the sum of \$500 per year for a license to transact business within this state. That there was due the state of Indiana, for unpaid license fees, the sum of \$2,000. That defendant had also failed to pay taxes into the state treasury at the rate of 3 per cent. per annum upon its gross receipts. That since the said statute took effect the gross receipts of premiums by defendant, collected within the state of Indiana, had amounted to the sum of \$200,000. That the taxes thereon at 3 per cent., which defendant ought to have paid, amounted to \$6,000, and the sum actually paid was \$2,500, leaving the sum of \$3,500, due and owing to the state of Indiana, as unpaid taxes, and wholly unpaid. Wherefore, etc., defendant's demurrer to plaintiff's complaint assigned the following grounds of objection thereto, namely: (1) Because the complaint did not state facts sufficient to constitute a cause of action; (2) because plaintiff had not the legal capacity to sue on the relation of its attorney general, but the action, if at all maintainable, should have been brought upon the relation of the auditor of state; and (3) because several causes of action have been improperly united, to-wit, for taxes and for license fees. This demurrer was sustained by the court, and, plaintiff excepted, and, declining to amend or plead further, the court adjudged that it take nothing by its suit herein, etc.

In considering the question of the sufficiency of plaintiff's complaint, we will notice the grounds of objection thereto assigned by defendant in the inverse order of their statement in its demurrer. The judgment below does not indicate that the demurrer was sustained by the court because several causes of action were united in the complaint, improperly or otherwise. But we may well assume that the complaint was not held bad because of the alleged misjoinder of causes of action therein; for, if the court had sustained the demurrer on the ground of such alleged misjoinder, it would have been the duty of the court, under the statute, to have caused two actions to be docketed between the parties, and that each should stand as a separate action, which was not done. Section 340, Rev. St. 1881. Defendant's learned counsel claim that the second cause of demurrer was well assigned, or, in other words, that the action was not well brought upon the relation of the attorney general, and that it could only be brought and maintained, under the statute, upon the relation of the auditor of state. In support of this claim counsel cite and rely upon the sixth clause of section 2 of the above entitled act of March 3, 1877, (now known as section 3772, Rev. St. 1881,) which clause of the statute reads as follows: "*Sixth.* The auditor of state shall also have power to institute suit and prosecutions, either by the attorney general, or such other attorneys as he may designate, for any violation of any of the provisions of this act."

Defendant's counsel place too much stress, we think, upon this statutory provision, when they claim that it repeals by implication the power of the attorney general to sue, in the name of the state, under the provisions of section 5668, Rev. St. 1881, in force since March 10, 1873. The utmost that can be said in regard to the effect of the clause above quoted of section 3772, upon prior legislation, is that if the case under consideration were a suit wherein a relator was necessary, and which could only be brought or maintained upon the relation of a state officer, after the act of March 3, 1877, took effect, either the auditor of state or the attorney general would have been a competent relator herein. We are of opinion, however, that no relator was necessary to enable the state to bring or maintain this action. Whenever the state has or claims to have a cause of action, which it seeks to enforce in any of its courts, in the absence of any statute to the contrary, we think that the action may be brought in the name of the state of Indiana, as plaintiff, without any relator; and especially so where, as here, the complaint is signed by the attorney general of the state. Of course, when the state becomes a suitor in the courts, it is as much bound by the laws of the land, by the rules of pleading and practice, and by the judgments and decisions of such courts, inferior or superior, as any other suitor. It may well be doubted whether the second cause of demurrer assigned by the defendant, under our decisions, properly presented the question of the right or power of the attorney general to bring and prosecute this action in the name of the state; but, whether it did or did not, the question is in the record, and it ought to be decided. We do not doubt the power and authority of the attorney general to commence the action now before us, and prosecute it to a final determination, in the name of the state of Indiana, upon his own relation, or *ex rel.* the auditor of state, or without any relator. Section 5660, Rev. St. 1881. In *Shane v. Francis*, 30 Ind. 92, it was held by this court that no relator is necessary in an action by the state, when the obligation is to the state, and no individual has an interest therein other than that common to all. In *State v. Johnson*, 52 Ind. 197, it was also held that where a cause of action exists in favor of the state, and the action is brought in the name of the state for a certain specified use, the words designating such use will be considered as surplusage, and the action will be regarded as an action properly brought by the state. The court there said: "By the agreement which is the foundation of the action, the decedent agreed to pay the sum named directly to the state of Indiana, and in such case the action should have been brought in the name of the state, without any averment as for whose use it was brought." In the case in hand, the money sued for, if collected, would belong to the state of Indiana, and no individual would have an interest therein, except the interest common to all the inhabitants of this state. In such a case no relator is necessary.

But the principal and most important questions in the case at bar are presented by the first ground of objection to plaintiff's complaint assigned in defendant's demurrer, namely, that the facts stated in such complaint were not sufficient to constitute a cause of action. These questions are by no means free from difficulty, but they have been ably and exhaustively discussed on both sides, in the oral, written, and printed arguments of counsel learned in the law. Defendant's counsel insist that plaintiff's action will not lie for three reasons, namely: (1) Because section 3 of the aforesaid act of March 3, 1877, is unconstitutional and void; (2) because taxes cannot be levied nor penalties laid by reference merely to the laws of another state or nation; (3) because such section 3 is void for uncertainty.

We will consider and pass upon the various objection urged by defendant's counsel to the constitutionality and validity of section 3 of the above-entitled act of March 3, 1877, (section 3773, Rev. St. 1881,) in the same order, as nearly as practicable, as that in which counsel have presented them. We may premise, however, that the primary rule in all statutory exposition and interpretation,

often recognized and applied in our decisions, is to explore, and if possible discover, the legislative intention in the enactment of the particular statute which at the time is the subject of inquiry and consideration. It must appear that the statute is clearly repugnant to or in conflict with some provision of our fundamental laws, state or federal, or its provisions must be upheld, and, if possible, must be enforced. In all cases, when the constitutionality of a statute is merely doubtful, it is clearly the duty of the courts to solve all doubts in favor of the statute, and sustain and uphold the constitutionality of the law, if it can be done by any fair construction. This is the doctrine of the decisions of this court, from its organization down to the present time. *Clare v. State*, 68 Ind. 17, and cases cited; *McComas v. Krug*, 81 Ind. 327; *Warren v. Britton*, 84 Ind. 14; *State v. Johnston*, 101 Ind. 223; *Robinson v. Schenck*, 102 Ind. 307, 1 N. E. Rep. 698. With these general rules in mind, we proceed now to the consideration and decision of the important questions so ably presented and discussed in this case by the learned counsel as well of the defendant as of the plaintiff herein.

1. Is section 3 of the amendatory and supplemental act aforesaid of March 3, 1877, (section 3773, *supra*,) unconstitutional and void? It may be premised that the first valid legislation of this state, in relation to foreign insurance companies and their agents, doing business in this state, was an act entitled "An act regulating foreign insurance companies doing business in this state, prescribing the duties of the agents thereof, and of the auditor of state in connection therewith, and providing penalties for the violation of the provisions of this act," approved December 21, 1865, (Acts 1865, Sp. Sess., p. 105 *et seq.*) This act contained eight sections, exclusive of the emergency section; of which sections 2, 4, 5, 6, and 7 are still in force, and are now known, respectively, as sections 3766, 3769, 3770, 3771, Rev. St. 1881. Section 3 of the act of December 21, 1865, was amended by an act approved March 12, 1875, (Acts 1875, Sp. Sess., p. 51.) The amended section is yet in force, and is now known as section 3767, Rev. St. 1881. The amendatory and supplemental act of March 3, 1877, contained three sections, exclusive of the section declaring an emergency. Section 1 of such amendatory act amended section 1 of the act of December 21, 1865, and sections 2 and 3 were supplemental sections. Acts of 1877, Reg. Sess., p. 65 *et seq.* These three sections are still in force, and are now known, respectively, as sections 3765, 3772, 3773, Rev. St. 1881. Sections 3765 to 3773, *supra*, inclusive, contain the law of this state regulating foreign insurance companies doing business therein, and prescribing the duties of the agents of such companies, and of the auditor of state in connection with such business, in force at the time plaintiff's alleged cause of action accrued against the defendant, and at the time this suit was commenced, and still in full force. The principle that a state may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions, and restrictions it may think proper, that are not repugnant to the constitution or laws of the United States, is firmly established by the decisions of the supreme court of the United States. *Bank v. Earle*, 13 Pet. 519; *Insurance Co. v. French*, 18 How. 404; *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410; *Doyle v. Insurance Co.*, 94 U. S. 535. In *Paul v. Virginia*, *supra*, the court said: "The corporation, being the mere creation of the law, can have no legal existence beyond the limits of the sovereignty, where created. As said by this court in *Bank v. Earle*: "It must dwell in the place of its creation and cannot migrate to another sovereignty. The recognition of its existence, even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states,—a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recog-

dition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely. They may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as, in their judgment, will best promote the public interest. The whole matter rests in their discretion." Such is the law applicable to the question we are now considering, as it is declared by the highest court of last resort, under our form of government. Under this law, and in the exercise of supreme and sovereign power, the general assembly of this state enacted the above-entitled act of December 21, 1865, and the subsequent acts amendatory thereof, or supplemental thereto, heretofore described and cited herein. In these acts the state of Indiana has imposed upon the defendant herein, and upon other foreign insurance companies, as a condition of coming into or doing business within its territory, such terms, conditions, and restrictions as the state has thought proper. We have been unable to discover, either from our own search and examination, or by the aid of the briefs of defendant's counsel, that any one or more of such terms, conditions, or restrictions are repugnant to the constitution or laws of the United States. Under the decisions of the supreme court of the United States heretofore cited, it must be held, therefore, that the terms, conditions, and restrictions, imposed by our statute regulating foreign insurance companies doing business in this state, were such as the state might lawfully impose upon the defendant herein, and other similar corporations, as a condition of coming into or doing business within its territory.

Much of the able brief of defendant's counsel is devoted to the consideration of the question whether the moneys sued for by the state in this action are taxes for revenue, or license fees exacted by virtue of the police power of the state. Counsel conclude, however, that, whether such moneys are taxes for revenues or license fees exacted as aforesaid, it must be held that section 3 of the above-entitled act of March 3, 1877, is void, because it attempts to levy different fees for the same privilege, from different members of the same class. But it is immaterial, as it seems to us, whether the moneys demanded by the state of the defendant herein, under the provisions of said section 3, (section 3773 *supra*,) are to be regarded as taxes for revenue or as license fees. In neither case is such section of the statute justly obnoxious to the charge of inequality in its provisions, in the sense that would render it unconstitutional. In *Insurance Co. v. Welch*, 29 Kan. 672, a case very similar to the one now before us, the same objection was urged to the retaliatory section of the Kansas statute regulating foreign insurance companies doing business in that state as the objection we are now considering to our statute; and it was held by the supreme court of Kansas that such objection was not well taken. The court there said: "The legislature may classify for the purposes of taxation or license, and when the classification is in its nature not arbitrary, but just and fair, there can be no constitutional objection to it. * * * Here foreign insurance companies are classified by the states from which they come, and, when we consider the purposes of such classification, it cannot be held that there is anything arbitrary or unjust therein. But, doubtless, this charge is not to be considered as within the constitutional restrictions as to taxation, but rather in the nature of a license or condition of entering this state and transacting business within its limits." What is here said by the supreme court of Kansas upon the point under consideration meets our full approval. Moneys which have or may become due to the state from any foreign insurance company, under the provisions of the retaliatory section of our statute regulating foreign insurance companies doing business in this state, are or will be due and payable as a part of the terms or conditions of its entering this state and transacting business within its limits. Such retaliatory section

of our foreign insurance company statutes, therefore, is not within our constitutional restrictions in relation to taxation. Defendant's counsel are mistaken, we think, in their construction of such retaliatory section of our statute, when they assert, as they do, that, in and by such section, the general assembly of this state have enacted, or have attempted to enact, "the laws of Pennsylvania on the subject of insurance into our statutes on that subject." Nothing of that kind is done, or is attempted to be done, in or by such section, if fairly construed. Nor can it be said, with any degree of legal accuracy, that, by the enactment of such retaliatory section, the general assembly of this state have "adopted," or have attempted to "adopt," the statute laws of the state of Pennsylvania, or any part thereof, upon the subject of insurance, or upon any other subject. To the people and courts of this state the statutes of the state of Pennsylvania on the subject of insurance, since such retaliatory section became a part of our law, have been, as they were before, facts merely, and, as such, they must be pleaded and proved by any party who relies upon their existence as constituting a part of his cause of action. But we need not extend this opinion further in the examination and consideration of the questions presented for decision in the case at bar. It is clear to our minds that section 3, above quoted, of the above-entitled act of March 3, 1877, (section 3773, *supra*.) sometimes called and known as the retaliatory section of our statutes regulating foreign insurance companies doing business in this state, is not repugnant to, or in conflict with, any provision of our fundamental laws, state or federal. But such section is, we think, a constitutional and valid exercise of legislative will, is not void for uncertainty, is susceptible of enforcement, and ought to be enforced upon the happening of the contingency therein mentioned. Similar legislation to that of our retaliatory section has been upheld as constitutional, and enforced by the courts of last resort, in the states of Virginia, Illinois, Kansas, and New York. *Goldsmith v Insurance Co.*, 62 Ga. 379; *Insurance Co. v. Swigert*, 104 Ill. 653; *Insurance Co. v. Welch*, 29 Kan. 672; *People v. Association*, 92 N. Y. 311. See, also, as bearing upon the questions under consideration, *Insurance Co. v. Brim*, 111 Ind. 281, 12 N. E. Rep. 315, and *Insurance Co. v. Burdett*, 112 Ind. 204, 13 N. E. Rep. 705, and cases cited. Our conclusion is that the court below erred in sustaining defendant's demurrer to plaintiff's complaint herein. The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

(115 Ind. 291)

BLACKMER, Treasurer, etc., v. ROYAL INS. CO. OF LIVERPOOL *et al.*

(*Supreme Court of Indiana. June 22, 1888.*)

1. INSURANCE—FOREIGN COMPANIES—LICENSE FEES—CONSTITUTIONAL LAW—EQUAL TAXATION.

Rev. St. Ind. 1881, § 3773, providing that "when, by the laws of any other state, any taxes, fines, penalties, licenses, fees, deposits of money, or securities, or other obligations or prohibitions, are imposed upon insurance companies of this or other states, or their agents, greater than are required by the laws of this state, then the same obligations and prohibitions of whatever kind shall in like manner, for like purposes, be imposed upon all insurance companies of such states, and their agents; all insurance companies of other nations under this section shall be held as of the state where they have elected to make their deposit and establish their principal agency in the United States,"—is not unconstitutional as attempting to levy different fees for the same privilege, from different members of the same class.

2. SAME—ENACTING LAWS OF ANOTHER STATE.

Neither is such section unconstitutional as attempting to enact the laws of another state on the subject of insurance in the statutes of Indiana.

3. SAME—CERTAINTY.

Neither is such section void for uncertainty. Following *State v. Insurance Co.*, *ante*, 574.

4. SAME—ACTION TO RECOVER—PARTIES PLAINTIFF.

The legislature of New York having imposed upon insurance companies of other states doing business there a tax greater than that imposed by Indiana, and requiring it to be paid to the treasurer of the fire department of each city, or to the city treasurer, who should have all the powers of such treasurer of the fire department in cities where there was none, the treasurer of such city in Indiana cannot maintain an action against a New York company for taxes under said section, as the collection thereof is the duty of the state officers only; Acts Ind. 1873, p. 205, § 8, providing that such companies shall report their earnings to the auditor of the state, and pay taxes thereon into the state treasury.

Appeal from circuit court, Tippecanoe county; DAVID P. VINTON, Judge.

Action by Collins Blackmer, treasurer of the city of La Fayette, on behalf of the fire department of that city, against the Royal Insurance Company of Liverpool, and Edward Groenendyke, agent of said company, to recover taxes due to said fire department. Judgment for defendants on demurrer. Plaintiff appealed.

James R. Carnahan and D. P. Baldwin, for appellant. *McDonald & Butler and Finch & Finch*, for appellees.

Howk, J. In this case, appellant, Blackmer, treasurer of the city of La Fayette, on behalf of the fire department of said city, sued the defendants, the Royal Insurance Company of Liverpool, and Edward Groenendyke, agent of such company at said city of La Fayette. Defendants separately demurred to the complaint herein, upon the ground that it did not state facts sufficient to constitute a cause of action. These demurrers were sustained by the court below, and to these rulings plaintiff excepted, and, declining to amend, the court adjudged that he take nothing by his suit, and that defendants recover of him their costs. Plaintiff has appealed, and has here assigned as errors the sustaining of the demurrers to his complaint.

Plaintiff alleged in his complaint that said Royal Insurance Company was duly incorporated under the laws of England, for the purpose of taking risks against loss or damage by fire, and had elected to make its place of deposit and establish its principal agency in this country, in the city, county, and state of New York; that said insurance company, by its agent and co-defendant, Groenendyke, had been carrying on the business of fire insurance in said city of La Fayette continuously since March 3, 1877; that said insurance company, by its agents, had received as premiums on insurance against loss or damage by fire upon property situate within the corporate limits of said city of La Fayette, since March 3, 1877, and prior to September 1, 1879, the sum of \$10,000; that the city of La Fayette had, under the control of its common council, an organized fire department, which department had no treasurer; that, as treasurer of such city, plaintiff had authority to collect all moneys due said fire department, for the use and benefit thereof, from insurance companies transacting fire insurance within said city, organized under the laws of any other nation and country, but having their principal place of deposit and principal agency in the United States, for the transaction of business, in another state than the state of Indiana, and not incorporated under the laws of this state. Plaintiff then set out in his complaint section 3, of the amendatory and supplemental act of March 3, 1877, regulating foreign insurance companies doing business in this state, (section 3773, Rev. St. 1881,) as follows: "When, by the laws of any other state, any taxes, fines, penalties, licenses, fees, deposits of money or securities, or other obligations or prohibitions, are imposed upon insurance companies of this or other states, or their agents, greater than are required by the laws of this state, then the same obligations and prohibitions, of whatever kind, shall, in like manner for like purposes, be imposed upon all insurance companies of such states, and their agents. All insurance companies of other nations, under this section, shall be held as of the state where they have elected to make their deposit and establish their principal agency in the United States." Plaintiff then averred that

the legislature of the state of New York, on the 19th day of May, 1876, enacted a law entitled "An act to require the payment of certain premiums to the fire departments of cities and incorporated villages, by fire insurance companies not organized under the laws of the state of New York, but doing business therein;" that by such law it was provided as follows: "There shall be paid to the treasurer of the fire department of every city or incorporated village of this state, for the use of such fire department,—and when no treasurer of a fire department exists, then to the treasurer of such city or village who, for the purposes of this act, shall have the same powers as the treasurers of fire departments,—on the 1st day of November of each year, by every person who shall act as agent for or on behalf of any individual or association of individuals, not incorporated under the laws of this state, to effect insurance against loss or injury by fire upon property in this state, although such individual or association may be incorporated for that purpose by any other state or country, the sum of two dollars upon the hundred dollars, and that rate upon the amount of all premiums which, during the year or part of a year ending on the last preceding 1st day of September, shall have been received by such agent or person, or received by any other person for him, or shall have been agreed to be paid for any insurance effected, or agreed to be effected, or promised by him as such agent, or otherwise to be effected, against loss or injury by fire upon property situate within the corporate limits of such city or village." Plaintiff further averred that the law last quoted was still in force in the state of New York and applicable to fire insurance companies of this and other states; that by said law there was collectible from fire insurance companies of this and other states the sum of \$2 upon the \$100, and at that rate upon all premiums which had been received, and had been agreed to be paid, for insurance effected against loss and injury by fire upon property within the corporate limits of the city or incorporated village where such company should transact business within the state of New York; that said tax and fee of 2 per cent., so imposed by said law of the state of New York, was, by that amount, greater than was imposed and required for a like purpose by the laws of this state from insurance companies of other states doing business in this state; that, by reason of the premises, defendants were indebted to the fire department of said city of La Fayette in the sum of \$200, being 2 per centum of the amount of money received and agreed to be paid to said Royal Insurance Company, defendant, for insurance effected and agreed to be effected against loss and injury by fire upon property within the corporate limits of the city of La Fayette, since March 3, 1877, and prior to September 1, 1879; and that said sum of money was then due, owing, and wholly unpaid. Wherefore, etc.

Two questions are presented for decision by the record of this cause, and the error assigned thereon, which may be thus stated, namely: (1) Is section 3 of the amendatory and supplemental act of March 3, 1877, (section 3773, Rev. St. 1881.) regulating foreign insurance companies doing business in this state, etc., a constitutional and valid law? And, (2) conceding such section 3 to be a constitutional and valid statute, does plaintiff's complaint herein state a case within its purview, and within the intent of the law-making power of the state, in its enactment?

The first of these questions we examined and decided in the recent case of *State v. Insurance Co.*, ante, 574, (at the present term.) In the case cited, we held, upon full consideration, as we do here, that such section 3 (section 3773, *supra*) is not in conflict with any provision of our fundamental laws, state or federal, but is a constitutional and valid law. *Goldsmith v. Insurance Co.*, 62 Ga. 379; *Insurance Co. v. Swigert*, 104 Ill. 653; *Insurance Co. v. Welch*, 29 Kan. 672; *People v. Association*, 92 N. Y. 311; *Insurance Co. v. Burdett*, 112 Ind. 204, 13 N. E. Rep. 705.

2. We are of opinion that the second question, above stated, must be an-

swered in the negative; that the case made by the facts averred in the complaint herein does not come within the scope of such section 3, or within the letter, spirit, or intention of any of its provisions. The first valid legislation of this state, in relation to foreign insurance companies, *eo nomine*, was "An act regulating foreign insurance companies doing business in this state, prescribing the duties of the agents thereof, and of the auditor of state in connection therewith, and providing penalties for the violation of the provisions of this act," approved December 21, 1865, (Acts 1865, Sp. Sess. p 105 *et seq.*) Such foreign insurance companies were not required to pay any taxes, or any money in the nature of taxes, by the provisions of this act. The only moneys which such companies or their agents were required to pay for any purpose by the above-entitled act were certain small fees to the auditor of state for his services under such act. On March 8, 1873, an act was approved entitled "An act supplementary and amendatory of an act entitled 'An act to provide for a uniform assessment of property, and for the collection and return of taxes thereon,' approved December 21, 1872." Acts 1873, p. 205 *et seq.* Section 8 of this latter act reads as follows: "Sec. 8. Every insurance company not organized under the laws of this state, and doing business therein, shall, in the months of January and July of each year, report to the auditor of state, under oath of the president and secretary, the gross amount of all receipts received in the state of Indiana on account of insurance premiums, for the six months last preceding, ending on the last days of December and June of each year, and shall, at the time of making such report, pay into the treasury of the state the sum of three dollars on every one hundred dollars of such receipts, less losses actually paid within the state." It will be seen from its provisions that this section of the statute provides for the assessment and payment, semi-annually, by foreign insurance companies doing business in this state, of a tax on their premium receipts, less losses actually paid within the state, as revenue for state purposes. It was the first and only statute of this state providing for such taxation during the period of time covered by plaintiff's alleged cause of action, and continued in force until it was superseded by section 6351, Rev. St. 1881, which became in force on March 29, 1881. We have never had any statute which authorized the cities or incorporated towns of this state, or any of their officers, to assess or collect, by any form of procedure of foreign insurance companies or their agents transacting the business of insurance within their corporate limits, any such taxes as those described in the complaint herein. We are clearly of the opinion that plaintiff's pending action is not authorized by any of the provisions of section 3 of the amendatory and supplemental act of March 3, 1877, (section 3773, *supra*,) or by any other statute of this state. Indeed, it is apparent, we think, from the titles of the several acts in relation to foreign insurance companies and from all the provisions of such acts, that the general assembly committed, and intended to commit, the entire regulation of such companies, under the law, to the state officers exclusively, and especially the collection of all such taxes as were or might be assessed against such companies, as well under the provisions of such section 3 (section 3773, *supra*) as under those of said section 8, last above quoted. Our conclusion is therefore that the court below committed error in sustaining the separate demurrers of the defendants to the complaint herein. The judgment is reversed, with costs.

(115 Ind. 696)

BLACKMER, Treasurer, etc., v. HOME INS. CO. OF NEW YORK *et al.*

(*Supreme Court of Indiana. June 22, 1888.*)

Appeal from circuit court, Tippecanoe county; DAVID P. VINTON, Judge.
Jas. R. Carnahan and D. P. Baldwin, for appellant. McDonald & Butler and Finch & Finch, for appellees.

Howe, J. By the record of this cause, and the error assigned thereon, substantially the same questions are presented for decision as those which were considered and de-

cided by this court in the recent cases of *State v. Insurance Co.*, ante, 574, and *Blackmer v. Insurance Co.*, ante, 580, (at the present term.) Upon the authority of the cases cited, the judgment is reversed, with costs.

(115 Ind. 378)

LOUISVILLE, N. A. & C. R. Co. v. WRIGHT.

(Supreme Court of Indiana. June 20, 1888.)

1. MASTER AND SERVANT—ASSUMPTION OF RISK—RAILROAD COMPANIES—BRIDGES.

A brakeman, on so dark a night that he could not see around him, at the request of the engineer in charge of the train, went to the top of a car to set the brakes, as was his duty, and, without any fault of his own, was knocked off the car, and seriously injured, by his head coming in contact with a bridge, built by the defendant company so low as not to allow a man on the top of a car to walk and stand erect. The brakeman had no knowledge or express notice of the dangerous nature of the bridge, or any opportunity of finding out its dangerous character. *Held*, that he was entitled to damages against the defendants, as on entering their service he did not assume risks of unusual danger, of which he had no knowledge, and of which he was not bound to take notice.¹

2. SAME—NEGLIGENCE—INSTRUCTIONS.

In an action by a brakeman against his employer for personal injuries, there being no dispute as to the facts, an instruction that it is negligence, for which a railway company is liable, to construct and maintain a bridge only four feet and nine inches above the tops of the cars, where it was plaintiff's duty to go to operate the brakes, is proper.²

3. SAME—EVIDENCE—CONSTRUCTION OF BRIDGES BY OTHER ROADS.

In an action against a railroad by a brakeman for injuries received from being struck by a bridge, it is no error to exclude evidence that there are bridges on all railways in the United States too low for brakemen standing or walking on the top of ordinary box cars to pass under with safety.

4. SAME—NOTICE TO RAILROAD—EVIDENCE OF OTHER ACCIDENTS.

In an action for injuries received by a brakeman from being struck by a bridge, it is competent, for the purpose of showing knowledge on the part of the railroad company that the bridge was dangerous, to show that, prior to the time of plaintiff's injuries, other persons had been struck in the same manner, and seriously injured.³

5. EVIDENCE—ADMISSIONS—OFFERS OF COMPROMISE.

A letter written by plaintiff to defendant, before action brought, containing an offer or proposition for a compromise of a legal controversy, not accepted, cannot be produced in evidence for or against either party.⁴

6. DAMAGES—FOR PERSONAL INJURIES—EVIDENCE—OPINION.

A doctor having been at time of trial a practicing physician and surgeon for more than 20 years, but who had not attended plaintiff continuously up to the time of trial, is competent to give evidence as to the probable result of plaintiff's injuries.⁵

¹ It is the duty of a railroad company to so construct its track and bridges as will make them safe for its employees to perform their duties; and a party entering its service has a right to assume that this obligation has been discharged. *Railroad Co. v. Irwin*, (Kan.) 16 Pac. Rep. 146. On the subject of the assumption by the servant of risks of unusual danger by reason of previous knowledge thereof, see *Rogen v. Morgan's Sons Co.*, 1 N. Y. Supp. 273.

² That a railroad company is liable to its employees for injuries sustained by reason of its negligence in failing to keep its track in proper condition, see *Knapp v. Railway Co.*, (Iowa,) 32 N. W. Rep. 18; *Hewitt v. Railroad Co.*, (Mich.) 34 N. W. Rep. 659; *Railway Co. v. Eubanks*, (Ark.) 3 S. W. Rep. 808; *Railway Co. v. Pettis*, (Tex.) 7 S. W. Rep. 93. The master's duty and liability to his servant extends, not only to such unnecessary and unreasonable risks as are in fact known to him, but to such as he ought to have known in the exercise of proportionate diligence. *Cook v. Railway Co.*, (Minn.) 24 N. W. Rep. 811; *Regan v. Railway Co.*, (Mo.) 6 S. W. Rep. 371.

³ Likewise, in an action against a municipality to recover for injuries sustained by reason of a defective sidewalk, evidence that other accidents had previously occurred at the same place is admissible for the purpose of showing notice of the defect on the part of the city authorities. *District of Columbia v. Arms*, 2 Sup. Ct. Rep. 840.

⁴ See note, 16 N. E. Rep. 153.

⁵ A foundation for the introduction of the opinion of witnesses as experts requires to be laid only where the witnesses are unacquainted with the facts of the case. A witness who has knowledge of the material facts may give his opinion by showing the reason for it, whether he be an expert or not. *Killian v. Railroad Co.*, (Ga.) 3 S. E. Rep. 631.

7. TRIAL—INSTRUCTIONS—CHARGE TO BE TAKEN AS A WHOLE.

It is unnecessary to embody the whole law of a case in one instruction; and, if an instruction contains no erroneous proposition of law, it is proper to be given, although not full enough,—the remedy being to submit other instructions.

8. SAME.

Inaccuracy of statement in particular instructions is not ground for reversal, where, considering all the instructions together, the law of the case is correctly and intelligently stated.

9. SAME—REPETITION.

It is not error to refuse an instruction when another is given in substance embodying the same principles.

10. SAME—HARMLESS ERROR.

It is harmless error to give an erroneous instruction upon the effect of plaintiff's negligence, at the request of plaintiff, where the jury find specially that he has not been guilty of negligence.

Appeal from circuit court, Jasper county; PETER H. WARD, Judge.

On rehearing. For former opinion, see 16 N. E. Rep. 145.

George W. Easley and *W. F. Stillwell*, for appellant. *W. P. Adinon, J. P. Wright*, and *E. P. Hammond*, for appellee.

ZOLLARS, J. It was held in the principal opinion that we could not, over appellee's objection, decide the questions made upon the giving and refusal of instructions, for the reason, as there stated, that, although the clerk had copied into the record what purported to be instructions given and refused, there was nothing to show that they had been filed by him as required by the statute, in order that they might become a part of the record without a bill of exceptions. In its petition for a rehearing, appellant's counsel cite us to another portion of the record where the instructions thus given and refused are embodied in the bill of exceptions. This they should have done in their original briefs, as required by rule 19 of this court. The question was made in appellee's brief, and in his counsel's statement of points for oral argument, that the instructions were not in the record for the reasons above stated, and stated in the principal opinion. Appellant's counsel now claim that they met the question thus made in their oral arguments. If their recollections are correct, ours are at fault. However that may be, as the case is an important one, we give to appellant the benefit of the doubt, and have very carefully examined all of the instructions given and refused, as also the arguments of counsel in relation thereto. The theory of appellant's counsel is that the railway company was only bound to exercise ordinary care in the construction and maintenance of the bridge, and that the jury should have been so instructed; and, further, that if appellee had an opportunity, by the exercise of care, to discover that the bridge was too low to pass under with safety, and remained in the service of the company, he must be held to have voluntarily assumed the risk, and thereby waived all right of action for damages.

Complaint is made that some of the instructions given at the request of appellee, and upon the court's own motion, do not come up to the standard thus fixed by appellant's counsel, in that they omit the element of ordinary care on the part of appellant in the construction and maintenance of the bridge, and put the case to the jury regardless of the assumption of risk on the part of appellee. It would be a tedious, and we think unprofitable, task to set out all of the numerous instructions thus objected to, and to extend this opinion in meeting specifically the objections urged. Some of the instructions are somewhat confused, in that the jury were instructed in relation to matters not in issue either by the pleadings or the proof; but we think that the extraneous matters referred to could in no way have misled the jury to the prejudice of appellant. Some of the instructions given were, perhaps, not as full as they might have been; but it has often been held by this court that it is unnecessary, as it is impracticable, to embody all of the law of the case in one instruction, and that where a rule of law applicable to the case is given

In one instruction it is not necessary to repeat it in another; and, further, that if an instruction contains no erroneous proposition of law as applied to the case, and either party thinks that it is faulty because not full enough, his remedy is to submit additional instructions. *Railroad Co. v. Jones*, 108 Ind. 551, (570,) 9 N. E. Rep. 476, and cases there cited; *Board, etc., v. Legg*, 110 Ind. 479, (485,) 11 N. E. Rep. 612, and cases there cited; *Wilson v. Gravel Road Co.*, 93 Ind. 287, (291.) And so it has many times held that all of the instructions given must be considered together; and that if, thus considered, the law was correctly stated, in such a manner as to be intelligible and not confusing to the jury, the judgment will not be reversed by reason of inaccurate statements in any particular instructions. *Railroad Co. v. Jones, supra*, and cases there cited. *Cline v. Lindsey*, 110 Ind. 337, 11 N. E. Rep. 441, and cases there cited; *Rauck v. State*, 110 Ind. 384, 11 N. E. Rep. 450, and cases there cited; *Deig v. Morehead*, 110 Ind. 451, 11 N. E. Rep. 458, and cases there cited.

Leaving out of consideration for the present the seventh instruction given at the request of appellee, the others, given at his request, and upon the court's own motion, taken together, put the case to the jury substantially upon the theory contended for by appellant's counsel; and in the 10 instructions given at the request of appellant's counsel, their theory was pushed to the utmost limit, and in some instances beyond what reason and the correct rules of the law will justify. It appears in this case that the brakes which appellee was required to set were on the tops of the cars. It was necessary for him, in getting to them, to pass over the tops of the cars. There are cases which hold that in such a case railway companies are not bound to erect the overhead bridges constructed by them of such a height that brakemen can stand or walk erect upon the tops of the cars without coming in collision with them. As applied to this case especially, we can not approve of those rulings. Here the bridge was but four feet and nine inches above the top of the cars. The brakes were on the tops of the cars; and, to get to them, the brakemen were required to pass over the tops of the cars, not only in the day-time, but also in the night-time, and often, doubtless, as in this case, when the night was dark, raining, and foggy, and when it would be almost, if not quite, impossible for them to know of the proximity of such bridges when called to brakes upon moving trains, even if they had knowledge that such bridges were maintained. To erect and maintain such bridges under such circumstances is negligence. Further reflection has strengthened the conviction on our part that this conclusion is fully sustained, both by reason and the better authority. In addition to the authorities cited in the principal opinion, we cite the following: 1 Shear. & R. Neg. (4th Ed.) § 198 *et seq.*, and notes, and cases there cited. Beach, Contrib. Neg. § 134; *Railroad Co. v. Johnson*, 116 Ill. 206, 4 N. E. Rep. 381. And where, as here, the facts are shown without any conflict in the evidence, the court may charge the jury that, in the erection and maintenance of the bridge, the railway company was guilty of negligence. *Board, etc., v. Legg*, 110 Ind. 479, 11 N. E. Rep. 612, and cases there cited.

In the contract of hiring, an employe assumes all risks ordinarily and naturally incident to the service, but he does not assume the risk of injury from unusual hazards. To say the least, in this case, appellee did not, by his contract of hiring, assume the risk of injury from the low bridge, unless he had knowledge of the hazard. The danger from such a bridge is not a hazard ordinarily and naturally connected with the service. It is not shown that he was informed of the danger, nor that he had knowledge of it when he engaged in the service. As to his duty to exercise care for his own safety, both in discovering the danger and in avoiding the injury, the jury were fully instructed, and, as we have said, and without being more specific, the rule was pushed beyond what reason and the law will sanction.

It is not easy to determine whether the seventh instruction given at the request of appellee was intended to place appellee's right to recover upon the doctrine of comparative negligence, or upon the ground of willfulness on the part of appellant, in which case negligence on the part of the appellee would not defeat his right to recover. Upon either construction the instruction was erroneous. In the first place, the doctrine of comparative negligence, as held by the Illinois court, and as applied to a case like this, has no place in the rulings of this court; and, in the second place, appellant is not charged with willfulness in the complaint. The error, however, must be regarded as a harmless one, as the jury found, in answer to interrogatories, that appellee was not guilty of negligence. It is therefore apparent that the verdict was not based upon the greater negligence of appellant and the lesser negligence of appellee; nor upon the theory that, although appellee was guilty of negligence, he could yet recover by reason of willfulness on the part of appellant. See *Worley v. Moore*, 97 Ind. 15; *Woolery v. Railway Co.*, 107 Ind. 381, 8 N. E. Rep. 226.

As to the eleventh instruction asked by appellant and refused by the court, it is sufficient to say that it does not state the law correctly; and that, if it did, the error in refusing it would be a harmless error, as the second instruction so asked and given embodied the substance of it. *Stephenson v. State*, 110 Ind. 358, 11 N. E. Rep. 360; *Association v. Grauman*, 107 Ind. 288, 7 N. E. Rep. 233. And so of instructions 12 and 12½ asked by appellant and refused by the court, without deciding whether, as asked, they stated the law correctly, it is sufficient to say that the substance of them was embodied in other instructions given. From what is here said it must not be understood that we intend to indorse in full the theory upon which appellant's counsel have argued the alleged errors in the giving of instructions as above stated, and as applied to a case like this.

After a careful consideration of all of the questions discussed by counsel, we are satisfied that the record presents no error for which the judgment should be reversed. The petition for a rehearing is therefore overruled.

(116 Ind. 15)

CITY OF LOGANSFORT v. DYKEMAN *et al.*¹

(Supreme Court of Indiana. June 21, 1888.)

1. MUNICIPAL CORPORATIONS — CONTRACTS WITH ATTORNEY TO EFFECT COMPROMISE — RECORD OF VOTE OF COUNCIL.

Though Rev. St. Ind. 1881, § 3099, declares that "on the passage or adoption of any by-law, ordinance, or resolution, the yeas and nays shall be taken and entered of record," yet a contract by a city council to pay for services to be rendered in effecting a compromise of the city's indebtedness, when such compromise is effected and accepted, is good, though not in writing, and though the vote of the council does not appear upon the record of its proceedings.

2. SAME — ESTOPPEL TO DENY REGULARITY OF MEETING.

Where a contract by a municipality for services to be rendered in effecting a compromise of its indebtedness was made at a meeting attended by eight of the ten members of the council, presided over by the mayor, and in the presence of the city attorney; and many subsequent meetings of the council were held, all of whom knew of the contract, and there was no dissent, or attempt to abrogate it; and a payment of part of the stipulated consideration was made by the treasurer, whose report thereof was confirmed; and the compromise was effected, and the city's debt greatly reduced,—the municipality, when sued for the consideration of the contract, cannot question the regularity of the meeting of the council at which it was made.

3. SAME — ACTION ON CONTRACT — PLEADING — PRESUMPTION.

Under a complaint upon a contract alleged to have been entered into by a municipal corporation, it will be presumed that whatever was necessary to the contract in respect to entries upon the record of the proceedings of the common council was done.

4. SAME — DEFENSES — LIMITATION OF INDEBTEDNESS.

Const. Ind. art. 18, limiting municipal indebtedness, furnishes no defense to an action upon a contract by a municipality to pay for services to be rendered in effecting a compromise of its indebtedness.

¹ Rehearing denied.

5. SAME—CONTRACT BY MEMBER OF COUNCIL.

Where the complaint in an action on a contract made by a municipal corporation alleges that the plaintiff's partner, who is made a party defendant, had assigned all his interest in the contract to plaintiff, it is not a good plea in bar by the municipality that, since making such contract, such copartner became and now is a member of its common council, and while such received a part of the benefits of the contract.

6. SAME—EVIDENCE—REPORT OF COMMITTEE.

In an action on a contract made by a municipality, the report of a committee of the common council upon plaintiff's claim is admissible so far as it is in the nature of an admission that the council had notice of the contract, and that plaintiff was proceeding under it.

7. SAME—OBJECTIONS TO EVIDENCE.

In an action upon a contract for services with a municipality, where the report of a committee of the common council upon plaintiff's claim was introduced in evidence over defendant's objection to it as an entirety, defendant cannot take advantage of the inadmissibility of the opinion of the city attorney, appended thereto, that plaintiff's services were valuable, and that he ought to be paid according to the agreement.

8. PLEADING—PLEAS IN ABATEMENT—PARTIES—IMPROPER JOINDER.

It cannot be pleaded in abatement that a party interested in the cause of action is made a party defendant, instead of being joined as plaintiff.

9. CONTINUANCE—ABSENCE OF WITNESS.

It is within the discretionary powers of the court to refuse a continuance on the ground of the absence of a witness.

10. JURY—SUMMONING AND IMPANELING—SELECTION FROM BY-STANDERS.

In ordering jurors to be selected from the by-standers, instead of being regularly drawn by the jury commissioners, the court acts in its discretion.

Appeal from circuit court, Cass county; M. WINFIELD, Judge.

Action by David D. Dykeman and George C. Taber against the city of Logansport to recover compensation for the services of Dykeman in effecting a compromise of certain of the defendant's bonded indebtedness. The first and third paragraphs allege a contract for such services between the city and Dykeman, acting for himself and his copartners in the firm of Dykeman, Wilson & Taber, and the second paragraph is upon the common count for the same services. Wilson, who was alleged to have assigned his interest to plaintiffs, was joined as a defendant, and filed a disclaimer. A demurrer to the first and third paragraphs was overruled. The city filed a plea in abatement admitting the partnership between plaintiffs and Wilson, and alleging that Wilson was a member of defendant's common council from May 5, 1885, and was such at the time of answer; and that as such partner, subsequent to November 5, 1885, he received his proportionate share of the fees arising from the collection of certain bonds which formed a part of the consideration of the alleged contract with the city, and which were paid under such contract. A demurrer to the answer in abatement was sustained. At the trial the city asked for a continuance on the ground of the absence of one of its witnesses, Daniel W. Tomlinson, who was a councilman. The remaining facts are sufficiently stated in the opinion. Judgment was entered for plaintiffs, and the city appealed.

Q. A. Myers, (*D. H. Chase*, of counsel,) for appellant. *D. C. Justice*, *D. P. Baldwin*, and *D. D. Dykeman*, for appellees.

MITCHELL, J. This was a suit brought by David D. Dykeman and George C. Taber against the city of Logansport to recover the amount which it is alleged the city agreed to pay the plaintiffs for the services of the appellee Dykeman in effecting a compromise and settlement of a large outstanding bonded indebtedness against the city in the year 1885. William T. Wilson, a partner in business with the plaintiffs, was made a party defendant to answer; it being alleged in the complaint that he had no interest in the claim against the city, he having assigned or surrendered his interest therein to the plaintiffs. It is averred that the *Ætna Insurance Company* of Hartford, Conn., held bonds theretofore issued by the city of Logansport, amounting to \$80,-

000 principal, and \$61,000 of accumulated and overdue interest. Suit had been commenced, and was then pending against the city to enforce a payment of the bonds and interest, amounting to \$141,000. Thereupon, on the 4th day of February, 1885, the city of Logansport, as it is alleged, entered into a contract with the plaintiff Dykeman, by the terms of which the latter undertook and agreed to effect a compromise, and settle with the holders of the bonds and coupons, and procure the indebtedness to be canceled and surrendered up to the city upon such terms as might be agreed upon by the common council of the city and the holders; for which services the city promised and agreed to pay him 5 per cent. of the amount of the reduction which he might secure from the principal and interest of the bonds and coupons. It was further provided that, in case the plaintiff should fail to secure a compromise and reduction satisfactory to the common council of the city, he was to receive no compensation for his services, except the sum of \$100, which was to be paid towards his expenses. It is averred that he entered upon the performance of his contract; that the city paid him \$100 out of its treasury for his expenses; and that he secured a compromise which was acceptable to the city,—the result of the settlement being that the bonds and interest coupons above mentioned were surrendered up and canceled upon the payment by the city of \$95,000, thus saving the sum of \$46,000. The plaintiffs claim that the city became indebted to them in the sum of \$2,300; that amount being 5 per cent. of the reduction secured by the services of the appellee Dykeman. The complaint was held good on demurrer, and this ruling is one of the grounds on which error is predicated.

The argument on behalf of the appellant is based upon the proposition that "a common council of a city can only enter into a contract for personal or professional services by a record." Hence it is contended, since it does not appear by averment in the complaint in the present case that the contract which the plaintiffs rely upon was entered of record, and adopted by taking the yeas and nays, as is required upon the adoption of a by-law, ordinance, or resolution, that it afforded no right of action, and that the court below erred in not sustaining the demurrer to the complaint. The averment in the complaint in that regard is general, and to the effect that on the 4th day of February, 1885, the city of Logansport entered into a contract with the plaintiffs whereby the appellee Dykeman undertook and agreed that in consideration, etc. Under this averment, it must be presumed that whatever was necessary to be done by the common council in respect to its records, in relation to entering into the contract relied on by the plaintiffs, was properly done. *Over v. City of Greenfield*, 107 Ind. 231, 5 N. E. Rep. 872. It is quite true that section 3099, Rev. St. 1881, declares that, "on the passage or adoption of any by-law, ordinance, or resolution, the yeas and nays shall be taken, and entered of record." This is to the end that in acting upon matters of a quasi judicial or of a legislative character, in which the public is concerned, or which may affect the persons or property of citizens, each member of the common council shall be obliged to assume his full measure of responsibility by putting himself upon record, and thus indicating his attitude in regard to the matter in question. *Steckert v. City*, 22 Mich. 104. It is a mistake to suppose, however, that in the transaction of mere matters of business, such as the purchase of goods necessary for the welfare of the corporation, or the employment of persons or agencies to perform service for or to protect the interests of the municipality, a formal ordinance, by-law, or resolution must be adopted, and the yeas and nays taken and entered of record. Cities are authorized, upon conditions prescribed, to issue bonds, to incur liabilities, to purchase and own property, and to employ various agencies in conducting the business affairs which concern the municipality. *City of Indianapolis v. Gas-Light Co.*, 66 Ind. 396; *Leeds v. City of Richmond*, 102 Ind. 372, 1 N. E. Rep. 711. As a consequence, they have the incidental power to compromise and adjust disputed claims, and to

employ agents or attorneys to accomplish that end. The statute does not prescribe the method by which contracts of that character are to be made, nor that such contracts must be in writing. The method of adopting or the form of such contracts are therefore matters within the discretion of the council. Of course, the proper and business-like way would require that the employment should appear upon the record of the proceedings of the common council; but the record is not necessarily the contract, although it may afford the most satisfactory evidence of the fact that a contract was made. Where, however, a common council, properly convened, enters into a contract with an attorney, or where an attorney is employed through the agency of a committee or other authorized person, and has performed service, of which the municipality has accepted the benefit, it will be too late, when he asks to be compensated for the services according to the agreement, to object that the contract was not in writing, or that the vote of the council does not appear upon the record of its proceedings. In respect to such contracts, a municipal corporation may be bound by the acts of its properly authorized agents substantially as a natural person. *Bank v. Patterson*, 7 Cranch, 299; *Township v. Township*, 11 Iowa, 506. Cases involving contracts for street improvements, and those in which certain precedent steps are required to be taken before the common council can acquire jurisdiction to contract at all, or where the statute requires that the contract be made in a certain form, or in pursuance of a certain mode, bear no analogy to the present case. In such cases the common council exercise a special statutory power in relation to the contract; and where a mode of procedure is prescribed, and the conditions and form of the contract are matters of statutory regulation, both the mode of procedure and form of the contract must be substantially observed. *City v. Humphrey*, 84 Ind. 467; *Turnpike Co. v. Board*, 72 Ind. 226. On the other hand, where the contract is one which the corporation has the incidental power to make, independently of any statute, in order that it may execute powers expressly conferred, and carry out the purposes of its being, the rule that such contracts are not void merely because there is no written evidence of them, or because of the absence of some mere formality, is now too firmly settled to be shaken. *Ross v. City of Madison*, 1 Ind. 281; *School Tp. v. Gebhart*, 61 Ind. 187; *State v. Hauser*, 63 Ind. 155-182; *McCabe v. Board*, 46 Ind. 380; *Leeds v. City of Richmond*, 102 Ind. 372, 1 N. E. Rep. 711; *City of Terre Haute v. Water-Works*, 94 Ind. 305; *White v. State*, 69 Ind. 273; *City of Logansport v. Crockett*, 64 Ind. 319; *Langdon v. Castleton*, 30 Vt. 285; 1 Dill. Mun. Corp. §§ 463-479. A broad distinction exists, and must be kept in view, between those cases in which a municipality, or some one through its authority, seeks to avail itself of the contract or proceedings of a common council, in order to impose a burden upon the property of another, or to affect the rights of others, and those in which the neglect or omission of the common council, or other officer of a city, to observe some mere matter of form, is interposed in order to deprive a person of compensation for services rendered for the municipality in respect to a matter in which no formality whatever is required. 1 Dill. Mun. Corp. § 449. In respect to contracts which are within the ordinary corporate power of a city, and in relation to which no statutory requirements are laid down, or mode of procedure prescribed, a municipal corporation will be bound by its contracts, and will be affected by the principles of ratification in the same manner as an individual. If the contract could have been made, in the first instance, without any particular or prescribed conditions or formalities, it being within the corporate authority, and a necessary incident to enable it to execute its functions, it may be ratified in like manner. *Cullen v. Town of Carthage*, 103 Ind. 196, 2 N. E. Rep. 571; 1 Dill. Mun. Corp. §§ 463, 464; *Machine-Works v. Parke Co.*, *post*, 593, (present term); *Corporation of Bluffton v. Studabaker*, 106 Ind. 129, 6 N. E. Rep. 1. So, also, in respect to services performed for a corporation

at its request. If the service relates to a matter within the scope of its powers, the corporation will be bound by implied contracts or agreements to pay; and such implied agreement may be deduced from authorized corporate acts without either a vote or deed or writing. 1 Dill. Mun. Corp. § 459. The court committed no error in overruling the demurrer to the complaint.

Several paragraphs of the answer presented defenses arising under article 13¹ of the constitution, relating to the limitation upon municipal indebtedness. As has already been seen, the complaint shows that the result of the contract with the plaintiff was to reduce the corporate indebtedness from \$141,000 to \$95,000. The answers, in effect, confess these averments in the complaint, but say that the contract to pay 5 per cent. is within the constitutional inhibition, because the city was already indebted in an amount beyond the limit of the constitution. The contract with the plaintiffs did not contemplate the creation of a new or additional debt. It was a contract for services to be rendered in securing the reduction of an existing debt. Certainly, it never was intended that a municipality whose indebtedness was actually or nominally up to the constitutional limit might not contract for the services of an agent or attorney to contest the validity of the whole or any part of its indebtedness, or secure a reduction of the amount thereof. To give the constitution such a construction would effectually tie the hands of municipalities, so to speak, and disable them from entering into any arrangement for refunding or reducing the amount of their pre-existing indebtedness by new promises to pay, or by any arrangement looking to a compromise. *Powell v. City of Madison*, 107 Ind. 106, 8 N. E. Rep. 31, and cases cited.

There are some other questions discussed, of minor importance, relating to questions raised by other answers, some of which are treated as pleas in abatement. It is quite sufficient to say that, after an attentive consideration of the argument in appellant's behalf, we have discovered no error in the rulings of the court in that connection. The fact pleaded in abatement was not matter which went to abate the suit. It went to the merits. *Morningstar v. Cunningham*, 110 Ind. 328, 11 N. E. Rep. 593. It affords no ground for the abatement of an action that a party really or nominally interested, is made a defendant to answer to his interest, instead of joining as a plaintiff. *Durham v. Hall*, 67 Ind. 123. In either case, his right under the contract would be barred by the event of the suit. Nor were the facts pleaded sufficient as an answer in bar. It was no cause of concern to the city if the defendant Wilson was content that it should be adjudged that he had no interest in the contract.

Some questions presented by the motion for a new trial, such as the overruling of the appellant's motion for a continuance on account of the absence of Mr. Tomlinson, and the objection that certain of the jurors were selected from the by-standers, instead of being regularly drawn by the jury commissioners, have been duly considered. In respect to these matters, the court acted within its discretion, and there was no error in the rulings of the court. *Deig v. Morehead*, 110 Ind. 451, 11 N. E. Rep. 458; *Heyl v. State*, 109 Ind. 589, 10 N. E. Rep. 916.

It is contended that the motion for a new trial should have been sustained because the verdict of the jury is contrary to law and contrary to the evidence. This contention is predicated upon the proposition that the common council of the city was not lawfully convened at the time the contract was

¹ By Const. art. 13, "no political or municipal corporation in this state shall ever become indebted, in any manner or for any purpose, to an amount in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void;" and by proviso allows an increase in the amount of obligations in case of war, foreign invasion, or other great public calamity.

entered into with the plaintiffs. Without attempting to detail the facts in that connection, it may be conceded, for the purposes of this case, that the meeting of the common council at the time referred to was informal. It is, however, beyond dispute that at a meeting of the common council, attended by eight of the ten members thereof, presided over by the mayor, and in the presence of the city attorney, the contract relied on was made. The evidence fully justifies the conclusion that, after the contract was thus entered into, the plaintiff Dykeman proceeded to consummate what he had undertaken on behalf of the city, and that the mayor, city attorney, and common council all knew that he was acting for the city, in pursuance of the contract thus made. The council met again and again; every member thereof having complete knowledge of what had been agreed upon, and of what was being done under the contract. So far as the record discloses, there was not one word of dissent, nor any attempt, at any subsequent meeting, to abrogate or set aside the action taken at the informal meeting of the mayor and common council. The \$100 which the council agreed to pay towards expenses had been paid by the city treasurer, and the payment regularly reported, through the proper committee, to the common council. This report appears to have been regularly confirmed. Finally, after months of negotiation and effort, a compromise was effected by the plaintiff Dykeman, which was accepted by the common council of the city. The city, as a result, received the surrender of its bonds and interest coupons to the amount of \$141,000, and, after the consummation of the whole matter, it now seeks to go back, and question the regularity of the meeting at which the contract under which the plaintiffs performed the service was made. With all the diligence and laborious research of counsel, they have presented no authority which would support a holding that the contract, even though not regularly made in the beginning, had not been so ratified and adopted by the subsequent acquiescence and affirmative conduct of the common council as to authorize a recovery. We do not for a moment doubt the proposition, so abundantly supported by appellant's counsel, that a municipal corporation cannot be bound by the ratification of a contract which it had no power to make, or which had been made in disregard of a mode prescribed by the statute. The principles of ratification cannot be invoked to help out or enlarge the power of a corporation to make contracts, or to cure or supply defects in case the prescribed mode of contracting has been disregarded; but we have already pointed out that the present case is within the rule which applies the principles of ratification to the contracts of municipal corporations, the same as to those of individuals. The common council having assumed to contract concerning a business matter which was entirely within its discretion both as to the time and mode of contracting, and having acquiesced in the performance of the contract, and accepted the results of the service performed under it, they must now be held to have ratified the original contract, so as to have made it as binding as though it had been adopted in a manner entirely beyond question.

The next question relates to the ruling of the court in admitting in evidence a report made to the common council by the claims committee, to whom was referred the claim of the plaintiff for compensation under the contract. This report purports to state the fact and manner of the employment of Mr. Dykeman, the various steps taken by him in bringing about a settlement, and it sets out copies of letters and telegrams which were laid before the mayor and various committees of the council during the progress of his negotiations for a compromise. It also recites the terms of the final compromise agreed upon, and it concludes with an appended statement by the city attorney to the effect that, in his opinion, the services of Mr. Dykeman were instrumental in bringing about the settlement, and that he ought to be paid according to the agreement. The report seems to have been objected to as an entirety. It was admitted upon the theory that it was in the nature of an authentic declaration.

tending to show that the common council had notice of the contract which had been entered into with the plaintiff, and that the mayor and council were advised from time to time, by the reports and correspondence which were laid before them, of the progress of events under the contract, and that the agreement entered into had therefore been acquiesced in and ratified by the knowledge and conduct of the common council. To the extent that the report of the committee was in the nature of an admission that the common council had notice of the contract, and that the appellee Dykeman was proceeding under it, it was properly admitted in evidence. *City of Delphi v. Lowery*, 74 Ind. 520. It must have been, in any event, harmless as evidence, for the reason that the matters therein recited do not seem to have been in serious dispute. The opinion and recommendation of the city attorney were not admissible in evidence for any purpose; but as we have been unable to discover any separate objection or motion addressed to that feature of the report, no question in that regard is presented by the general objection to the report.

Some questions are made in relation to the giving and refusing certain instructions; but these have been incidentally determined, in consonance with the ruling of the court, by what has been said upon the sufficiency of the complaint and the subject of ratification. They need not be adverted to again. The evidence tends to sustain the verdict and findings of the jury. While we have not separately stated each of the numerous questions made upon the briefs, we have examined them all. We find no error. The judgment is affirmed, with costs.

(115 Ind. 234)

BASS F. & M. WORKS v. PARKE COUNTY *et al.*

(*Supreme Court of Indiana.* June 15, 1888.)

1. COUNTIES—LIABILITIES—PLEADING—PRESENTATION OF CLAIM.

Though the circuit court, having jurisdiction over the subject-matter, has not perfect jurisdiction to adjudicate claims against the county until the same have been presented to the commissioners, still a complaint against the county which does not allege a presentation of the claim is not subject to demurrer for want of jurisdiction, under Rev. St. Ind. 1881, § 839, providing for demurrer to a complaint "when it appears on the face thereof * * * that the court has no jurisdiction," as the failure to present the claim may have been waived, and is to be shown by answer or plea.

2. SAME—CONTRACTS—ADVERTISING FOR BIDS.

Under Rev. St. Ind. 1881, §§ 4243-4245, prohibiting county commissioners from contracting for county buildings without first advertising for bids, if the contractor, after being accepted, has abandoned the work, a contract entered into by the commissioners with a subcontractor to pay him for work then done by him, and to pay him for work to be done by him in the future for them, is not *ultra vires*, as to the work to be done for them, if the building has progressed so that, in the judgment of the commissioners, it may be completed substantially under the original contract, and by keeping in operation the agencies already in motion.

Appeal from circuit court, Parke county; JOSHUA JUMP, Judge.

Action by the Bass Foundry & Machine Works against the board of commissioners of Parke county and William H. Meyers upon a contract for furnishing a county building. A demurrer to the amended complaint was sustained, and plaintiff appeals.

Bell & Morris, for appellant. *A. F. White*, for appellee.

MITCHELL, J. This was a suit by the Bass Foundry & Machine Works, of the city of Fort Wayne, against the board of commissioners of Parke county. The questions involved arise upon the ruling of the court in sustaining a demurrer to the plaintiff's amended complaint. The facts upon which the action is predicated, as set forth in the complaint, are in substance as follows: Prior to the 11th day of December, 1883, the board of commissioners of Parke county, after having duly adopted plans and specifications, and taken the

other preliminary steps required by law in that behalf, advertised the letting of a contract, and requested bids for the construction of a court-house and jail for Parke county. The contract was regularly let to William H. Meyers at a specified price; he having been the lowest responsible bidder, and having given bond as required by law. The contract as finally executed provided, in case the work should be unreasonably delayed or abandoned by the contractor, that the board of commissioners should have the right to enter upon the work, and procure such necessary labor and material as might be required to carry on and complete the contract, and charge the cost thereof to the contractor. After having entered upon the execution of his contract and partially completed the buildings, the contractor, Meyers, abandoned the work, and declared his inability to resume it. He had previously sublet the contract for the iron-work to the plaintiff, having agreed to pay therefor \$32,000, and he had also become indebted to it on that account, for work already done, in the sum of \$10,000. It is alleged in the complaint that, on the date above mentioned, the board of commissioners, pursuant to the right therein reserved, declared the contract with Meyers forfeited on account of his previous abandonment of the work, and that the commissioners thereupon gave notice of their purpose to proceed to the completion of the work, and to charge the excess of the cost thereof over the contract price to the contractor, and to hold him and his sureties liable therefor. It is further alleged that the commissioners agreed with the plaintiff that, in consideration that it would go on and complete the iron-work for the court-house and jail according to its contract with Meyers, the board would become responsible for and pay the amount then due from the contractor, and to become due on the contract; and that, in pursuance of such agreement, the plaintiff had proceeded and performed work and furnished materials in the construction and completion of the court-house and jail so left uncompleted by the contractor, which work and materials, it is alleged, were reasonably worth the sum of \$17,000. It is averred that the board of commissioners accepted and approved the work, and took possession of the court-house and jail, and that they have ever since used and occupied them, and that, although often requested so to do, the board has failed and refused, and still fails and refuses, to pay the plaintiff. An itemized account is filed with the complaint. Except as it may be inferred from the averment that the board had failed and refused to pay the plaintiff, it does not appear whether the claim had been filed with the auditor, and presented to the board of commissioners and disallowed. The court sustained a demurrer to the complaint. Two questions are presented by the ruling on the demurrer: (1) Assuming that the facts stated were otherwise sufficient, was it necessary, in order to make the complaint good, and give the circuit court jurisdiction of the claim, that it should have been averred therein that the claim sued on had been filed with the county auditor, and presented to the board of county commissioners and disallowed? (2) Is the board of commissioners of Parke county liable to the plaintiff for the work done and materials furnished in completing the court-house and jail under the facts disclosed in the complaint? It should be remarked that the causes of demurrer assigned were that the complaint did not state facts sufficient to constitute a cause of action, and "that the circuit court has no original jurisdiction of said cause of action."

The statute regulating the filing and prosecution of claims against counties has undergone some comparatively recent modifications, which require to be briefly considered. Under the statute in force from May 6, 1853, to May 31, 1879, county commissioners were forbidden to allow any claim against the county unless the claimant should first file a detailed statement of the items and dates of charge, and unless the truth of the charge was known to the commissioners, until such competent proof was adduced in favor of the claim as was required in other courts. Provision was made for taking an appeal from all decisions for allowances, except in certain specified cases, within 30 days, or,

in case a claim was disallowed in whole or in part, the claimant, instead of appealing, might, at his option, bring an action against the county. Sections 5761-5763, Rev. St. 1881. While this statute remained in force, the uniform holdings were that a suit might be brought against the county in the circuit court in the first instance, without presenting the claim to the county commissioners for their consideration. The rulings were distinctly to the effect that it was not necessary either to aver or prove that the claim sued on had been presented to the board of commissioners and disallowed before the commencement of the action, but that a claimant might present his claim to the board, and appeal in case it was disallowed in whole or in part, or that he might, at his option, commence suit against the county in the first instance. *Board v. Ford*, 27 Ind. 17; *Board v. Wright*, 22 Ind. 187; *Commissioners v. Holman*, 34 Ind. 256, *Jameson v. Board, etc.*, 64 Ind. 524. In the absence of restrictive legislation, those cases correctly assume that the liability to be sued in a court of general common-law jurisdiction on matters arising out of contract is one of the inherent attributes of a municipal corporation. By the act which took effect May 31, 1879, it was provided, in substance, that any person who should thereafter have a legal claim against any county should file it with the county auditor, to be by him presented to the board of county commissioners. The commissioners were required to examine into the merits of the claim, and in their discretion allow it in whole or in part, as they might find it just and owing. An appeal was allowed to the circuit court to any person feeling himself aggrieved by any decision of the board. Sections 5758, 5759, 5769, Rev. St. 1881. The fourth section of the act of 1879 (section 5760, Rev. St. 1881) reads as follows: "No court shall have original jurisdiction of any claim against any county in this state in any manner except as provided in this act." It was uniformly held that the above-mentioned act repealed section 5771, Rev. St. 1881, being section 10 of the act of 1852, by implication, in so far as that section allowed the bringing of an independent action against a county at the option of a claimant whose claim had been disallowed by the board of commissioners, and that the effect of section 4 of the act of 1879 was to deprive all the courts of the state, except boards of county commissioners, of original jurisdiction of claims against counties. *State v. Board*, 101 Ind. 69; *Board v. Maxwell*, Id. 268; *Pfaff v. State*, 94 Ind. 529; *Board, etc., v. Hon*, 87 Ind. 356. By an act approved March 9, 1885, (section 3 of the act of 1879,) section 5769, Rev. St. 1881, was amended by substantially re-enacting that section, and sections 9 and 10 (sections 5770, 5771, Rev. St. 1881) of the act of 1852. This amendment necessarily restored the statute, with the interpretation which it had received by this court, as it was prior to the act of 1879, unless section 5760, which provided that no court, except boards of commissioners, should have original jurisdiction of any claim against a county, remained in force after the re-enactment of section 5771 in the amendment of 1885. The re-enactment of this last section certainly restored the right to bring an original action against the county in case the board of commissioners disallowed a claim in whole or in part. Did it restore the right to bring the action without first presenting the claim to the board, and did it revive the right of the circuit court to entertain original jurisdiction of such a claim before the claim had first been presented to and disallowed by the board of commissioners? After a good deal of hesitation, we are constrained to the conclusion that the purpose of the act as it now stands, was to require claims against counties to be first presented to the respective boards of commissioners before bringing suit. This is to the end that a county shall not be involved in a litigation which might be avoided by affording it the opportunity to discharge its legal obligations without the expense of a suit. The original jurisdiction of the circuit court is still subject to the provisions of the act of 1879, and the amendment thereof in 1885.

The question still remains, should the demurrer have been sustained to the

complaint in the present case, because of the absence of an averment therein that the claim had been presented to the board of commissioners and disallowed? The first ground of demurrer, that the complaint does not state facts sufficient, presents no question concerning the jurisdiction of the court. *Railroad Co. v. Bridgett*, 94 Ind. 216. Waiving the question made concerning the informality of the second ground of demurrer assigned, our conclusion is that the complaint is good against a demurrer thereto, in whatever form it may have been drawn. Section 339, Rev. St. 1881, enacts that "the defendant may demur to the complaint when it appears upon the face thereof, either—*First*, that the court has no jurisdiction of the person of the defendant or of the subject of the action." The rule is universal, as applied to courts of general jurisdiction, and especially in matters which proceed according to the course of the common law, that the facts which give the court jurisdiction of the subject of the action need not affirmatively appear on the face of the complaint. *Kinnaman v. Kinnaman*, 71 Ind. 417, and cases there cited; 1 Work, Pr. § 474. It follows from the very language of the statute which prescribes the causes of demurrer, as well as from the general rules of the common law, that a demurrer for want of jurisdiction, either in respect to the person of the defendant or of the subject-matter of the action, will only lie when the defect appears upon the face of the complaint. The difference between want of jurisdiction because the court is wholly without power or authority to take cognizance of and adjudicate upon the particular subject-matter involved in the suit, and want of jurisdiction on account of the non-existence of some extraneous fact which may or may not exist in that case, is not to be disregarded. Where the court is, in law, incompetent, and without the faculty to deal with the subject-matter before it, its proceedings and judgment, without regard to any question of waiver or consent by the parties, would be *coram non iudice*. In such a case the want of jurisdiction would necessarily appear upon the face of the complaint, and objection might be taken by demurrer or motion to dismiss. Where, however, the subject-matter before the court is within its ordinary jurisdiction, so that its judgment would be binding, unless the facts going to defeat its jurisdiction in that particular case were brought forward, a court of general jurisdiction may proceed until the facts showing want of jurisdiction are made affirmatively to appear. This is so because the parties may, in such a case, waive any question concerning the jurisdiction of the court. Where facts exist which would deprive the court of jurisdiction, or arrest the proceedings for the time being, the complaint being silent in that regard, objection cannot be taken by demurrer, but the facts must be brought forward by answer or plea. If no objection be thus taken, the defect is to be deemed waived. As has already been seen, under the act of 1885, courts were reinvested with original common-law jurisdiction in respect to suits against counties. That act brought the subject-matter generally within the power and authority of the court. In other words, it restored the competency of the court, and gave it the power to take original jurisdiction of, and to adjudicate upon, the subject-matter of claims against counties. It is necessary that certain precedent facts, *viz.*, the presentation of the claim to the board of commissioners, should have occurred before the jurisdiction of the court becomes perfect and unavoidable, precisely as it is necessary, in order to give the court jurisdiction to contest the validity of a will, that the testator must have died in, or left assets in, or that assets of the estate must have come into, the county where the contest is being carried on. *Kinnaman v. Kinnaman*, *supra*; *Thomas v. Wood*, 61 Ind. 132. In cases of the latter class, and all others analogous thereto, it has been uniformly ruled that the complaint need not show the jurisdictional facts upon its face. Of course, the rule is different in respect to courts of inferior or limited jurisdiction, or where a court of general jurisdiction is exercising a mere statutory power, and is not exercising a jurisdiction which was accord-

ing to the course of the common law. We are thus led to the conclusion that it was not necessary that the complaint should have shown upon its face that the claim sued on had been filed with the auditor of Parke county, and that it had been presented to the board of commissioners, and disallowed, prior to the commencement of the action.

It is argued, next, that the demurrer was properly sustained, because, in any event, the county is not liable to the plaintiff upon the facts disclosed in the complaint. This argument proceeds upon the assumption that the action of the board of commissioners of Parke county, in taking possession of the uncompleted work upon the failure of the contractor, and their agreement with the plaintiff to pay in case it proceeded to furnish and complete the iron-work for the court-house and jail, was *ultra vires* and void. This result is said to follow because the statute prohibits county commissioners from letting any contract for the construction of any court-house, jail, or other county building, the cost of which exceeds the sum of \$500, without first adopting plans and specifications, and giving public notice, and requesting bids, as provided in sections 4243-4245, Rev. St. 1881. The provisions of the statute referred to apply manifestly to the original contract for the construction of the buildings therein enumerated and referred to. After a contract has been let in compliance with the provisions of the statute, and the work has been entered upon, whether the commissioners may, upon the default of the contractor, proceed by the employment of such agencies as are available, and complete the building, must depend, to some extent at least, upon the circumstances of each particular case. In the event that a contractor should abandon his contract when the work was at such an incipient stage as that to complete it would amount practically to the construction of a court-house by county commissioners without regard to the contract previously let, it might be a question whether contracts made by them for labor and materials would be binding as such upon the county. On the other hand, if, after the contract had been regularly let, the contractor had carried the work forward to such a state as that, in the judgment of the commissioners, the building could be completed substantially under the contract by carrying forward and keeping in operation the agencies and forces already in motion, we can see no reason why that course may not be within the incidental power of the commissioners. The statute (section 5748) makes it the duty of the board of commissioners of each county to construct and furnish a court-house, jail, and other necessary public buildings for the use of the county, and to keep them in repair. It requires that plans and specifications be adopted, and that the contract for the building be let in pursuance of certain formalities. The statute makes no provision for such a contingency as has happened in the present case; yet it is within the experience of all that such contingencies are likely to happen in the construction of public as well as private buildings. It would hardly do to assume that the legislature failed to consider that such a contingency might happen, or that it was intended, in case it did happen, at whatever stage of the work, that the hands of the county commissioners should be tied until new plans and specifications were adopted, and a new contract let. In the absence of any provision in the statute for such a case, we must assume that it was intended that the commissioners should exercise their best discretion in each case, according to the circumstances that should exist at the time. Whatever may be said about the binding force and effect of contracts made by commissioners under the circumstances disclosed, certainly, where a county board, in pursuance of its duty to erect public buildings for the county, has proceeded regularly to a point where a contractor abandons the work while it is in progress, and then, in the exercise of its discretion, procures others to furnish money, labor, and materials, so as to carry the work forward to completion, the county cannot, after accepting and enjoying the buildings thus completed, refuse to repay the money, and the rea-

sonable value of the labor and materials, furnished at the request of the commissioners. The doctrine of *ultra vires* does not absolve municipal corporations from the principles of common honesty. When a corporation has received the money or property of an individual under color of authority, and has appropriated it to its necessary and beneficial use, it will not be heard to assert its want of power to pay the value of what it has received and still retains. In such a case, where the initiatory steps have been taken which authorize a municipality to proceed with a public work, persons who furnish money, labor, or materials to the municipality, which are actually used in the work, and retained by it, become equitably entitled to recover. *Bicknell v. School Tp.*, 73 Ind. 501, and cases cited; *Wallis v. School Tp.*, 75 Ind. 368; *Bank v. School Tp.*, Id. 361; *Civil Tp. v. Manufacturing Co.*, 83 Ind. 121; *School Tp. v. Address*, 56 Ind. 157; 1 Dill. Mun. Corp. § 464, and note. It appears from the facts disclosed in the present case that the appellants had taken a subcontract to furnish the contractor with the iron-work for the court-house and jail at a specified price; that it had proceeded so far that the contractor had become indebted to it in the sum of \$10,000. The commissioners agreed that if it would proceed, and complete the iron-work according to its contract with Meyers, the county would pay the amount due from the contractor, as well as that to become due for the work not yet completed. The commissioners had no power to assume an indebtedness due the appellant from the contractor, and so far its contract cannot be enforced; nor has the county come under any equitable obligation to pay the amount due for work done for the contractor. But, in respect to work actually furnished for the county at the request of the commissioners, the county is at the least liable to pay the actual and reasonable value of the labor and materials furnished, and for the money expended in constructing public buildings which the county has accepted, and which it is using and enjoying. These conclusions lead to a reversal of the judgment. Judgment reversed, with costs.

(115 Ind. 282)

MORRIS v. STATE *ex rel.* ADDRESS.

(Supreme Court of Indiana. June 19, 1888.)

1. BASTARDY—PROCESS—WARRANT.

The process in a prosecution for bastardy in Indiana is a warrant, and is not limited to one township, but extends throughout the county.

2. APPEAL—FROM JUSTICES—PRESUMPTION OF JURISDICTION.

Where an appeal from a justice of the peace is entertained by the circuit court, the supreme court will presume, the contrary not appearing, that the circuit court had jurisdiction thereof, it being a court of general jurisdiction.

Appeal from circuit court, Switzerland county.

On petition for rehearing. For former opinion, see 16 N. E. Rep. 632.

John B. Coles, for appellant. *D. S. Wilber*, for appellee.

ELLIOTT, J. The process which issues in a prosecution for bastardy is essentially different from an ordinary summons in a civil action. It is a warrant requiring the officer to bring the body of the defendant into court. A writ in the nature of a warrant is not limited to the township, but extends to the entire county. The circuit court is a court of general jurisdiction; and, having entertained jurisdiction of the appeal from the justice of the peace, we must presume, the contrary not appearing, that the circuit court had jurisdiction of the appeal in this instance. *Machine-Works v. Parke Co.*, ante, 593, (this term.) Petition overruled.

(115 Ind. 286)

MULCAHY v. GIVENS.

(Supreme Court of Indiana. June 22, 1888.)

1. INTOXICATING LIQUORS—CIVIL DAMAGE LAWS—STATUTES—REPEAL.

Act Ind. 1875, §§ 15, 20, relating to the sale of intoxicating liquors, provides in section 15 that every person who shall sell * * * such liquors to a person in a

state of intoxication shall be guilty of a misdemeanor, and punished as therein provided. Section 20 provides that a person selling * * * such liquors in violation of the provisions of the act shall be personally liable, and also liable on his bond filed in the auditor's office in pursuance of section 4 of said act, to any person sustaining injury to his person, property, or means of support on account thereof. Rev. St. Ind. 1881, § 2092, which took effect in September, 1881, provides that any one selling * * * any intoxicating liquor to a person in a state of intoxication shall be fined and imprisoned as therein provided, and disfranchised and rendered incapable of holding office for a determinate period. *Held*, that the last-named statute did not repeal or abridge by implication so much of the sections of the act of 1875 as provides for the recovery of damages for such illegal sale of liquor.

2. SAME—RIGHT TO MAINTAIN ACTION WITHOUT ACTION ON BOND.

An action for civil damages resulting from the sale of intoxicating liquors under act Ind. 1875, (1 Rev. St. 1876, p. 869,) may be brought against the party causing such damage alone, and need not be brought upon the bond executed by defendant; section 20 of said act providing that a person causing such damage shall be personally liable, and also liable on his bond filed in the auditor's office in pursuance of section 4 of said act.

3. SAME—PLEADING—COMPLAINT.

A complaint for civil damages for the sale of intoxicating liquors under act Ind. 1875, §§ 15, 20, (1 Rev. St. 1876, p. 869,) which avers, in substance, that defendant sold to plaintiff's husband, then intoxicated, six drinks of liquor, which he drank, and became so extremely intoxicated from the effects thereof as to cause, by his mismanagement of the horses, the overturning of the sleigh in which he and plaintiff were driving, throwing the sleigh violently on plaintiff, whereby she was badly injured, to her great damage, and also by the same means and in the same manner injuring him, whereby he was so maimed as to become unable to do any labor since, and was permanently disabled, and that the plaintiff was greatly injured thereby in her means of support, is sufficient on demurrer, the damages therein stated being the proximate cause of the injury.

Appeal from circuit court, Newton county; PETER H. WARD, Judge.

E. P. Hammond, W. H. H. Graham, and David L. Bishop, for appellant.
S. P. Thompson, for appellee.

NIBLACK, C. J. This action was brought by Winifred Mulcahy against James F. Givens, under sections 15 and 20 of the act of 1875, regulating the sale of intoxicating liquors. 1 Rev. St. 1876, p. 869. The complaint is in two paragraphs. It is alleged in both paragraphs that, since the 25th day of December, 1882, the plaintiff has been the wife of one Michael Mulcahy, upon whose labor and industry she was wholly dependent for her support and maintenance prior and up to the happening of the grievances for which this action is prosecuted; that on the 28th day of January, 1886, the plaintiff and her said husband came to the town of Rensselaer from their home in the country, a distance of six miles, in a sleigh drawn by two horses, which were driven by her husband; that while in said town of Rensselaer on that day the said Givens, who was a licensed vendor of intoxicating liquors therein, unlawfully sold to the said Michael Mulcahy, who was at the time in a state of intoxication and known to be in that condition by him, the said Givens, six drinks of intoxicating liquors, for the price of 10 cents for each drink, which liquors he, the said Michael, then and there drank; that immediately thereafter the plaintiff and the said Michael started home in the sleigh in which they had come; that from the effects of said intoxicating liquors so sold to and drank by him, the said Michael became extremely intoxicated, and unable to control or manage the horses attached to such sleigh; that he nevertheless persisted in attempting to drive said horses, and would not permit the plaintiff to drive them; that by reason of such extreme intoxication, and of his incapacity resulting therefrom to control and manage said horses, the said Michael suffered, caused, and permitted the horses to upset the sleigh. It is averred in the first paragraph that in the upsetting of the sleigh the plaintiff was violently thrown to the ground, and that the sleigh was thrown heavily upon her, whereby she was badly bruised, wounded, and injured, to her great damage. The second paragraph averred that, by the upsetting of the sleigh, the said Michael was also thrown violently to the ground, and that the sleigh

fell upon him with great force, whereby he was wounded, maimed, and paralyzed so that he has ever since been wholly unable to perform any labor whatever, and has become permanently disabled; that the plaintiff has thereby been greatly injured in her means of support. A demurrer was sustained to both paragraphs of the complaint, and the defendant had final judgment upon demurrer.

While the record discloses nothing as to the ground upon which the demurrer was sustained, it has been conceded in argument that it was upon the theory that sections 15 and 20 of the act of 1875 were, so far as they might have had an application to the facts of this case, impliedly repealed by section 2092, Rev. St. 1881, and that hence there was, at the time this action was commenced, no law in force authorizing the prosecution of a civil action for the alleged injuries resulting from the unlawful conduct of Givens. Sections 15 and 20 are respectively as follows: "Sec. 15. Any person who shall sell, barter, or give away any spirituous, vinous, or malt liquors, to any person at the time in a state of intoxication, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten nor more than fifty dollars." "Sec. 20. Every person who shall sell, barter, or give away any intoxicating liquors, in violation of any of the provisions of this act, shall be personally liable, and also liable on his bond filed in the auditor's office, as required by section 4 of this act, to any person who shall sustain injury or damages to his person or property or means of support on account of the use of such intoxicating liquors so sold as aforesaid, to be enforced by appropriate action in any court of competent jurisdiction." Rev. St. 1881, § 5323. Section 2092, Rev. St. 1881, which came into force on the 19th day of September, 1881, is in these words: "Whoever sells, barter, or gives away any spirituous, vinous, malt, or other intoxicating liquor, to any person at the time in a state of intoxication, knowing him to be in a state of intoxication, shall be fined not more than one hundred dollars, nor less than ten dollars, to which may be added imprisonment in the county jail not more than one year, nor less than thirty days, and disfranchised and rendered incapable of holding any office of trust or profit for a determinate period." As applicable to the facts relied on for a recovery in this action, section 20 ought to be construed as if it read: "Every person who shall barter or give away any spirituous, vinous, or malt liquors, to any person at the time in a state of intoxication, shall be personally liable, and also liable on his bond, * * * to any person who shall sustain any injury or damage to his person or property or means of support on account of the use of such intoxicating liquors. * * *" As thus construed, the right to prosecute a civil action under that section, for the sale of alcoholic liquors to a person in a state of intoxication, was neither abridged nor taken away by the subsequent enactment of section 2092, above set out. There is no inconsistency between so much of section 15 as constructively entered into and became a part of section 20, as above stated, and section 2092, and hence that part of section 15 still continues in force in support of a civil action for a violation of its provisions and any consequent injury which may ensue therefrom. This conclusion is fully sustained by the recent case of *State v. Cooper* 114 Ind. 12, 16 N. E. Rep. 518. See, also, *Bish. Writ. Law*, § 181; *Alexander v. State*, 9 Ind. 337; *Martindale v. Martindale*, 10 Ind. 566; *Cordell v. State*, 22 Ind. 1; *State v. Miller*, 58 Ind. 399; *Gorley v. Sewell*, 77 Ind. 316; *Capron v. Strout*, 11 Nev. 304; *Com. v. Kendall*, 144 Mass. 357, 11 N. E. Rep. 425; *Fullerton v. Spring*, 3 Wis. 667; *Randolph v. Larned*, 27 N. J. Eq. 557.

The additional point is made that the sale of the intoxicating liquors to the plaintiff's husband was not, within the proper meaning of that term, the proximate cause of the injuries of which she complains; that such injuries could not reasonably have been anticipated by Givens when he sold the liquors as charged; and the cases of *Krach v. Heilman*, 53 Ind. 517, *Collier v. Early*,

54 Ind. 559, and *Backes v. Dant*, 55 Ind. 181, are cited as supporting that view of the doctrine of proximate cause in cases of the class to which this belongs. These cases do lend support to this additional point made against the sufficiency of the complaint, but they arose and were decided under an older, and in some respects a different and more exceptional, statute than the one now before us. They were, nevertheless, held to be against the weight of authority, and not binding as precedents in similar cases brought under the act of 1875, in the later case of *Dunlap v. Wagner*, 85 Ind. 529, and we still adhere to that interpretation of those cases. In so far as they are inconsistent in principle with the case of *Dunlap v. Wagner*, they must be regarded as having been overruled. As the facts are stated in the last-named case a stronger and more direct case was seemingly made against Wagner than the complaint does in this case against Givens; but the conclusions reached and the general principles recognized in that case sustain the sufficiency of the complaint in this, as regards the proximate cause of the injuries sued for, and we are content to rest this cause in the respect stated upon the conclusions and general principles there announced.

The further point is made that an action like the one at bar, when prosecuted against a licensed vendor of intoxicating liquors, must be upon the bond given by him under section 4 of the act of 1875, and that consequently an action will not lie against him alone for a violation of any of the provisions of that act. This point has the merit of plausibility, but we see no sufficient ground upon which it can be sustained. Section 20 authorizes an action in general terms, either against the vendor personally, as well as upon his bond; thus fairly implying that the plaintiff has an option either to sue the vendor alone or to sue him and his sureties together on his bond. This view is impliedly supported by the case of *Kane v. State*, 78 Ind. 108, and is, as we believe, in accordance with the legislative intention on the subject.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

(116 Ind. 306)

HOME INS. CO. OF NEW YORK v. DAUBENSPECK.

(Supreme Court of Indiana. June 23, 1888.)

INSURANCE—ACTIONS ON PREMIUM NOTES—DEFENSES—INSOLVENCY OF COMPANY.

Assured, under a contract of fire insurance for five years, paid the premium for the first year in cash, and gave notes for the succeeding premiums. Before the expiration of the first year the company became insolvent and suspended business. Held, in an action on the notes, that the consideration had failed, and plaintiff could not recover.

Appeal from circuit court, Hamilton county; D. Moss, Judge.

Christian & Christian, for appellant. *Stephenson & Fertig*, for appellee.

MITCHELL, J. Complaint by the Home Insurance Company of New York, as assignee of the American Insurance Company of Chicago, against Daubenspeck, on a promissory note dated the 20th day of July, 1880, stipulating for the payment of \$60 in four annual installments of \$15 each. The defendant answered, first, by alleging that the note had been delivered to the American Insurance Company as part consideration for a policy of insurance, by the terms of which the company agreed to insure his property for a period of five years from a certain date, at the stipulated price of \$15 per annum; that he had paid the premium for the first year in cash, and executed the note in suit for the premium for the remaining four years. It was alleged in the answer that, before the expiration of the first year, the contract of insurance had been canceled; that the defendant had paid the customary short rates, and returned his policy to the company. The second paragraph set up substantially the same facts as to the consideration, and in respect to the payment of the first year's premium in cash. It was then averred that, before the expiration of

the first year, the American Insurance Company became insolvent, and suspended business, and that the consideration of the note had for those reasons failed. It is contended that the court erred in overruling the demurrer to the second paragraph of answer. The paragraph was clearly good. There is no basis for the suggestion that the defendant got all he contracted for. He contracted for indemnity against loss or damage to his property by fire, and as a consideration therefor agreed to pay \$15 annually for insurance for five years. The demurrer admits, however, that the insurance company whose policy he held became insolvent and suspended business before the end of the first year. As a consequence, the company became unable to afford him the indemnity for which he contracted. How can it be said, therefore, that he received what he contracted for, and upon what principle should the defendant now be compelled to pay for that which the insurance company, because of its insolvency and suspension of business, became unable to furnish? A policy in an insolvent suspended insurance company is presumably worthless as a means of indemnity against future loss. The case is not controlled by *Myers v. Conway*, 62 Ind. 474. The evidence fully sustains the finding upon the issue made by the first paragraph of the answer. There was therefore no error, even though the second paragraph may not have been proved. If one sufficient and complete defense was proved, the finding of the court was proper. Judgment affirmed, with costs.

(116 Ind. 337)

PHELPS et al. v. SMITH et al.¹

(Supreme Court of Indiana. June 27, 1883.)

1. FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—SUBSEQUENT CREDITORS.

Under Rev. St. Ind. 1881, § 4924, providing that "the question of fraudulent intent in all cases arising under the provisions of this act shall be deemed a question of fact, nor shall such a conveyance be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration," where a husband whose remaining property subject to execution is amply sufficient to pay his debts conveys real estate without consideration for the purpose of placing the same beyond the reach of creditors, the grantee immediately reconveying to such husband and his wife as tenants by entireties, such conveyances are not fraudulent as to subsequent creditors, no actual fraud on the part of either the husband or wife having been found.

2. SAME—GIFT TO WIFE—LOAN OF THE MONEY TO HUSBAND—GOOD FAITH OF WIFE—CONFESSION OF JUDGMENT.

Where a husband whose remaining property subject to execution is amply sufficient to pay his debts makes a gift of money to his wife, immediately borrowing the same from her, and securing its payment by promissory note, and thereafter suffers judgment on the note, and seizure of his property on execution, with intent to defraud his creditors, the wife is not liable to a creditor of the husband for the goods seized, although she had notice of her husband's fraudulent intent in suffering judgment and seizure of the goods.

3. SAME—CONFESSION OF JUDGMENT—WANT OF CONSIDERATION—KNOWLEDGE OF CREDITOR.

Where a party executes a note without consideration, and suffers judgment thereon, and seizure of his property under execution, for the purpose of defrauding his creditors, the payee having notice of the fraud, such payee is liable to a creditor of the maker for the property seized.

Appeal from circuit court, Montgomery county; J. M. RABB, Judge.

E. C. Snyder, Kennedy & Kennedy, Ristine & Ristine, and R. J. Greene, for appellants. *Paul & Humphries and W. H. Thornton*, for appellees.

ELLIOTT, J. Stated in an abridged form, the facts set forth in the special finding are these: From the 29th day of March, 1883, until the 9th day of June, 1884, John B. Smith and Thomas B. Collins were partners doing business at Anderson and at Crawfordsville, in this state. On the 30th day of January and the 8th day of May, 1884, Smith & Collins, as partners, became indebted to the plaintiffs in the sum of \$936, and that sum was due and unpaid when this suit was brought. The partnership was dissolved on the 9th

¹ Rehearing denied

day of June, 1884. Smith, under the agreement of dissolution, took the stock of goods at Anderson, and Collins took that at Crawfordsville. Between January 30, 1884, and the date of the dissolution of the partnership, Smith & Collins became largely indebted to the appellees and others. They were insolvent at the time the partnership was dissolved, and have so continued. On and prior to the 10th day of December, 1883, Jennie C. Smith was the wife of John B. Smith. On that day, John B. and Howard W. Smith were the joint owners of a tract of land, and made parol partition of it. To carry into effect this partition, deeds were executed and delivered. After John B. Smith had received his deed, he and his wife conveyed the land to Howard W. Smith, and he immediately conveyed the land to John B. Smith and his wife. The deed was recorded on the 8th day of January, 1884. This conveyance was a voluntary one, and, as the finding recites, "was made for the sole purpose of placing the entire title in John B. Smith and his wife as tenants by entireties, and beyond the reach of his present or future creditors." At the time this deed was executed, John B. Smith had no other individual property subject to execution, but he then owed no individual debts. The indebtedness of the firm of Smith & Collins, at that time, was \$3,000, and its assets \$6,000. The indebtedness of the firm due at the time the conveyances were made was subsequently all paid by the firm, and, in the language of the finding, "the payments were made out of cash then in the hands of the firm, from collections made afterwards on bills then due from former sales of goods then on hand, and sales of goods subsequently purchased by the firm, and for which it still owes the wholesale creditors." On and before the 29th day of May, 1882, Elizabeth Collins was the wife of the defendant Thomas B. Collins. Prior to that day, her husband made her a gift of \$3,000, and on that day he borrowed from her the identical money which he had previously given her. To secure its payment, he executed his promissory note, which was signed by Thomas B. Smith a short time before the dissolution of the firm of Smith & Collins, but no consideration passed to Smith. At the time Smith signed the note, he was insolvent, and has so remained. Smith & Collins also obtained a loan from the First National Bank of Crawfordsville, and, after the dissolution of the partnership, suffered judgment to be rendered against them. Their purpose in creating this debt, and suffering judgment, was to defraud their creditors. On the 30th day of June, 1884, Elizabeth Collins instituted an action on the note executed to her by her husband and Smith, and recovered a judgment. On the judgment recovered by her, executions were issued, and were levied upon the goods at Anderson and at Crawfordsville. The goods at Anderson were levied upon and sold as the property of John B. Smith, and those at Crawfordsville were seized as the property of Thomas B. Collins. The purpose of John B. Smith in signing the note, and that of Smith & Collins in suffering judgment on the note, and the seizure of the goods of the partnership upon the execution issued on the judgment, was to defraud their creditors; and of this purpose Elizabeth Collins had full notice. On the 9th day of June, 1884, and thenceforward, Thomas B. Collins was insolvent. The executions were issued on the judgments of Elizabeth Collins and the bank, after dissolution, and the property taken by the partners under the agreement of dissolution was seized and sold. The conclusions of law stated by the court are: "(1) That the plaintiffs are entitled to recover judgment against the defendants John B. Smith and Thomas B. Collins in the sum of \$1,029.48; (2) that the conveyances from John B. Smith and wife to Howard W. Smith, and from Howard W. Smith to John B. Smith and Jennie C. Smith, of date January 4, 1884, are valid and effectual as against the creditors of Smith & Collins; (3) that the plaintiffs are not entitled to take judgment on their complaint, and the facts found against the defendant Elizabeth Collins." The course of argument pursued by the appellants' counsel makes it necessary to consider the case only in so far as the rights of Mrs. Smith

and Mrs. Collins are concerned, for it is not asserted that there was any error in the proceedings except such as it is alleged were committed in their favor. We therefore confine our discussion and decision to the questions arising on the issues joined between the appellants and Jennie C. Smith and Elizabeth Collins.

The issues and the questions presented by Mrs. Smith are very different from those presented by Mrs. Collins, and we shall first dispose of the case in so far as it affects the rights of the former. The rights of Mrs. Smith depend upon the deed executed to her and her husband by Howard W. Smith on the 4th day of January, 1884. If that deed is not invalid as against creditors, then the second conclusion of law stated by the trial court is right, and the judgment in her favor must be affirmed. The deed to Mrs. Smith and her husband is valid, and constitutes them tenants by the entireties, unless it can be adjudged from the facts stated that it is vitiated by fraud. A husband who is not insolvent may, in good faith, unquestionably cause land to be conveyed to himself and his wife, and thus vest in himself and wife a joint tenancy with all its legal incidents. The creation of the tenancy is the act of the grantor, but the incidents are annexed by the law. It cannot be held that a husband who has property subject to execution more than sufficient to pay his debts is guilty of fraud merely because he causes land owned by him to be conveyed to himself and his wife as tenants by the entireties. It is certainly true that a husband not in debt, or one in debt, but having ample property subject to execution to pay all his debts, may, in good faith, make an absolute gift of land to his wife; and, if he may do this, surely he may cause the land to be so conveyed as to make the tenure such as to vest her with a joint right in possession, coupled with the incident of survivorship. The conveyance, whatever its character or effect, provided it creates no secret trust, is valid, unless there be legal or actual fraud. We assume, therefore, that the deed which vested in Mrs. Smith an estate in the land jointly with her husband is only impeachable at the suit of creditors upon the ground of fraud, and that if the creditors do not show it to be fraudulent it must be upheld. The special finding does not show that there was any actual fraud on the part of Mrs. Smith or her husband. It is true that it is stated that the purpose was to place the property out of the reach of creditors, but it is not found that this was a fraudulent purpose. Fraud is not presumed. The presumption is in favor of honesty and good faith until the contrary appears. This rule would require us to decline to impute to the parties any corrupt motive. But there is another rule which applies here, and that is this: where a cause of action depends upon the establishment of fraud, the special finding must state that there was fraud. The rule was thus stated in *Elston v. Castor*, 101 Ind. 426: "The court below found all these facts, but failed to find the ultimate fact that there was any collusion between the brothers, or that there was any fraud, or intent to defraud any one. If appellants were satisfied that the several facts mentioned were badges of fraud, and that fraud in fact should have been found, their proper course was by a motion for a new trial. Fraud in such cases is a question of fact, and hence we cannot determine it here, as a matter of law, upon the facts found." The rule stated in the quotation we have made, is asserted in other cases, and is in harmony with the decisions upon kindred questions. *Stitz v. Sadler*, 109 Ind. 254, 9 N. E. Rep. 905; *Bartholomew v. Pierson*, 112 Ind. 430, 14 N. E. Rep. 249. By our statute the question of fraud is made one of fact; and, where fraud is essential to the existence of a cause of action, it must be found as a fact, and not left to be inferred as a matter of law. *Rose v. Colter*, 76 Ind. 590. This court may, doubtless, give to facts their legal effect; but where, as here, the case is presented upon a special finding, it cannot add a new and substantive fact to those stated by the trial court. It is to be kept in mind that there is no finding that John B. Smith meant to place the partnership assets beyond the reach of creditors, nor

that he intended to incur debts that he could not pay; nor, indeed, that he intended to incur any new debts at all. Nor is the value of the real estate stated in the special finding. For anything that appears, it was of less value than \$600, and exempt from the claims of creditors. If exempt, creditors have no right to complain of its conveyance. *Blair v. Smith*, 15 N. E. Rep. 817; *Dumbould v. Rowley*, Id. 463; *Barnard v. Brown*, 112 Ind. 53, 13 N. E. Rep. 401; *Taylor v. Duesterberg*, 109 Ind. 165, 9 N. E. Rep. 907; *Faurolle v. Carr*, 108 Ind. 123, 9 N. E. Rep. 350; *Burdge v. Bolin*, 106 Ind. 175, 6 N. E. Rep. 140. As the value of the property is not stated, and as the presumption is in favor of good faith, we must assume that the husband did not convey an unreasonable amount of property to his wife. The legal effect of a conveyance to a husband and wife is to place the land beyond the reach of the creditors of the husband during the life of the wife, and, in the event of her survivorship, vest her with title; and all that the facts show is that the parties intended that the conveyance of Howard W. Smith should have this effect. It cannot, it seems clear to us, be assumed that there was actual fraud in a case where no more appears than that a conveyance was intended to have precisely the force and effect given it by law. The assumption cannot be made without violating the rule that the presumption is in favor of honest dealing, nor without also violating the rule that, where a fact essential to a cause of action is not found, the presumption is, where the plaintiff has the burden, that it does not exist. *Stitz v. Sadler*, *supra*, and cases cited; *Meeker v. Shunks*, 112 Ind. 207, 13 N. E. Rep. 712. We can, of course, do no more than decide the case as it comes to us upon the special finding, and upon that finding we cannot assert that there was any actual fraud. The exception to the conclusions of law concedes that the facts are correctly found; and, if a party desires to challenge the correctness of the finding, he must move for a new trial. *Warren v. Sohn*, 112 Ind. 213, 13 N. E. Rep. 863, and cases cited. We cannot, therefore, inquire what conclusions of fact might be drawn from evidentiary facts, but must take the ultimate facts as the special finding presents them, and apply the law to them. *Elston v. Castor*, *supra*. This necessarily restricts the power and duty of the court within much narrower limits than would hedge it in if the evidence were before the court, and we were authorized to determine what inferences of fact should be drawn from the evidence.

Having ascertained that there is no actual fraud shown by the special finding, we come now to the question as to whether there is any constructive or legal fraud. Much that has been said applies to this phase of our inquiry. For years it has been the rule in this state, asserted by statute and affirmed by the adjudged cases, that fraud, whether actual or constructive, is a question of fact, but it also declares that a conveyance shall not be deemed fraudulent merely because it was a voluntary one. Its language is clear and strong. Thus it reads: "The question of fraudulent intent in all cases arising under the provisions of this act shall be deemed a question of fact; nor shall such a conveyance be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration." Rev. St. 1881, § 4924. Many cases have been decided upon this statute; and they all agree that fraud, whether actual or constructive, is a question of fact, and that a voluntary conveyance cannot be adjudged fraudulent at the suit of creditors, where there is no actual fraud, if, at the time the conveyance was made, or the suit was brought, the grantor had property subject to execution out of which the claims of his creditors could be paid. *Maple v. Burnside*, 22 Ind. 139; *Ewing v. Patterson*, 35 Ind. 326; *Parton v. Yates*, 41 Ind. 456; *Pence v. Croan*, 51 Ind. 336; *Sherman v. Hogland*, 54 Ind. 578, and cases cited; *Hardy v. Mitchell*, 67 Ind. 485; *Noble v. Hines*, 72 Ind. 12; *Leasure v. Coburn*, 57 Ind. 274; *Luce v. Shoff*, 70 Ind. 152; *Bruker v. Kelsey*, 72 Ind.

51; *Rose v. Colter*, 76 Ind. 590, and cases cited; *McLaughlin v. Ward*, 77 Ind. 383; *Wooters v. Osborn*, Id. 513; *Lockwood v. Harding*, 79 Ind. 129; *Morris v. Stern*, 80 Ind. 227; *Jarvis v. Banta*, 83 Ind. 528; *Powell v. Stickney*, 88 Ind. 310; *Sedgwick v. Tucker*, 90 Ind. 271; *Taylor v. Johnson*, 113 Ind. 104, 15 N. E. Rep. 238. The principle which our cases assert, and in various phases apply, is substantially that asserted in *Rice v. Perry*, 61 Me. 145, where it was said: "A fraudulent purpose is an important element in the case. But it is not the only one; there must be superadded to it, in addition to the sale, actual fraud, hinderance, or delay resulting therefrom to the creditors. The sale will be upheld unless the fraudulent purpose is actually accomplished. Thus if, notwithstanding the sale, Whitehouse and Goodwin retained sufficient to pay the debt of Watson and Clark, and equally open, known, and accessible to them with that sold, the sale would not be void, whatever may have been the secret purpose of the parties to it. The reason for considering the sale void in this class of cases is that creditors are damaged; and, when the reason is wanting, the rule itself becomes inapplicable." There is, as our cases have always affirmed, no reason for stigmatizing a conveyance as fraudulent when the grantor has, at the time it is made, abundant property subject to execution out of which all his debts could be collected. Suppose, for illustration, a man to have \$10,000 of property, and to be in debt no more than \$500, and that he should make a gift to his wife of \$5,000, could it be said with justice that he was guilty of fraud? The case before us is not different in principle from the supposed case. At the time the conveyance was made, the grantor owed no individual debts. The firm of which he was a member did owe \$3,000; but it had \$6,000 of property subject to execution with which to pay its indebtedness. Moreover, the debt of the firm existing at the time the conveyance was made was subsequently paid in full, so that the creditors who now complain gave Smith and Collins credit long after the conveyance was made and recorded. Counsel for appellants make ingenious inferences from the facts found, and upon those inferences construct a very plausible argument. If we were dealing with the evidence, there would be much force in their argument; but we have before us a special finding, which, as the authorities cited prove, we must assume contains all the facts, and we cannot infer that others exist. If there were other facts, the appellants should, as we already suggested, have pursued a different course. We limit our decision to the facts before us, and assume, as we must, that no others favorable to the plaintiffs were proved. Counsel say: "We are aware that it is a well-settled rule of law of this state that a voluntary conveyance will not be set aside as fraudulent if, at the time it was made, the grantor retained sufficient property subject to execution to pay his debts; but we insist that this rule does not apply to the case in hand. Here one of the grantees is the debtor. The conveyance was made while he was a debtor. It was made for the purpose of placing his property beyond the reach of his present as well as future creditors. His wife and co-grantee knew of this design. It is true, the court does not say so in so many words, but the court does say that John B. Smith and his wife conveyed the land to Howard W. Smith, and that Howard W. Smith conveyed it back to John B. Smith and wife, for the sole purpose of placing the property out of the reach of creditors." If all the assumptions of counsel were correct, then they might, perhaps, escape the force of the general rule which they concede our cases establish. But many of these assumptions are groundless. In the first place, while it is true that John B. Smith was indebted as a partner, it is also true that the partnership had property double in value the amount of the indebtedness. In the second place, it is not found, even indirectly, that Smith himself, at the time the conveyance was made, had any intention of defrauding creditors. It is not even found that he then had any thought of incurring any debt. It does, on the contrary, appear that he had property abundantly sufficient to

pay his debts, and it could not be presumed, even if the facts stated in the finding were treated as evidentiary and not ultimate facts, that he intended to contract debts which he could not pay. In the third place, it is not found that Mrs. Smith knew that her husband was in debt, or intended to become indebted. Nor, indeed, is it found that the land conveyed was ever subject to the claims of the husband's creditors. The utmost that can be inferred is that he, being then solvent, intended to place his property where it could not be reached during the life-time of his wife, or, in case she survived him, where it could not be taken from her at all. But, when this conveyance was made, he had a right to have given it to his wife absolutely; and that he chose to do less does not invalidate the conveyance as against the wife. As to her, the conveyance is valid, and that is the only question here. Under the law, she might have been the grantee of the entire estate, and the fact that she does not get the estate absolutely does not invalidate the conveyance. From whatever point of view the case is considered, the conclusion must be that, upon the facts stated in the special finding, regarded, as the law requires us to regard them, as the facts, and all the facts, in the case, the conveyance is valid as to Jennie C. Smith.

The case in so far as it affects the rights of Mrs. Collins remains for consideration. That Mrs. Collins had a just claim against her husband is settled by the special finding. As against him, she had a clear right to take judgment and issue execution. If she had this right, then, of course, she had a right to levy her execution upon the property of her debtor. There is no finding that she was guilty of any fraud with respect to her husband's indebtedness, and we can see no reason why she was not entitled to the sum realized from the sale of the stock of goods at Crawfordsville, which passed to her husband under the agreement of dissolution. The appellees, as partnership creditors, had no specific lien upon that property. *Louden v. Ball*, 93 Ind. 232; *Davis v. Canal Co.*, 15 N. E. Rep. 873; *Bank v. Klein*, 64 Miss. 141, 60 Amer. Rep. 47; *Bates, Partn.* § 347. As Mrs. Collins had a just claim against her husband, and as she did no more than enforce that claim against his property in levying her execution upon the goods at Crawfordsville, she cannot be compelled to refund to the appellees what she received from the sale.

A more difficult question arises respecting the sale of the property at Anderson which passed to Collins under the agreement of dissolution. In order to present the question, we copy literally from the special finding: "That the note was so signed by John B. Smith, and the judgment so consented to by him, for the fraudulent purpose of cheating, hindering, and delaying the creditors of the firm of Smith & Collins, and for the purpose of enabling Elizabeth Collins to subject the stock of goods which had belonged to the firm of Smith & Collins, and which became his individual property upon the dissolution of said firm, to sale to pay and satisfy said debt, of which fraudulent purpose of the defendant Smith the defendant Elizabeth Collins then and there had notice." This finding, in connection with others, shows that Mrs. Collins became a party to the fraud; that she yielded no consideration for the note upon which she obtained judgment; that, from property sold pursuant to her fraud, she has realized the sum of \$1,740.47, which she withholds from the creditors of her fraudulent debtor. It is our judgment that she is chargeable in equity with this amount. Equity will compel her to account for the sum acquired by fraud, and will not suffer her to enjoy the fruits of her wrong. *Jones v. Reeder*, 22 Ind. 111; *Blair v. Smith*, 15 N. E. Rep. 817, and cases cited; *Smith v. Selz*, 16 N. E. Rep. 524; *Chamberlin v. Jones*, Id. 178; *Mason v. Pierron*, 34 N. W. Rep. 921; *Decker v. Decker*, 15 N. E. Rep. 307. In the case last cited the question was presented very like it is here, and it was held that one who is a party to a fraudulent transfer of property for the purpose of defrauding creditors is liable to the creditors to the extent of the property in his hands, and to the value of that which has been sold by him.

Counsel cite us to *Dormuell v. Ward*, 108 Ill. 216, and other cases holding that only creditors who have obtained judgments are entitled to invoke the aid of courts of equity against fraudulent conveyances; but it is enough to say that this is not the rule under the Code of Indiana. *Field v. Holzman*, 93 Ind. 205, and authorities cited page 209. What we have said disposes of the questions presented by the appellees' assignment of cross-errors, and we need not discuss the question it presents.

The judgment as to Jennie C. Smith is affirmed; and as to so much of the judgment as holds that the appellee Elizabeth Collins is not bound to account for the money received from the sale of the goods which passed to John B. Smith under the agreement dissolving the partnership of Smith & Collins, the judgment is reversed, with instructions to restate the conclusion of law on this point, and enter judgment requiring the appellee Elizabeth Collins to account for the sum received from the sale of such property.

(115 Ind. 374)

MITCHELL v. HARTLEP.

(Supreme Court of Indiana. June 28, 1888.)

CONTRACT—CONDITION—PERFORMANCE.

Where an assignee of a note agreed with the assignor that, if he could use the note assigned, he would pay the assignor a certain sum of money, and afterwards the assignee brought a suit on the note, joining several other causes of action therein, against the maker, and, without introducing the note in evidence, obtained a judgment, the assignee is liable at the suit of the assignor on such agreement. *Mitchell v. Hartlep*, 16 N. E. Rep. 645, affirmed.

On petition for a rehearing. For former opinion, see 16 N. E. Rep. 645. *J. W. Cole*, for appellant. *J. McCabe & Son*, for appellee.

ELLIOTT, J. As we said in our original opinion, the controlling question in this case is whether the appellee did use the promissory note assigned to him by the appellant. That he did use it there can be no doubt, for he filed it as a cause of action against the maker in an action regularly brought. It is true that the appellee did not take judgment on the note, but why he did not the record does not inform us. He agreed to pay for the note in the event that he used it, and, as he did use it, we can perceive no reason why he should not be held to his contract. To us it seems clear that, where a party agrees to pay for a thing if he uses it, he becomes bound the moment he makes use of the thing for which he bargained. Counsel put much more of assertion than of argument into their brief, and make many assumptions that cannot be sustained. They forget that their client promised to pay for the note if he could use it, and, omitting this important fact, argue that the judgment rendered in the action in which the note was sued on was not conclusive. We think it immaterial whether the judgment was or was not conclusive, for the appellant elected to make use of the note, and, for anything that appears, might have made a successful use of it if he had done his duty. As we said in our former opinion, there is nothing to show that he might not have obtained judgment, for, surely, the note constituted a *prima facie* cause of action. Its bare production would have entitled him to judgment, unless a defense was successfully established. But, after all, the case must be decided against him irrespective of this consideration, because he did elect to use the note. If the appellant had averred that there was a mistake in reducing the contract to writing, there would be much more of relevancy in counsel's argument, but no such issue was tendered. The contract, as it is written, does not, as counsel unwarrantably assume it does, restrict the use to any particular method, but, on the contrary, provides that if any use is made of the note the appellant shall pay for it. In order to make the contract mean what counsel assume it does mean it would be necessary to interpolate the important words. Petition overruled.

(115 Ind. 413)

ROGERS v. BEACH *et al.*

(Supreme Court of Indiana. July 10, 1883.)

1. QUIETING TITLE—PLEADING—COMPLAINT.

A complaint to quiet title, which shows that plaintiffs purchased the land in good faith, paid full value for it, and received a warranty deed for the same; and that defendant is in possession, claiming that the deed, though absolute on its face, was in fact a mortgage, and invalid as such because executed to secure the debt of her husband, is good.

2. MORTGAGE—DEED ABSOLUTE—EVIDENCE—SUFFICIENCY.

Where several witnesses testify positively that defendants bought the land in question after having refused to accept a mortgage on the same, and it appears that no debt subsisted between the grantors and grantees, although the latter were sureties for one of the former on his official bond; that the grantees paid to one of the grantors money on account of the purchase, to be used by him in paying his debts; that no contingency was provided for upon which the land should revert to the grantors, nor was there any sum for which either of the grantors would be liable to the grantees after the purchase price paid by the latter had been exhausted,—the evidence is sufficient to sustain a finding that a deed absolute on its face was not given as a mortgage security. It is not sufficient, to overthrow the deed, that the parties agreed that, in case the property sold for an increase over the agreed price, the grantor should have the increase.¹

3. APPEAL—REVIEW—MATTERS NOT APPARENT ON RECORD—OBJECTIONS TO EVIDENCE.

When a motion for new trial simply states that the court erred in admitting incompetent evidence, and in excluding competent evidence, "as set out and designated by the bill of exceptions," but the evidence is not specified, nor is the name of any witness given, the record presents no question upon the rulings in admitting or excluding testimony.

Appeal from circuit court, Vigo county; JOSHUA JUMP, Judge.

Action by Mary J. Rogers against Beach and others to have declared a mortgage a deed executed by Newton J. Rogers and Mary, his wife, to the defendants. Defendants filed a cross-complaint to quiet their title. Judgment for defendants, and plaintiff appeals.

T. W. Harper, C. F. McNutt, I. N. Pierce, and Davis & Davis, for appellant. John G. Williams, for appellees.

ELLIOTT, J. The appellant brought this suit to have a deed absolute on its face declared a mortgage, and to have it declared invalid as a mortgage because executed by her to secure the debt of her husband. The appellees filed a cross-complaint containing these material allegations: That Mary J. Rogers is and has been the wife of Newton J. Rogers for more than 10 years; that Newton J. Rogers was the treasurer of Vigo county from 1877 to 1881, inclusive; that he was a defaulter in the sum of \$50,000; that the appellees were the sureties on his official bond; that, while he was indebted to the county, he bought the land in controversy, and caused the title to be made to his wife, without any consideration moving from her; that he paid for the real estate with his own money, and with the money of the county; that, at the close of his term of office, he desired to apply the real estate to the payment of the sum due from him to the county; that, to effect this purpose, he and his wife conveyed it by a general warranty deed to the appellees; that the

¹A deed, though absolute in form, if intended merely as security for an indebtedness, will be treated as a mortgage. *Eisaman v. Gallagher*, (Neb.) 37 N. W. Rep. 941; *Knapp v. Bailey*, (Me.) 9 Atl. Rep. 123; *Nesbitt v. Cavender*, (S. C.) 2 S. E. Rep. 702, and note; *Booth v. Hoskins*, (Cal.) 17 Pac. Rep. 225, and note; *Frey v. Campbell*, (Ky.) 3 S. W. Rep. 368, and note.

To convert a deed absolute on its face into a mortgage, the evidence should be clear and convincing. *Cochrane v. Price*, (Md.) 8 Atl. Rep. 361; *Pancake v. Cauffman*, (Pa.) 7 Atl. Rep. 67, and note; *McCormick v. Herndon*, (Wis.) 31 N. W. Rep. 303; *Canal Co v. Crawford*, (Or.) 4 Pac. Rep. 113.

For facts held sufficient, see *Id.*; *McMillan v. Bissell*, (Mich.) 29 N. W. Rep. 737, and note; *Huscheon v. Huscheon*, (Cal.) 12 Pac. Rep. 410; *Arnot v. Baird*, *Id.* 386; *Stephens v. Allen*, (Or.) 3 Pac. Rep. 168; *Miller v. Ausenig*, (Wash. T.) *Id.* 111; *Cosby v. Buchanan*, (Ala.) 1 South Rep. 898; *Pearson v. Sharp*, (Pa.) 9 Atl. Rep. 33.

consideration agreed upon was \$10,000, which was paid by the appellees to the county; that the amount paid by them was the full value of the land; that they are in good faith the owners of the land in fee-simple; that Mary J. Rogers is unlawfully and without right claiming title to it, and unlawfully detains possession of it; that she falsely and fraudulently pretends and claims that the conveyance to these appellees is simply a mortgage executed as the security for the debt of her husband; but that such claims and pretenses are without foundation in fact, but serve to cast a cloud upon the title of the appellees. The prayer of the cross-complaint is that the title of the appellees be quieted, and that Mary J. Rogers be required to surrender possession to them.

The appellant's counsel assume that the cross-complaint seeks to set aside the conveyance from Newton J. Rogers to Mary J. Rogers as fraudulent, but this assumption is entirely groundless. The cross-complaint does not proceed upon the theory attributed to it by counsel, but proceeds upon the theory that, by the deed executed to the appellees by the appellant and her husband, they became the owners in fee of the property, and that the appellant's claim is unfounded, although sufficient to cast a cloud upon their title. It is in fact a complaint to quiet title. As a complaint to quiet title it is unquestionably good. It shows that the appellees bought the land; that they paid, in good faith, full value for it, and that they received a warranty deed for it. The pleading makes an unusually strong case, for it shows that Mary J. Rogers was not at any time, in equity or good conscience, the owner of the land, but that it belonged to her husband. Independent, however, of this consideration, the cross-complaint is good; for it shows that the appellees are the owners in fee-simple of the land; and, as they are the owners, they may maintain a suit to quiet title. *Railway Co. v. Allen*, 113 Ind. 308, 581, 15 N. E. Rep. 446, 451; *Dumont v. Dufore*, 27 Ind. 263.

The record presents no question upon the rulings in admitting and in excluding testimony, for the reason that the motion for a new trial simply states that the court erred in admitting incompetent evidence, and in excluding competent evidence, "as set out and designated by the bill of exceptions;" but the evidence is not specified, nor is the name of any witness given.

There is evidence sustaining the finding of the trial court. The deed is absolute on its face, and it must operate as a conveyance of the fee unless it can be said that the evidence proved it to be a mortgage. The presumption is that the instrument is what it purports to be,—a general warranty deed. 1 Jones, Mortg. §§ 282, 283; 8 Pom. Eq. Jur. § 1196. Several witnesses testified positively that the appellees bought the land after having refused to accept a mortgage. This evidence certainly gives full support to the theory of the appellees that they acquired the title to the land in fee. The fact that the parties agreed that the transaction should be a sale, and not a mortgage, is a very important one, although, if it stood alone against the evidence favoring the theory that the instrument was a mortgage, it might possibly not be absolutely controlling. *Baker v. Thrasher*, 4 Denio, 493; *Macaulay v. Porter*, 71 N. Y. 173. But the fact does not stand alone, nor is it opposed by circumstances of greater weight. It does not appear that the deed was made to secure a debt; but, on the contrary, it appears that the grantees paid to one of the grantors money to be used by him in paying a debt due from him to a third person. It can, of course, make no difference for what purpose the grantor obtained the money, provided the grantees became the purchasers of the land. If, in other words, they agreed to buy and did buy the property, then it is not material for what purpose the grantor wanted the money, nor to what purpose he applied it. He did in fact want the money which the appellees paid for the property for his own purpose, and did apply it to the payment of his own debt. There was no debt existing at the time the contract was made, owing from the grantors to the grantees; nor was any debt then created, so that the instrument was not executed to secure a subsisting debt.

It is true, the grantees were sureties on the bond of one of the grantors; but the debt was his, and was due his creditor. If there had been a subsisting debt, the question would be more difficult; but there was no debt to the grantees, and the money was paid by them when the instrument was executed. There is still another reason why the instrument cannot be regarded as a mortgage, and that is that upon no possible contingency was the property to revert to the grantors. *Baker v. Thrasher, supra*; *Macaulay v. Porter, supra*. Nor was there any sum for which either of the grantors would be liable to the grantees after the purchase price paid by the latter had been exhausted. There was, in fact, a sale of the property for an agreed price, and this price was paid in full by the grantees; so that the transaction was what it purports to be,—a sale, and not a mortgage. *Slowey v. McMurray*, 27 Mo. 113; *Robinson v. Cropsey*, 2 Edw. Ch. 138; *Slutz v. Desenberg*, 28 Ohio St. 371. It is not sufficient, to transform a deed into a mortgage, to prove that, at the time it was made, the parties agreed that, in the event that the property should be sold for more than the agreed price, the grantors should receive the increased price. *Hays v. Carr*, 83 Ind. 275; *Conway v. Alexander*, 7 Cranch, 218; *Cunningham v. Banta*, 2 Ind. 604; *Lee v. Kilburn*, 3 Gray, 594; *Glover v. Payn*, 19 Wend. 518; *Flagg v. Mann*, 14 Pick. 467. Leaving entirely out of consideration the evidence tending to show that Newton J. Rogers, and not the appellant, was the owner of the property, we think it clear that the judgment was right; for there was an absolute sale, and not a mere pledge of the property as the security for a debt. Judgment affirmed.

(115 Ind. 502)

LINDLEY *et al.* v. STATE *ex rel.* WELLS.¹

(Supreme Court of Indiana. June 23, 1888.)

EXECUTORS AND ADMINISTRATORS—ACTION TO COMPEL ACCOUNT TO SUCCESSOR—PLEADING.

In an action to compel an administrator to account to his successor for sums received by the former for the sale of lands of his intestate, a complaint stating that the former administrator received money for the sale of real estate of his intestate; that he has refused to account, though often requested; and that he still has the money in his hands,—is sufficient.

Appeal from circuit court, Orange county; E. D. PEARSON, Judge.
Farrell, Throop & Buskirk, for appellants. *Will. H. Martin*, for appellee.

ELLIOTT, J. The complaint of the relator is founded on a bond executed by Lindley as principal and the other appellants as sureties. It is alleged that the appellant Lindley, as administrator, petitioned for an order to sell the real estate of his intestate, that he obtained the order sought, and that the bond in suit was executed and approved by the court. It is further alleged that "the said Hiram Lindley, as such administrator, proceeded to sell said real estate for a large sum of money, to-wit, five thousand dollars; that the sales so made were by said administrator reported to the court and approved; that the said sum remains in the hands of the defendant Hiram Lindley." It is also alleged that Lindley was removed from his trust, and the relator appointed his successor, and that Lindley, "although often requested so to do, has failed, neglected, and refused to account to the relator for the proceeds of said sale." It is our judgment that the complaint is sufficient, inasmuch as it shows that the former administrator received money from the sale of the real estate of his intestate for which he has refused to account, and that he still has the money in his hands. The criticism of counsel upon the special finding is founded on a mistake. The finding not only states that the notes given for the purchase money were paid, but it also states that the defendant Lindley is chargeable therewith. It further states that the whole amount with which Lindley is chargeable is \$4,628.85. Judgment affirmed.

¹ Rehearing denied.

(115 Ind. 341)

HIRSCH v. NORTON et al.*(Supreme Court of Indiana. June 26, 1888.)***1. FRAUDULENT CONVEYANCES—TRANSFER OF CORPORATE STOCK—SECRET TRUST.**

One who has made an actual transfer to another of certain shares of stock, thus enabling the assignee to secure credit upon the faith of his ownership, cannot avail himself, as against the assignee's creditors, of a secret agreement, made at the time of the transfer, whereby the assignor was to remain the owner and receive the dividends of the stock. Such agreement creates a secret trust, void as against creditors, under Rev. St. Ind. 1881, § 4921, which provides "that all transfers of goods or things in action, made in trust for the use of the person making the same, shall be void against creditors, antecedent or subsequent."

2. SAME—RIGHTS OF ADMINISTRATOR OF ASSIGNEE.

The administrator of the assignee's estate, as the representative of the creditors hereof, may properly prove when their claims accrued, and that credit was given the deceased on the faith that he owned the stock transferred.

3. SAME—EVIDENCE—DECLARATIONS OF DECEASED ASSIGNEE.

The declarations of the deceased are competent to prove his indebtedness, and to prove that credit was given him on the faith of his ownership of the stock.

Appeal from circuit court, Randolph county; M. E. FORKNER, Special Judge.

Action brought by Adam Hirsch against Luther W. Norton, administrator of the estate of Levi W. Study, for certain shares of bank stock, part of the estate of Study, but claimed by Hirsch. Judgment was rendered for defendant, and plaintiff appeals.

Watson & Engle, for appellant. *Thompson, Marsh & Thompson*, for appellees.

ELLIOTT, J. In his complaint the appellant alleges that he is the owner of 10 shares of the capital stock of the Randolph County Bank; that he transferred the stock on the books of the bank to Levi W. Study; that the bank issued to Study the proper certificate; that, at the time the transfer was made, a written contract was entered into between the appellant and Study, wherein it was stipulated that the former should remain the owner of the stock, and receive all dividends; and that the transfer was made without consideration. It is further alleged that Study did not own or control the stock; that he died intestate on the 11th day of December, 1885; that he was, at the time of his death, in possession of the certificate issued to him; that his estate is insolvent; and that the appellee Norton, as his administrator, has taken possession of the certificates of stock, and holds them as part of the assets of his intestate's estate. The material allegations of the third paragraph of the answer of the appellee Norton are these: That the Randolph County Bank was a corporation duly organized under the laws of this state; that the capital stock of the bank was divided into shares of \$100 each; that the appellant owned 110 shares of the capital stock; that he transferred to Study 10 shares, and caused a formal transfer to be made on the books of the bank; that the bank issued a certificate for 10 shares of stock to Study; that the stock remained in Study's name at the time of his death, and still so remains; that the certificate was in his possession when he died; that Study and the appellant executed the written contract set out in the complaint; that the execution and existence of this writing were kept a secret and were concealed until after Study's death; that, from the time of the transfer until Study died, the appellant held him out to the stockholders of the bank, and to the public generally, as the owner of the stock; that he drew dividends and paid taxes on it; that, at the date of his death, he was insolvent; that each and all of the creditors of his estate contracted with him with the full knowledge that the stock stood in his name on the books of the bank, and in the full faith and belief that it was his absolutely; and that they gave him credit in the faith and belief that he owned the stock.

The 10 shares of stock were transferred to Study in full form, and he was invested with all the evidences of title that his assignor could clothe him with. In appearance he was the sole and legal owner of the stock. The books of the bank showed this ownership, and he was the holder of the certificate, which was the highest and best evidence of ownership. Nothing was lacking in his evidence of title. As against those with whom he dealt, and who gave him credit on the faith that he owned the stock, he is in equity to be deemed the owner. *Wheelock v. Kost*, 77 Ill. 297; *Adderly v. Storm*, 6 Hill, 625; *Hale v. Walker*, 31 Iowa, 344; *Leitch v. Wells*, 48 N. Y. 592; *Kelly v. Scott*, 49 N. Y. 595; *Moore v. Bank*, 55 N. Y. 41; *McNeil v. Bank*, 46 N. Y. 326; *Hilliard v. Cagle*, 46 Miss. 336. The property transferred by the appellant to Study is of a peculiar nature, and is assignable in a peculiar method. The cases which govern transfers of tangible personal property cannot control where the subject of the transfer is the capital stock of a corporation. In making transfers of corporate stock, the full, absolute, legal title is transferred in cases where all is done that the law requires. *State v. Bank*, 89 Ind. 302; *Brewster v. Hartley*, 37 Cal. 15; *Fisher v. Seligman*, 75 Mo. 21. The transfer made by the appellant gave to Study all the evidence of title that it was possible for the one to create or the other to acquire; and as to those who, in good faith, gave Study credit on the faith of his legal ownership, the appellant cannot be allowed to make available the secret agreement between him and his assignee. He voluntarily put it in the power of Study to secure credit upon the faith of his ownership of the stock, and as against creditors he cannot be heard to aver that the secret agreement secured to him the ownership of the capital stock. Where a party, by clothing another with all the legal *indicia* of ownership, enables him to mislead others, he, and not those who are misled by his acts, must be the sufferer. If loss comes, the man who invested the debtor with the evidence of absolute title, and thus misled creditors, must bear it, and not the creditors. The conclusion we assert involves little more than an application of the familiar general principle that, where one of two innocent persons must suffer by the act of a third, he must suffer who put it in the power of the third to do the act. *Quick v. Milligan*, 108 Ind. 419, 9 N. E. Rep. 392; *Preston v. Witherspoon*, 109 Ind. 457, 9 N. E. Rep. 585; *Kelley v. Fisk*, 110 Ind. 552, 11 N. E. Rep. 453; *Cowdrey v. Vandenburg*, 101 U. S. 572; *Woods' Appeal*, 92 Pa. St. 390; *Hamlin v. Sears*, 82 N. Y. 327; *Crocker v. Crocker*, 31 N. Y. 510. The assignment and transfer of the certificate, considered without reference to the secret agreement, undoubtedly vested a title in Study; and, if that title is defeasible, it must be because of agreement between him and the appellant.

We have already given sufficient reasons for our conclusion that the secret agreement cannot prevail as against creditors, but we may add another; and that is that the agreement creates a secret trust, void as against creditors, under the provisions of our statute. Rev. St. § 4921; *Plunkett v. Plunkett*, 16 N. E. Rep. 612; *Mayer v. Feig*, ante, 159, (May 19, 1888.) The case of *McGirr v. Sell*, 60 Ind. 249, and cases of a similar class, cannot, as we have already suggested, rule here, for here there was much more than a mere delivery of possession of property; there was an actual transfer, evidenced in such a method as to invest the assignee with all the possible *indicia* of ownership. In the cases referred to by appellant's counsel, there was no written evidence of title, and for that reason those cases are to be discriminated from the present. But, as we have already indicated, that is not the only reason for discriminating between the two classes of cases.

It was proper to prove the claims of creditors, and to prove when they were created. The reason for this conclusion is that the administrator represents the creditors, and, as their representative, had a right to show when their claims accrued, and to show, also, that credit was given the intestate on the faith that he owned the stock transferred to him by Hirsch. The case is

strictly analogous to that of a fraudulent conveyance, and in such cases it is well settled that the creditors or their representative may show when the debt was contracted. *Stout v. Stout*, 77 Ind. 537; *Bank v. Townsend*, ante, 116, (May 15, 1888.)

The declarations of Study were competent. They were competent upon two grounds: to prove the indebtedness, and to prove that credit was given him on the faith of his ownership of the stock. Judgment affirmed.

(116 Ind. 58)

HESSIAN v. STATE.¹

(Supreme Court of Indiana. June 26, 1883.)

EXCEPTIONS, BILL OF—CERTIFICATION—RECORD.

A statement in the record that "60 days are given to defendant to file a bill of exceptions, which bill of exceptions is in the words and figures following," followed by what purports to be a bill of exceptions, and a statement in the certificate to the transcript that the transcript "contains true and complete copies of all the papers and entries in said cause," does not show that any bill of exceptions was ever filed, and any point which can be presented only by bill of exceptions cannot, in such case, be considered; Rev. St. Ind. 1881, § 629, providing that, when the bill of exceptions is filed, it shall be a part of the record.

Appeal from circuit court, Monroe county; E. D. PEARSON, Judge.

Miers & Corr and Louden & Rogers, for appellant. *S. B. Lowe and The Attorney General*, for appellee.

ZOLLARS, J. The ground urged by appellant for a reversal of the judgment, and that upon which the state asks for its affirmation, is each based upon a strict construction of the statutes, and neither goes to the merits of the case. It is contended by appellant that the court erred in giving an oral instruction after having been requested to charge in writing. On the other hand, it is contended by the attorney general that the record does not present the point relied upon by appellant, for the reasons that it can only be presented by a bill of exceptions, and that there is nothing in the record to show that a bill of exceptions was ever filed. This contention on the part of the state cannot be disregarded. The statute provides that when the bill of exceptions is filed it shall be a part of the record. Rev. St. 1881, § 629. The holdings have been that, where time is given in which to file a bill of exceptions, the record must show affirmatively, in some manner, that it was filed within the time given by the court, or it cannot be considered in this court as constituting a part of the record. *Loy v. Loy*, 90 Ind. 404. It has been held, however, that where, in the clerk's certificate to the transcript, made before the expiration of the time given within which to file the bill, there is a statement that the transcript is a transcript of all of the papers "filed" in the cause, or of all of the papers "on file," that will be regarded as sufficient evidence of the filing of the bill. *Hull v. Louth*, 109 Ind. 315, (336,) 10 N. E. Rep. 270; *Armstrong v. Harshman*, 93 Ind. 216; *Oliver v. Pate*, 43 Ind. 182; *Porter v. Choen*, 60 Ind. 346. The case before us is not within the ruling in those cases. After noting the filing of a motion for a new trial by the appellant, the record is as follows: "Which motion is overruled by the court, and the defendant at the time excepted, and sixty days are given defendant to file a bill of exceptions, which bill of exceptions is in the words and figures following, to-wit." Following that is set out what purports to be a bill of exceptions. In his certificate to the transcript, the clerk states that the transcript "contains true and complete copies of all the papers and entries in said cause." A bill of exceptions is not a paper in the cause, unless filed as required by the statute, and it will readily be seen that there is nothing in the record to show that any bill was ever filed in this cause. For this reason the judgment must be and is affirmed with costs.

¹Rehearing denied.

(115 Ind. 351)

DUFFY et al. v. STATE ex rel. ROGERS.

(Supreme Court of Indiana. June 27, 1888.)

EXECUTORS AND ADMINISTRATORS—ADMINISTRATOR DE BONIS NON—FRAUDULENT CONVEYANCE BY PREDECESSOR—ACTION TO SET ASIDE.

An administrator *de bonis non*, who has obtained a judgment upon the bond of his predecessor for converting the assets of the estate, may maintain an action to enforce the judgment against land fraudulently conveyed by such predecessor, without issuing execution against the same or against the sureties, and though there are no debts due from the estate.

Appeal from circuit court, Cass county; M. WINFIELD, Judge.

Action by the state *ex rel.* Lewis E. Rogers, administrator *de bonis non* of the estate of Michael Carney, deceased, against James Duffy, the former administrator, and others, to set aside fraudulent conveyances. A demurrer to the complaint was overruled. Answers were then filed, and, after trial, judgment was rendered for plaintiff. Defendants appeal.

D. P. Baldwin, for appellants. Dykeman, Wilson & Taber, for appellee.

ELLIOTT, J. It is alleged in the relator's complaint that James Duffy was appointed the administrator of the estate of Michael Carney, deceased; that Duffy received money and property of the decedent's estate to the value of \$3,000; that for the money and property so received he has never accounted, but appropriated it to his own use prior to the 1st day of January, 1880; that Duffy invested the amount appropriated by him in the purchase of the described real estate; that he abandoned his trust, and fled the state; that he was removed from his trust on the 17th day of September, 1883, and the relator appointed his successor; that on the 21st day of November, 1883, the relator brought an action on the bond executed by Duffy as administrator, and obtained judgment against him and his sureties, McTaggart and Pierce, for \$1,899, on the 4th day of December, 1884. It is further alleged that in October, 1882, James Duffy conveyed the land so bought by him with trust funds to his children, his co-appellants; that, at the time the conveyance was made, he was insolvent, and had no other property than that fraudulently conveyed by him subject to execution; that he had none other at the time this suit was brought; that the grantees paid no consideration for the property conveyed to them; that the conveyances were executed for the fraudulent purpose of cheating and defrauding the creditors of Duffy. The adult appellants did not appear to the complaint, and a default was entered against them.

The administrator *de bonis non* had authority to bring and maintain this suit. The judgment obtained by him against Duffy for a breach of duty was a lien on the land fraudulently conveyed. *Blair v. Smith*, 15 N. E. Rep. 817, (March 6, 1888;) *Hanna v. Aebker*, 84 Ind. 411. As the relator had a lien on the property of the fraudulent grantor, he had the right to invoke the aid of a court of equity to perfect that lien, and make it available for the purpose of his trust. *Quarl v. Abbott*, 102 Ind. 233, 1 N. E. Rep. 476. The lien was created by the judgment obtained on the bond, but, in order to remove obstructions to its successful enforcement, the relator was entitled to the assistance of the courts. He might, had he so elected, have sold the land, and left it for the purchaser to assail the fraudulent conveyances; but this he was not bound to do, for he had a right, in the first instance, to clear away the fraudulent conveyances which clouded his lien. *Brown v. Brown*, 17 Ind. 475; *Johnson v. Harris*, 69 Ind. 305. *Stout v. Stout*, 77 Ind. 537-541. The judgment obtained against Duffy and his sureties conclusively adjudged that the amount found due was due the estate of the decedent, and it created a lien for that amount. It also established the further fact that the debt was part of the assets of the estate. As the debt was due the estate, it was not only the relator's right, but it was his duty, to take measures to collect it by enforcing

the judgment. It is plain, therefore, that he had authority to make clear his way to property subject to his lien by removing the apparent claims of fraudulent grantees. In removing these claims, he simply reduced to an available form a claim that had previously been adjudged to be part of the assets of the estate represented by him. An administrator *de bonis non* must, of necessity, have authority to prosecute all suits essential to perfect the lien of a judgment obtained by him upon the bond of his predecessor. He only is entitled to collect the judgment, and to distribute the proceeds, and, as this is his duty he must possess the means necessary to enable him to perform it. The debt for which the judgment was rendered was, it is important to keep in mind, a debt which the administrator *de bonis non* was authorized to collect and distribute as part of the trust-estate. It was not a debt due the decedent in his life-time, but a debt growing out of the default of the first administrator of his estate, and therefore one which the successor of the defaulting administrator was bound to collect. The collection of such debts must be made by the administrator *de bonis non*, since he obtains the judgment, and is charged with the duty of making it available as part of the trust-estate. It is not material, therefore, whether there are creditors or not; for, as the debt was due the administrator *de bonis non* in his trust capacity, he was bound to use diligence to secure and distribute the avails of the judgment according to law. It follows, as a necessary, logical sequence, that the relator was not bound to aver that there were unpaid debts due from the estate of his decedent. *Langsdale v. Woollen*, 99 Ind. 575. If he had not obtained the judgment on a claim which accrued subsequent to the death of the intestate, there might possibly be some doubt upon this question; but, however this may be, we think it clear that where, as here, the administrator *de bonis non* obtains a judgment against his predecessor for wrongfully converting the assets of the estate, he may enforce that judgment without alleging that there are unpaid claims against the estate. Either this conclusion must be correct, or it must be true that an administrator *de bonis non* who obtains judgment upon the bond of his predecessor can collect his judgment only in the event that there are no other assets sufficient to pay the claims of creditors. That this last conclusion is correct we venture to assert no one will affirm.

It is perhaps true that the relator might, had he so elected, have issued an execution against the sureties, and enforced his judgment; but it does not follow from this that the defaulting administrator and his fraudulent grantees have a right to coerce him to pursue that course. The truth of the one proposition does not imply the truth of the other. The relator was, at all events, not bound to pass by property which in equity belonged to the principal debtor, and upon which his judgment was a lien, and compel payment from the sureties on the wrong-doer's bond. There is neither equity nor justice in the demand of the appellants. They occupy a position unfavored by courts of chancery. The property which they seek to wrest from the creditors by fraud is equitably and legally subject to the lien of the relator's judgment, and we can conceive no reason for permitting them to dictate to him what course he shall pursue. There is no merit in their claim that the relator shall leave their wrong undisturbed, and compel the sureties to pay the judgment. It is not for them to fraudulently hold the property, and demand that the relator shall proceed against the sureties. Neither in law nor in equity have the appellants a right to demand that the sureties shall be compelled to pay the judgment, and they permitted to hold the property acquired by fraud. The question is not whether the relator might, if he chose, compel the sureties to pay the money, but whether he has a right to make good his lien upon the property of the principal. The lien exists, and we can see no reason why the relator may not make it available, even though it be conceded that he was not bound to do so. The question is, after all, not what he was bound to do, but what had he a right to do. To us it seems clear that, having a lien, he had a right

to make that lien perfect if he so elected, and that he was not bound to pass by the property fraudulently conveyed, and seize upon that of the sureties of his predecessor. The equities of the sureties are infinitely superior to those of the defaulting administrator and his fraudulent grantees, and the administrator was under no obligation to disregard those equities, and leave untouched the property upon which his judgment was a lien. Although it may be true that he might have disregarded those equities, and coerced payment from the sureties, still he was under no legal or moral obligation to do so, and, as he has violated neither a legal nor a moral obligation in endeavoring to perfect his lien upon the property of the principal debtor, there is no impediment in his way to a successful prosecution of this suit. Having a lien upon the property of the principal debtor, he has a right to rely upon that lien, and to decline to exact payment from persons whose equities are so great and whose position is so much favored as that of sureties. *Speiglemyer v. Crawford*, 6 Paige, 254. The rule that the execution creditor may in the first instance levy upon and sell land fraudulently conveyed to satisfy his judgment lien necessarily implies that he may make that lien available. Suppose that the appellee had levied upon the land in the hands of the fraudulent grantees, and sold it, could they have defeated a suit by the purchaser at the sheriff's sale to set aside the fraudulent conveyance upon the ground that the creditor should have issued an execution against the sureties? The question suggests its answer. If they could not defeat a suit by the purchaser, we can see no reason why they can defeat a suit brought for the same purpose by the judgment creditor. In assuming that the appellee had a plain legal remedy against the debtor, the appellants assume more than is just. There may have been a plain legal remedy against the sureties, but there was none against the principal. In seeking to avoid the fraudulent conveyance, the creditor is pursuing a remedy he is entitled to invoke as against him and his fraudulent grantees. As against them, there is no plain and adequate legal remedy, for the creditor is invoking the aid of equity to remove a cloud from his legal lien. This he unquestionably has a right to do, for the law affords him no adequate relief. It is therefore not just to assume that, as against them, the creditor has a plain and adequate legal remedy. It is true, this assumption is not directly made, but it is the tacit assumption on which the argument is constructed. The truth is that the appellants are contesting the case, not because there is an adequate legal remedy against them, but because there is such a remedy against some one else, and that some one else the sureties of the principal debtor and fraudulent grantor. When regard is had, as in justice it should be, to the strong equities of the sureties, it cannot be justly adjudged that the principal debtor and his fraudulent grantees shall be allowed to hold the land of the principal debtor, and compel the creditor to proceed against the sureties.

But is it not assuming too much to assert that the claim could, in any event, have been made off the sureties? We cannot assume that the administrator has done what he ought not to have done in a case where the demand comes from a fraudulent grantor and his grantees. It would seem that those parties ought, before they can hold the property acquired by fraud, if they can hold it at all, show that the debt could have been made from the sureties. It is not easy to see upon what equitable or legal grounds they can urge that, in order to protect them in the enjoyment of property fraudulently conveyed, the courts shall presume that the administrator has been guilty of a wrong. It follows from what we have already said that it was not necessary for the relator to allege that the sureties were insolvent; for, if he had a right to make good his lien against the property of the principal debtor, then it is immaterial whether the sureties were solvent or insolvent. If the relator had a right to make his lien available without proceeding against the sureties, then it was not incumbent upon him to do more than show that the principal debtor had no property

subject to execution other than that fraudulently conveyed when the conveyances were executed and the suit was brought. It appears on the face of the complaint that Pierce and McTaggart were the sureties on the bond of James Duffy, and this is sufficient to entitle them to protection as sureties under the general rules of the law. The fact that they were sureties, while it may not of itself entitle them to demand, as of right, the benefit of the statutory provision requiring the creditor to first exhaust the property of the principal debtor subject to execution, does entitle them to the benefit of the legal and equitable rules which govern the relation of principal and surety. The relationship between parties liable upon a bond may be shown, and when shown the sureties may assert their rights and equities. *Knopf v. Morel*, 111 Ind. 570, 13 N. E. Rep. 51; *Montgomery v. Vickery*, 110 Ind. 211, 11 N. E. Rep. 38; *Scherer v. Schutz*, 83 Ind. 543; *Bowser v. Rendell*, 31 Ind. 128; *Harker v. Glidewell*, 23 Ind. 219. In this instance the relationship does appear from the character of the instrument as well as from the allegations of the complaint, and the appellants are in no situation to complain of the insufficiency of the pleading in this particular. It is, indeed, not easy to perceive how they could successfully complain even if the averments of the complaint were much more indefinite than they are, since the creditor has so treated them, and the nature of the bond shows that only James Duffy, the defaulting administrator, could have been the principal. The relation of James Duffy so fully appears that his co-judgment defendants, Pierce and McTaggart, are entitled to be treated as sureties, with all the general rights and equities of that favored position, and the relator was not in the wrong in so treating them. As they are sureties, the relator is not in the position of one resorting to an extraordinary remedy to make good a lien or a debt, where there is a plain legal remedy open to him which he may invoke without doing injustice to the rights of others. It was both equitable and proper for him to elect to seize the property of the principal debtor, bound by the lien of his judgment, rather than to seize the property of the sureties. The fact that there were sureties with superior rights and equities plainly distinguishes this case from those cases which hold that where there is an adequate remedy at law, equity will not interfere, and that extraordinary remedies cannot be invoked. We do not depart from the doctrine of *Baker v. State*, 109 Ind. 47, 9 N. E. Rep. 711, but we affirm that it does not apply to a case where, as here, a fraudulent conveyance is sought to be annulled by a creditor who prefers to make his debt out of the property of the principal debtor rather than to exact it from sureties.

It is true, as counsel say, that *prima facie* an administrator has nothing to do with real estate, but this is nothing to the present purpose. The administrator is not seeking to obtain real estate; he is seeking to make available a lien created by a judgment in his favor. He is not seeking to subject a decedent's land to sale; he is seeking to clear away a fraudulent conveyance in order to make his judgment lien available. As said in a similar case: "This action was not for the purpose of paying debts against the estate, but for the purpose of collecting a debt due the estate." *Langsdale v. Woolten*, *supra*. The right to sue on the bond carried with it all incidental rights. The right to obtain a judgment necessarily implies the right to enforce the judgment when obtained. As the relator unquestionably had a right to sue on the bond, and obtain judgment, he must, under a plain legal principle, have the incidental rights necessary to enforce that judgment. If the right to bring a suit to set aside a fraudulent conveyance is essential to the enforcement of the judgment, then it exists in the relator, and that it is essential to enforce the judgment the complaint quite clearly shows. The relator is not, therefore, exercising any extraordinary powers, nor is he seeking to obtain land. All that he has done has been done in the exercise of an incidental power involved in his right to obtain and enforce a judgment.

We have fully discussed the questions presented upon the complaint; more

fully, perhaps, than, in view of the manner of the attack, the appellants had a right to ask, and we find no substantial defect in it. We have studied the evidence, and we find no reason for reversing the judgment of the trial court. Judgment affirmed.

(115 Ind. 345)

SYFERS *et al.* v. BRADLEY *et al.*

(*Supreme Court of Indiana. June 27, 1888.*)

CHattel Mortgages—Acknowledgment—Pleading.

In an action by a mortgagee for the wrongful conversion of the mortgaged property, the complaint is not defective because of its failure to aver that the mortgage was properly acknowledged before it was recorded, as, the presumption being in favor of a public officer having done his duty, an allegation that the mortgage was recorded in the proper recorder's office carries the implication that the mortgage had been duly prepared for record.

On petition for rehearing. For former opinion, see 16 N. E. Rep. 805. *New & Jones*, for appellants. *Wm. R. Hough* and *Offutt & Black*, for appellees.

NIBLACK, C. J. As has been seen, the complaint alleged that Walker Bros. executed to the plaintiffs a chattel mortgage, on their stock of groceries and other personal property, to secure the debt therein described; that it also alleged that the plaintiffs in due time caused the mortgage to be recorded in the recorder's office of Hancock county, the county in which Walker Bros. resided, and in which the mortgaged property was situate. The point was made at the hearing that the complaint was fatally defective in its failure to aver that the mortgage was properly acknowledged before it was recorded; but, regarding the point as wholly immaterial to the merits of the appeal, we did not make any distinct ruling upon it. In their petition for a rehearing the appellees have renewed the point with much earnestness and apparent confidence, and insist that we shall now consider it. The presumptions are all in favor of a public officer having done his duty in every matter concerning which he has taken official action. The allegation that the mortgage was recorded in the proper recorder's office consequently carried with it the implication that the mortgage had been duly prepared for record before it was recorded. In legal contemplation, the entry of an unacknowledged deed or mortgage on the recorder's books does not constitute a recording of the instrument. *Taylor v. City of Fort Wayne*, 47 Ind. 274; *Westerman v. Foster*, 57 Ind. 408; *Carver v. Carver*, 97 Ind. 497. The acknowledgment of a deed or mortgage has reference only to the proof of its execution, and to its preparation for record, and forms no part of the instrument itself. *Gray v. Ulrich*, 8 Kan. 112. If the mortgage in question was not acknowledged before it was recorded, the objection can be made and will regularly arise upon the evidence at the trial. If an acknowledgment cannot be shown, the record will be of no avail. Other questions are reargued, but they have already received sufficient consideration. The petition for a rehearing is overruled.

(115 Ind. 380)

BOARD OF COM'RS v. DAILEY.

(*Supreme Court of Indiana. June 28, 1888.*)

HIGHWAYS—ASSESSMENTS FOR GRAVEL ROAD—INJUNCTION—PAYMENT OF ASSESSMENT NOT QUESTIONED.

The collection of a special tax claimed to have been illegally assessed, for the purpose of paying interest on bonds issued in aid of the construction of a gravel road, will not be restrained where the complaint shows that the original tax, the validity of which is not questioned, has not been paid by the complainant.

Appeal from circuit court, Wells county; HENRY B. SAYLER, Judge. *Dailey, Mock & Simmons* and *Wilson & Todd*, for appellants.

Howk, J. The first error of which complaint is here made by appellant, defendant below, is the overruling of its demurrer to the second paragraph of plaintiff's (Dailey's) complaint herein. In the second paragraph of his complaint, plaintiff, Dailey, alleged that he was the owner of certain real estate, particularly described, in Wells county, Ind.; that on June 9, 1885, defendant, without notice to plaintiff, and without any authority of law, attempted to levy a special tax of \$8.20 on plaintiff's said real estate for the purpose, as was claimed by the order of said board of commissioners, defendant, of paying interest on bonds issued by said Wells county to aid in the construction of the Bluffton & Salimonia Free Gravel Road, and for the purpose of paying expenses of collecting said tax, and this long after the original assessment for making said gravel road had been placed on the tax duplicate, and long after the said gravel road had been completed and had been received from the contractor; that the tax duplicate for said gravel-road tax, and for said additional special tax of \$8.20, was then in the hands of defendant Deam, as treasurer of Wells county, who threatened to levy the same by distress and sale, unless paid; that said tax, being assessed without authority of law, was illegal and void, but it made a cloud on plaintiff's title to said real estate, which he claimed should be lifted. Wherefore, etc., we are of opinion that the court below clearly erred in overruling defendants' demurrer to the complaint herein, the substance of which we have given almost in the language of the pleader. Two taxes are described in the complaint, namely: (1) The original gravel-road tax; and (2) the additional special tax, levied long after such original tax, on the 9th day of June, 1885. The original gravel-road tax is not shown by any averment in the complaint to have been illegally assessed for any cause or reason. In considering the question of the sufficiency of the complaint herein, it must be assumed, as against the plaintiff, therefore, that such original gravel-road tax is a tax lawfully assessed by competent authority, upon proper notice and in conformity with law. There is no averment in the complaint that such original gravel-road tax has ever been paid, in whole or in part, nor is there any averment therein from which such payment may be fairly inferred. On the contrary, we think it is fairly shown by the averments of the second paragraph of complaint that, at the time of the filing of such paragraph, the original gravel-road tax was on the tax duplicate then in the hands of the treasurer of Wells county, who threatened to collect such tax by distress and sale, unless the same were paid. Upon this showing, it must be held, in accordance with repeated decisions of this court, that the second paragraph of complaint did not state facts sufficient to entitle plaintiff to an injunction against any of the gravel-road taxes described therein, even though it appeared that some part or portion of such taxes was clearly illegal. The doctrine of these cases is that a court of equity will not enjoin the collection of taxes claimed to be illegal, until the plaintiff has first paid or tendered the amount of taxes assessed against him, the legality and validity of which he does not call in question in his complaint. *City of South Bend v. University*, 69 Ind. 344, and cases cited; *Mullikin v. Reeves*, 71 Ind. 281; *Mesker v. Koch*, 76 Ind. 68; *Stilz v. City of Indianapolis*, 81 Ind. 582; *Read v. Yeager*, 104 Ind. 195, 8 N. E. Rep. 856. With respect to the additional special tax, mentioned in the second paragraph of complaint, the only fact averred by plaintiff therein, assailing the legality and validity of such tax, is that such special tax was attempted to be levied by defendant on plaintiff's land, "without notice to him." We say this is the only fact averred, because the remainder of the allegation, "and without any authority of law," is not the averment of a fact, but of the pleader's opinion or conclusion. If it had been averred that such additional special tax was attempted to be levied "without any notice whatever," the averment of the fact would have been the same as that in the complaint in *Wells Co. v. Gruver*, ante, 290, (decided at this term,) which was there held to be sufficient. In the case in hand, the averment of

plaintiff is that such special tax was attempted to be levied "without notice to him." Our statute in relation to the levy of taxes or assessments for the construction of free gravel roads (section 5092, Rev. St. 1881) does not provide for or contemplate personal notice to the owner of the land, but only a "notice by publication" to be given by the proper county auditor. It may well be doubted, therefore, if the second paragraph of complaint sufficiently shows that the statutory notice of the levy of the special tax was not given by the auditor of Wells county. We do not decide this point, as it has not been discussed by counsel; but, as having some bearing on the question, we cite the case of *Railroad Co. v. North*, 103 Ind. 486, 3 N. E. Rep. 144.

The demurrer to the second paragraph of complaint ought to have been sustained. This conclusion renders it unnecessary for us now to consider or decide any question presented by the other errors assigned here by the defendant. Plaintiff's counsel has not favored this court with any brief or argument in support of the rulings of the court below. The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrer to the complaint, and for further proceedings.

(115 Ind. 275)

BEDGOOD *et al.* v. STATE.

(Supreme Court of Indiana. June 20, 1888.)

RAPE—EVIDENCE—PREVIOUS SEXUAL INTERCOURSE—WITNESS—EXAMINATION.

Upon indictment of several for a rape, a question, asked the prosecuting witness on cross-examination, whether she had not voluntarily submitted to sexual intercourse a short time before the alleged rape, with one of defendants, who, according to her testimony, had participated in the rape, is relevant, as bearing upon her credibility, and does not tend to criminate her; and a refusal by the court to compel her to answer is error, although the indictment had been *nolle prosequi* as to such defendant, and the fact had been testified to by him.

Appeal from circuit court, Bartholomew county; N. R. KEYES, Judge.
Hord & Ewing, for appellants. *The Attorney General*, for appellee.

ELLIOTT, J. Bedgood, Hill, and Bozell, the appellants, were convicted of the crime of rape. With them were indicted Henry Shumway and Andrew Gaston. A *nolle* was entered as to Shumway, and Gaston was acquitted. Ardelle Tilford, the woman upon whom it was alleged the rape was committed, gives substantially this account of herself, and of the crime charged against the appellants: She was a married woman, 21 years of age, and lived with her husband in the village of Jonesville. There were inhabited houses not far from the house in which she lived. On the night of the 7th day of January, 1888, the persons accused of the crime came to the house, and forced open the door. Two of them, Gaston and Bedgood, seized her, and placed their hands over her mouth. They told her that if she cried out they would kill her, and that if she told her husband they would kill him and kill her. When they entered the house she was in her night-clothes. They told her she might put on her clothes, and, as she says, they helped her "put on a loose mother-hubbard dress." They took her into the back room, Gaston and Bedgood having hold of her, and the others following, but they could not all get into that room because of its size. She was held by some of the accused during the whole time, having been first thrown on a bed, and each one of them violated her person. They repeated their threats, and she made no outcry, because, as she says, she feared to do so, and because some one of the men held his hand over her mouth. After they had accomplished their purpose, they left the house, but returned within five minutes, and remained a short time, again violating her person. After they had violated her person the second time, Gaston attempted to fix the door fastening, and some of the others went to her trunk. After they left she went to the house of John Lewis, and informed him or his family that some one had broken into the

house, but she did not make complaint of any one of the accused until the Monday after the occurrence. The reason she did not inform her husband, or any one else, sooner, was because she feared that the accused persons would kill her and kill him. On Sunday morning she told Mrs. Lewis and others that the persons who had broken into the house had not injured her, and had not put their hands upon her, and she made substantially the same statement to Mr. Lewis, and perhaps others. This is substantially the testimony as elicited by the direct examination. John Q. A. Lewis was called by the state, and he testified that on Saturday night, January 7, 1888, about 10 o'clock, Mrs. Tilford came to his house, and asked that some one come to her house, but made no complaint that any outrage had been committed upon her person. Mr. Tilford, the husband of Ardelle Tilford, as a witness for the prosecution, testified that no complaint was made by his wife of the alleged crime on Saturday night, but that complaint was made by her on Monday night. He also testified that she was weeping during Monday. W. H. Meyers testified that he saw her on Monday morning, and that she was then somewhat excited, and he also testified that he saw some marks on her face. These were all the witnesses called by the state, except such as were called upon the question of character. Gaston adduced very strong evidence of an *alibi*, and on that ground was acquitted; although Mrs. Tilford testified quite as positively to his presence as to that of any one else, and, indeed, testified that he took a rather more active part in the affair than any of the others. Shumway testified that he was not at Mrs. Tilford's house after 7 or 8 o'clock; that Bedgood and Gaston came in as he went out, and that no personal violence was inflicted upon her. Shumway was corroborated by Wagoner, Wright, and other witnesses. Miss Lewis testified that when Mrs. Tilford came to her father's house on the night of January 7 there were no marks of violence on her person; that her clothes were not torn; that she said six or seven men had broken into her house, but she did not know who they were; and that she made no complaint of any outrage on her person. Mrs. Lewis gave substantially the same testimony. Mrs. King, to whom Mrs. Tilford says she made complaint on Monday, testified that no complaint was made by Mrs. Tilford of an outrage on her person, but that she did say that six or seven men, none of whom were known to her, had broken into her house, and taken things out of her trunk, and scattered them about. This witness also testified that there were no marks of violence on Mrs. Tilford's face. The accused persons all denied that they had used any violence or threats, but some of them admitted that they did, at different times during the early part of the evening of January 7th, have sexual intercourse with Ardelle Tilford, with her consent. In many particulars the evidence of the accused was corroborated, and in many that of Mrs. Tilford was contradicted by them and by other witnesses. A number of witnesses testified that Mrs. Tilford's general reputation was bad, and others testified that it was good.

It is not our purpose to decide the case upon the evidence, and we have given a synopsis of the evidence for no such purpose. Our purpose is to show that the evidence is not of that satisfactory character which will enable us to say that the verdict is so clearly right that we can rightfully disregard errors committed in excluding testimony. We are, indeed, strongly impressed with the argument that the verdict is wrong on the evidence. The character of the case, and of the evidence, was, at all events, such as to entitle the appellants to the benefit of all the testimony they could adduce, and, if any legitimate evidence has been excluded, there must be a reversal. The evidence of the state is, at least, not of that strong and satisfactory character which would justify us in adopting the theory that the verdict is so clearly right that errors may be disregarded. The appellants asked Mrs. Tilford, on cross-examination, whether she had not, a short time before the crime was alleged to have been committed, voluntarily submitted to the embraces of Henry

Shumway. The trial court refused to require the witness to answer. The legal question is presented in various forms, but it is not necessary that we should do more than state it generally. If the prosecution had not dismissed as to Shumway, it is quite clear, upon principle and authority, that the appellants might, as of right, have required Mrs. Tilford to answer the questions propounded to her. The law upon this subject is thus stated in a recent work: "But previous acts of incontinence with the defendant stand on a different ground, and are fairly within the *res gestæ* of the inquiry, and within the same principle evidence is competent of the woman's lewd and indecent behavior towards the defendant." Gillet, Crim. Law, § 732. The authorities support this proposition. *Eyler v. State*, 71 Ind. 49; *Anderson v. State*, 104 Ind. 467, 4 N. E. Rep. 63, and 5 N. E. Rep. 711; *Rex v. Martin*, 6 Car. & P. 562; *State v. Forshner*, 43 N. H. 89; *State v. Cook*, 22 N. W. Rep. 675; *People v. Abbot*, 19 Wend. 192; *Shirwin v. People*, 69 Ill. 55; *State v. Jefferson*, 6 Ired. 305; *Hall v. People*, 47 Mich. 636, 11 N. W. Rep. 414; *Wilson v. State*, 17 Tex. App. 525; Whart. Crim. Law, (9th Ed.) § 568. The principle upon which these authorities proceed is that evidence of previous illicit commerce renders it probable that force was not used. This principle has a twofold effect, inasmuch as it affects the credit of the woman who charges that her person was forcibly violated, and also supplies the accused with a circumstance making it probable that he did not obtain by violence what he might have secured by persuasion or for money. It is, the rule assumes, not probable that a man who has procured without committing a felony what he desired would commit a felony to obtain it. A man accused of crime has a right to all relevant testimony that tends to make it appear improbable that he is guilty of the crime with which he is charged. "Like reason," it was said of old, "doth make like law." The like reason extends the rule declared by the authorities in this case. If it be true that Shumway did have sexual intercourse with Mrs. Tilford with her consent, then it is not probable that he would have joined other men in forcing her to submit to his embraces. If this is not probable, then it is not probable that such an occurrence took place as Mrs. Tilford testified to, on the night of January 7, 1888; for if it is probable that he was not with the appellants on that night, or that he did not unite with them in a felony, it is fairly inferable that the story told by Mrs. Tilford is not worthy of belief. We do not, of course, decide what weight should be given the evidence. All that is necessary or proper for us to decide is that the evidence sought to be elicited was relevant and competent. Where evidence is competent and relevant, it is the duty of the court to receive it, leaving it for the jury to determine its weight. *Pedigo v. Grimes*, 113 Ind. 148, 13 N. E. Rep. 700, and cases cited; *Railroad Co. v. Diller*, 110 Ind. 223, 9 N. E. Rep. 710, and cases cited; *Harbor v. Morgan*, 4 Ind. 158. The facts sought to be brought out on cross-examination, it is obvious from what we have said, affected all the persons accused; for, if it was improbable that Shumway would have resorted to violence, it is also improbable that he was one of several who did, and, if he was not, then the occurrence did not take place as Mrs. Tilford describes it. By dismissing the case as to Shumway the prosecution could not take from the appellants evidence which was favorable to them. Mrs. Tilford was not entitled to refuse to answer upon the ground that the answer might criminate her. If she had admitted that she did have sexual intercourse with Shumway on the night of January 7, 1888, it would not, it seems, have tended to prove her guilty of any crime; for the law does not make a single act of sexual intercourse a criminal offense. Gillet, Crim. Law, § 192. But waiving a decision, and conceding that the answer might tend to criminate her, still she could not, as of right, refuse to answer, because the statute prohibits testimony given under such circumstances from being used against an accused. Rev. St. § 1800; *Wilkins v. Malone*, 14 Ind. 153; *Frazer v. State*, 58

Ind. 8; *La Fontaine v. Association*, 88 N. O. 132; *State v. Nowell*, 58 N. H. 314; *U. S. v. McCarthy*, 16 Reporter, 388; *State v. Quarles*, 13 Ark. 307. If the statute did not fully shield the witness, the rule would be different; but here the shield completely protects the witness. *State v. Enochs*, 69 Ind. 314. We cannot agree with the attorney general that because Shumway was permitted to testify that he did have previous sexual intercourse with Mrs. Tilford, that the error in denying the right to compel Mrs. Tilford to answer was a harmless one; nor can we agree that because Mrs. Tilford denied, in general terms, that Shumway was at her house early in the evening of January 7th, that the error was rendered harmless. The right of cross-examination would be valueless, if restricted to mere general statements, and it is uniformly held that it cannot be thus restricted. Where there is a right to cross-examine, there is a right to interrogate as to particulars and details. *Hyland v. Milner*, 99 Ind. 308-311; 1 Greenl. Ev. § 446. But, in this instance, the fact inquired about was material in a very high degree, and was a fact affecting the credibility of the witness, as well as one going to one of the essential elements of the crime charged against the accused. 1 Whart. Ev. (2d Ed.) § 542. Other questions are discussed by counsel; but as the judgment must be reversed, and the questions discussed may not again arise, we do not deem it necessary to examine them. Judgment reversed, with instruction to sustain the appellants' motion for a new trial.

(116 Ind. 144)

DUESTERBERG et al. v. STATE ex rel. CITY OF VINCENNES.¹

(Supreme Court of Indiana. June 28, 1888.)

TRIAL.—INTERROGATORIES—WITHDRAWAL AFTER GENERAL VERDICT.

Where relevant interrogatories have been submitted to the jury, and the jury have returned a general verdict without answering them, the court cannot allow the interrogatories to be withdrawn by the party proposing them, and dismiss the jury, against the objection of the opposite party.

Appeal from circuit court, Knox county; GEORGE A. BICKNELL, Judge.

Thos. R. Cobb, O. H. Cobb, W. A. Crellob, and Geo. W. Shaw, for appellant. *Cauthorne & Boyle*, for appellees.

ELLIOTT, J. Five material and relevant interrogatories were submitted to the jury on the motion of the relator. The jury came into court with a general verdict, but did not answer any of the interrogatories. The appellants asked that the jury be required to answer the interrogatories, and the relator asked leave to withdraw them. The court refused to require the jury to answer the interrogatories, received the general verdict, and discharged the jury. The trial court erred in refusing to require answers to the interrogatories propounded by the relator. The appellants had a right to require answers, although the interrogatories were propounded by the adverse party. The party who secures the submission of interrogatories may not withdraw them after the return of the general verdict. When approved by the court, and properly submitted to the jury, they become a matter of interest to both parties; and neither can deprive the other of a right to have answers returned by the jury. If it were otherwise, a party might be misled by relying upon interrogatories asked by his adversary. But we deem it unnecessary to pursue the discussion, for we think the question is settled against the appellee by our authorities. The result of the cases is thus stated by Mr. Work: "When the court has submitted proper interrogatories to the jury, the parties have a right to have them answered, and they cannot be withdrawn without the consent of the parties." 1 Work, Pr. § 683. In another work, it is said: "And this is true, even though the party requesting their submission agree to their withdrawal, if the other party objects; for either has a right to insist that they be answered." Thornt. Jur. § 372. In

¹ Rehearing denied.

Sage v. Brown, 84 Ind. 464, it was said: "It was the province of either party to demand that the special verdict should be properly signed, and that the questions should be answered." It was held in *Peters v. Lane*, 55 Ind. 391, that it was error to refuse to compel more specific answers to interrogatories, although the interrogatories were submitted by the appellees, and not the appellants. We need not, however, comment upon the decisions in detail. It is enough to say that the current of opinion is that, when once the interrogatories have been submitted to the jury under proper instructions, neither party has exclusive control over them. *Wood v. Ostram*, 29 Ind. 177; *Noakes v. Morey*, 30 Ind. 103; *Coal Co. v. Raney*, 34 Ind. 329; *Maxwell v. Boyne*, 36 Ind. 120; *Pitzer v. Railway Co.*, 80 Ind. 569; *Summers v. Greathouse*, 87 Ind. 205; *Groscop v. Raintier*, 111 Ind. 361, 12 N. E. Rep. 694. The relevancy and materiality of the interrogatories clearly appear. There is no room for debate upon that subject. The general verdict could not have been rendered without an investigation of the facts embraced by the interrogatories. Judgment reversed, with instructions to sustain the appellants' motion for a new trial.

TOBIN *et al.* v. YOUNG.¹

(Supreme Court of Indiana. July 10, 1888.)

1. LANDLORD AND TENANT—RECOVERY OF POSSESSION—NOTICE TO QUIT.

Under Rev. St. Ind. § 5208, providing that all general tenancies in which premises are occupied by the consent, express or implied, of the landlord, shall be deemed tenancies from year to year, and section 5209, requiring tenancies from year to year to be determined by three months' notice given to the tenant prior to the expiration of the year, where a father places his son in possession of premises, and allows him to remain for several years, and after the son's death tells his widow that for that year, at least, she and the children should continue in possession as before, having allowed that farm year to pass and another to begin, he cannot determine her right to the possession by a demand of rent, but must give the notice required by the statute.

2. EXCEPTIONS, BILL OF—STENOGRAPHER'S LONG-HAND MANUSCRIPT—FAILURE TO STATE THAT STENOGRAPHER WAS SWORN.

A defect in the record on appeal, consisting in an omission to note the appointment and swearing of a stenographer, is cured by the stenographer's certificate that he was duly appointed and sworn official reporter, followed by the certificate of the clerk, that the report thus attested is the original long-hand manuscript of the evidence, and that the same was made a part of the bill of exceptions.

3. SAME—ORIGINAL PAPERS.

It is no objection to a long-hand manuscript of a stenographer's report of evidence, constituting part of a bill of exceptions, that it embraces original papers read in evidence.

Appeal from circuit court, Montgomery county: M. WINFIELD, Special Judge.

Ballard & Ballard, M. E. Clodfetter, M. D. White, and E. V. Brookshire, for appellants. Will H. Thompson, C. E. Snyder, and A. D. Thomas, for appellee.

NIBLACK, C. J. This was an action for the recovery of the possession of a hundred acre tract of land in Montgomery county, in which Alfred D. Young was plaintiff, and Elizabeth Tobin, James Tobin, Sarah A. Young, Grace M. Young, and Dudley W. Young were defendants. The answer was in general denial of the complaint; the last three named defendants being minors, and answering by a guardian *ad litem*. Verdict and judgment for the plaintiff. Numerous exceptions were reserved at the trial, and the questions arising upon these exceptions have been brought into and made a part of the record.

The plaintiff below and appellee here makes the point that the evidence is not properly in the record, and that hence we cannot consider any question based upon or connected with the evidence. This point is predicated upon the assumption that the record does not show that the short-hand reporter who

v.17N.E.NO.6—40 ¹ On rehearing, 24 N. E. 121.

took down the evidence was either appointed or sworn; that some of the papers attached to and embraced in the bill of exceptions purporting to contain the evidence are original papers, and hence improperly made a part of the bill of exceptions,—citing section 650, Rev. St. 1881, as to what may be lawfully certified to us by a clerk below when a cause is appealed to this court. The bill of exceptions, after giving the name of the state, county, proper court, and the title of the cause, proceeds: "Be it remembered that upon the trial of said cause the following proceedings were had, evidence introduced, rulings made by the court, and exceptions taken by the parties, to-wit." This is followed by what purports to be a verbatim report of the evidence, including papers read in evidence, and rulings made and exceptions reserved upon incidental questions arising during the progress of the trial. At the close of and attached to this report is the certificate of Charles H. Fiske that he was duly appointed and sworn as official reporter to take down the evidence and note the proceedings in the cause, and that the report contains a full and complete transcript of his short-hand report of the evidence as taken down, and of the proceedings as noted by him. This is immediately succeeded by the certificate of the clerk of the Montgomery circuit court, certifying that the report thus attested by Fiske is the original long-hand manuscript of the evidence; that such long-hand transcript was filed in his office on a day named; and that the same was made a part of a bill of exceptions, as it now appears to be. The bill of exceptions, further proceeding, certifies that the foregoing was all the evidence given in the cause. The proceedings below are informal, and in a sense defective, in not noting the appointment and swearing of Fiske as official reporter in the cause; but the defect is cured by the certificates attached to and verifying the report made by Fiske of the proceedings at the trial. By these certificates the official character of the report was fully recognized in the making up of the bill of exceptions, and hence the presumption ought to be indulged that Fiske was duly appointed and qualified as an official reporter, as he claims to have been. *Williams v. Turnpike Co.*, 76 Ind. 87; *Machine Co. v. Gray*, 16 N. E. Rep. 787. Besides, treating as surplusage and disregarding the certificates of Fiske and the clerk, the bill of exceptions can be sustained as an ordinary bill of exceptions containing the evidence given at the trial.

There is nothing connected with any one of the papers attached to and embraced in the bill of exceptions from which we can infer that it is an original paper. These papers may be copies made by filling up blanks corresponding to those used in preparing the original papers. But, aside from this view, it is no objection to a long-hand manuscript of a short-hand reporter's notes of evidence that it embraces original papers read in evidence. *Railway Co. v. Quick*, 109 Ind. 295, 9 N. E. Rep. 788, 925.

It was made to appear by the evidence that La Fayette Young, the only child of the appellee, Alfred D. Young, and then in the twenty-fifth year of his age, was, on the 28th day of September, 1871, married to the appellant, Elizabeth Tobin, whose maiden name was Elizabeth Brookshire; that after his marriage the said La Fayette and his wife resided with the appellee in the vicinity of the land in controversy, until April, 1872; that early in the year last named they resolved that they would in some way provide a separate home of their own, and move into and occupy it accordingly; that this resolution was communicated to the appellee, who interposed no objection; that they first looked at a farm in the same general neighborhood, known as the "Stipes Farm," lying near the residence of one Drake Brookshire, the father-in-law of the said La Fayette, who offered to advance to them \$1,000 to assist in purchasing that farm; that, upon being informed as to what had occurred, the appellee objected to the purchase of the Stipes farm, and proposed that they, the said La Fayette and wife, should move into and use, and occupy and make their home upon the land in suit, to which they assented; that the appellee there-

upon insisted in building a temporary and cheap house on the land, into which the said La Fayette and his wife moved in April, 1872; that for several years previously the land had belonged to and was at the time the property of the appellee; that a part of it was cleared and inclosed, and had been in cultivation; that they, the said La Fayette and wife, continued to reside upon, and to use, improve, and cultivate, the land without the payment or any demand of rent, until the 11th day of April, 1883, when he, the said La Fayette, died intestate; that during that time the said La Fayette made some valuable and lasting improvements on the land, and, so far as mere appearances indicated, acted as the owner of the land, paying all the taxes upon it after the year 1878; that at the time of his death the said La Fayette left the appellants, Sarah A. Young, Grace M. Young, and Dudley W. Young, as his only children surviving him, and who were also the children of his wife; that a short time after La Fayette's death the widow, now Mrs. Tobin, inquired of the appellee what terms in regard to the land he was going to give her, and the children thereafter; that the appellee told her that for the then current year, at least, everything should continue as formerly, and as if La Fayette were still alive; that the widow caused the land to be cultivated as usual that year, sowing wheat on a part of it in the fall following La Fayette's death; that, in the spring of 1884, she commenced to prepare the land for planting corn without objection from the appellee; that on the 11th day of May, 1884, the widow intermarried with her co-appellant, James Tobin; that on the day following the appellee called upon her, and, expressing great displeasure with her marriage to Tobin, notified her that he would require her to pay the customary rent for the land for that year and thereafter, giving her to understand that if she had acted differently he would not have required the payment of any rent; that Mrs. Tobin then declined to promise to pay rent as demanded; that some time afterwards she told the appellee that she had been advised that she was not liable to pay rent for that year, and definitely notified him that she would not, at all events, agree to pay him any rent for the crop then under cultivation. Early in August following, that is, in August, 1884, the appellee commenced this action without any demand of possession or notice to quit the land in dispute.

As to the precise terms upon which La Fayette Young entered upon and occupied the land, the evidence was quite, and indeed irreconcilably, conflicting. On behalf of the appellants, it was claimed that La Fayette was put into possession upon the mutual understanding that, upon his compliance with certain terms and conditions, the land would belong to him, and that he would ultimately receive a deed for it; also that he had complied with all the terms and conditions required of him, and that hence his widow and children had become the equitable owners of the land. On the part of the appellee the contention was that La Fayette was permitted to go upon the land, and to occupy and use it free of rent, as a means of support for himself and family, without any agreement to transfer or any intention of transferring the title to him; and that, consequently, the agreement under which he held possession terminated at his death, whereby the appellee became entitled to resume possession of the land at any time thereafter without further notice, and without any formal demand of possession. A further defense was made upon the ground that, construing the evidence most favorably to the appellee, the relative situation of the parties was such as to require notice to the appellants to quit before commencing this action to put them out of possession. No question is made here upon the evidence, so far as it may have tended to establish title upon either side. In that respect it is impliedly conceded that we could not disturb the verdict, even if the weight of the evidence was seemingly against it. The only objection made to the sufficiency of the evidence as a whole is that it failed to show that the appellee was entitled to a verdict for the immediate possession of the land. Other questions are made upon

the admissibility of evidence on the one side, and the exclusion of proffered evidence on the other; also upon the giving of certain instructions to the jury, and upon the court's refusal to give other instructions asked for by the appellants. In *Adams on Ejectment* it is said that as early as the time of King Henry VIII. it was held that a general occupation of land should be considered to be an occupation from year to year, and that a person so holding ought not to be ejected from the land without a reasonable notice from his landlord to relinquish possession at the end of the current year of the occupancy. This was upon the theory that any other rule might operate greatly to the prejudice of the occupant of the land by ejecting him immediately before harvest or some other specially valuable period of time, and this continues to be the rule, except when otherwise expressly agreed, or some local or particular custom requires a different interpretation. Adams, therefore, concludes that a general occupation of land inures as a tenancy from year to year, determinable by a notice to quit, as in cases of tenancies of that class. What used to be denominated a tenancy at will is now usually construed to be a tenancy from year to year, and determinable as such. So, where a person has been in possession of land for a term which has expired, and he continues in possession, negotiating for a new term, he cannot be ejected without a demand for possession. *Adams, Ej. (Wat. notes,) 142; Sedg. & W. Tr. Title Land, § 384; Tyler, Ej. 20; 1 Tayl. Landl. & Ten. §§ 55-59. 3 Wait, Act. & Def. 87, states the rule to be that "notice to quit is generally necessary when the occupant went into possession with the assent of the owner for no definite term."* Sections 5208, 5209, Rev. St. 1881, are as follows: Section 5208: "A tenancy at will cannot arise or be created without an express agreement, and all general tenancies in which the premises are occupied by the consent, either express or constructive, of the landlord, shall be deemed tenancies from year to year." Section 5209: "All tenancies from year to year may be determined by at least three months' notice given to the tenant prior to the expiration of the year, and in all tenancies which, by agreement of the parties, express or implied, are, from one period to another, of less than three months' duration, a notice equal to the interval between such periods shall be sufficient." These sections are nothing more than a substantial re-enactment of the law as it existed when they came into force, and they fully support the doctrine announced by the text writers, as above. See, also, *Tolle v. Orth*, 75 Ind. 298; *Montgomery v. Board*, 76 Ind. 362; *Swan v. Clark*, 80 Ind. 57; *Coomler v. Hefner*, 86 Ind. 108.

In the case before us, Mrs. Tobin and the children succeeded to whatever estate or interest La Fayette Young had in the land in litigation. After La Fayette's death the appellee agreed with Mrs. Tobin that the arrangement, whatever it may have been, which had theretofore existed between him and La Fayette, should inure to her benefit, and that of the children, for at least the then present year. That was, under the circumstances, equivalent to an agreement that she and the children should continue in possession of the land on the same terms as La Fayette had done, until further notice. The appellee permitted this indefinite condition of things to continue until in May, 1884, which was within only a few weeks of the time at which wheat already sown on the land had to be harvested, and after arrangements had been made for planting corn that year, when he gave Mrs. Tobin notice that the terms on which she held possession of the land must be so far modified as to require on her part the payment of rent. Conceding, therefore, that the farming year in this state runs from the 1st day of one March to the 1st day of the next March, as claimed by the appellee, and that Mrs. Tobin was only the tenant of the appellee, she had already acquired the right to remain on the land for the farming year which had already begun on the 1st day of the preceding March, and upon the same terms as those upon which she had theretofore occupied it. This demand of rent on the one side, and refusal to pay on

the other, did not, consequently, change the relations which had previously been maintained between the parties for at least what remained of that farming year. In any view of this case which we have been able to take, the evidence showed that the action was prematurely brought, and hence that the appellee was not entitled to a verdict for the possession of the land. This conclusion would lead us to hold that the cause was not well tried in some other respects; but, as another trial of the present action will probably not be insisted upon, we need not enumerate the other particular proceedings to which well-grounded objections have been urged. The judgment is reversed, with costs.

DURHAM v. STATE.

(*Supreme Court of Indiana. July 10, 1888.*)

TAXATION—FAILURE TO GIVE TRUE LIST—INDICTMENT.

An indictment charging that a tax-payer was requested to give a true list of all his taxable personal property, and that he failed, neglected, and refused to give and list a certain sum of money on deposit in the bank, charges an offense within the meaning of Rev. St. Ind. 1881, § 2150, providing that a tax-payer who fails, upon request, to give a true list of all his taxable property shall be fined, etc.; the objection that the offense charged is merely a failure to report a particular item of taxable property is not tenable.

Appeal from circuit court, Montgomery county; E. C. SNYDER, Judge.

Kennedy & Kennedy, for appellant. *Albert S. Anderson and The Attorney General*, for appellee.

NIBLACK, C. J. This was a prosecution under section 2150, Rev. St. 1881, for failing to return certain personal property for taxation. The indictment charged that on the 30th day of May, 1887, the appellant, William Durham, was, at the county of Montgomery and state of Indiana, requested by George W. Benefiel, who was then and there deputy-assessor of Union township of said county of Montgomery, appointed by Daniel H. Gilkey, the assessor of said township, and acting in that behalf, as he, the said William H. Durham, then and there well knew, to give and list to the said George W. Benefiel, as such deputy-assessor, a true list of all the taxable personal property owned by him, the said Durham, on the 1st day of April, 1887; and the said Durham, who was then and there a person of full age and of sound mind, and a resident of said township of Union, unlawfully failed, neglected, and refused to give and list to the said George W. Benefiel, as such deputy-assessor, for taxation, the following property of which the said Durham was, on the said 1st day of April, 1887, the owner, and which was then and there by law subject to taxation, to-wit, \$126,331.14 in money, on deposit in the First National Bank of Crawfordsville, in the state of Indiana, subject to the order, check, and draft of him, the said Durham. The indictment contained a second count, but it charged, only in a little different form, the same offense as that set forth above. Upon a trial, Durham was found guilty as charged, and he was adjudged to pay a fine of \$150 in addition to the costs of the prosecution. The only error assigned upon the proceedings below is one attacking, for the first time, the sufficiency of the indictment. Section 2150 is in these words: "Whoever, when requested by the assessor, state, county, or municipal, or any of his deputies, fails to give a true list of all his taxable property, or to take and subscribe any oath in that behalf, as required by law, or shall fix a fraudulent value, where an oath is not required, on such property, upon conviction thereof shall be fined not more than five hundred dollars nor less than ten dollars." The objection made to the indictment is that it did not charge Durham with having failed and refused to give to the deputy-assessor either a list or a true list of all his taxable property, and that the failure of a tax-payer to report a particular item or article of property for taxation is not the

equivalent of his failure to give a list of all his taxable property; citing the case of *Burgh v. State*, 108 Ind. 132, 9 N. E. Rep. 75, as supporting that objection. We do not regard the objection as well taken. We construe the indictment to mean, in legal effect, that Durham, upon demand, failed, neglected, and refused to give to the deputy-assessor a list of any kind, whether true or false, of his taxable personal property; and, as thus construed, the indictment charged an offense under the first clause of section 2150. *Moore*, Crim. Law, § 732; *Gillett*, Crim. Law, § 486; *Lose v. State*, 72 Ind. 285. The judgment is affirmed, with costs.

(115 Ind. 334)

LOWER v. FRANKS *et al.*¹

(*Supreme Court of Indiana*. January 17, 1888.)

1. MALPRACTICE—CONTRIBUTORY NEGLIGENCE AS DEFENSE.

In an action against physicians for alleged malpractice, contributory negligence, consisting in not obeying defendants' instructions, is a proper defense.

2. SAME—PLEADING AND PROOF—JOINT AND SEVERAL UNDERTAKING.

By Rev. St. Ind. 1881, § 570, providing that, "though all the defendants have been summoned, judgment may be rendered against any of them severally, when plaintiff would be entitled to judgments against such defendants if the action had been against them severally," a joint and several right of recovery is given; and in an action against two physicians for malpractice an instruction requiring plaintiff to prove a joint undertaking of the treatment of plaintiff, to entitle him to recover, is erroneous, although the joint undertaking had been alleged.

3. APPEAL—RECORD—INSTRUCTIONS.

Rev. St. Ind. 1881, § 535, provides that a party excepting to the giving of instructions shall not be required to file a bill of exceptions, but that it shall be sufficient to write on the margin, "Given, and excepted to," which memorandum shall be signed by the judge and dated. Consecutively numbered instructions were headed, "Instructions by the Court," and had a caption giving the name of the state, the name and term of the court, and the title of the cause. The words, "Given, and excepted to by defendant," were entered on the margin of each instruction. At the close of the last instruction the judge's name was signed as of the day when the cause was given to the jury. *Held*, that the instructions were brought into the record without a formal bill of exceptions.

4. SAME—REVIEW—PRESUMPTIONS.

Where an erroneous instruction is given, it will not be presumed that other instructions, modifying or in effect withdrawing it, were given; but such other instructions must be affirmatively shown.

Appeal from circuit court, Noble county; P. V. HOFFMAN, Judge.

Revised opinion. For former opinion, see 14 N. E. Rep. 885. Rev. St. Ind. 1881, § 535, cited in the opinion on rehearing, provides that a party excepting to the giving of instructions shall not be required to file a bill of exceptions, but that it shall be sufficient to write on the margin, "Given, and excepted to," which memorandum shall be signed by the judge, and dated.

Morris, Aldrich & Barrett and *I. Stratton*, for appellant. *Chapin & Barr* and *H. G. Zimmerman*, for appellees.

NIBLACK, C. J. William D. Lower brought this action against William H. Franks and George W. Carr, both practicing physicians and surgeons, for alleged malpractice in treating his broken leg. The defendants answered—*First*, in denial; *secondly*, that the plaintiff's neglect and refusal to obey the instructions given him by the defendants, and to observe and follow the treatment prescribed by them, contributed to and caused the suffering and damages complained of. A demurrer being first overruled to the second paragraph of the answer, issue was joined upon it. Verdict and judgment for the defendants.

The first assignment of error we deem it necessary to notice is made upon the overruling of the demurrer to the second paragraph of the answer. In argument it is claimed that contributory negligence is not admissible as a defense in actions of the class to which this belongs, which, in legal effect, are

¹ Rehearing denied.

based upon a contract entered into by the surgeon when he undertook to treat the plaintiff for the wound or injury from which the latter was suffering. An action against a railroad company for a negligent injury to a passenger while under its charge is, though sounding in tort, really an action founded upon and arising out of a contract. Yet, in that class of actions, proof of contributory negligence is fatal to a recovery. So important is it considered in this state that contributory negligence shall not appear as an element in actions of that class, the plaintiff is required to aver in his complaint, and show at the trial, that he did not contribute to the injury complained of. In pleading, therefore, contributory negligence is not, in this state, generally treated as a matter of defense, technically speaking, but as a thing to be negatived, both in the complaint and by the evidence, as a prerequisite to the right to recover for the negligence of the defendant. *Railroad Co. v. Orr*, 84 Ind. 50; *Railroad Co. v. Butler*, 103 Ind. 31, 2 N. E. Rep. 138. While there may be some exceptions to the rule, it may be said, generally, that there can be no recovery in an action sounding in tort, yet grounded on contract, where the injury sued for was caused by the mutual negligence of the opposing parties. The reasons which support this rule are stated with great force and perspicuity in the case of *Railroad Co. v. Aspell*, 23 Pa. St. 147; and the doctrine of that case is fully approved in Beach, Contrib. Neg. 14, 15, 37. In legal parlance, contributory negligence is usually referred to, in this and other jurisdictions, as a defense to an action for negligence; and in many of the states, perhaps,—in at least some of them,—it is treated only as a defense to such an action. Such negligence has been fully recognized in several well-considered cases, as well as upon general principles, as a defense to an action against a physician or surgeon for malpractice. 4 Wait, Act. & Def. 681, 682. 6 Wait, Act. & Def. 597, 598, and authorities cited. In the case of *Coon v. Vaughn*, 64 Ind. 39, it was held that, owing to some exceptional peculiarities of an action for malpractice, it was not necessary, under our system of practice, to aver the absence of contributory negligence in the complaint. As at present advised, we do not feel called upon to overrule that case. It follows that such negligence ought to be admitted in this state, as it has been elsewhere, as a defense to an action for malpractice, and that the demurrer to the paragraph of answer in question was rightly overruled.

At the trial the court gave to the jury what appears to have been a carefully, and, for the greater part, well prepared, series of instructions. The eleventh of the series was as follows: "The complaint charges that the defendants jointly undertook to treat the plaintiff's limb. Under the complaint, it must be shown by a preponderance of the evidence that the undertaking or contract was made jointly with both the defendants for treating the limb. Such a contract may be implied from the conversations and conduct of the parties, and circumstances of the case, as well as by an express agreement. And, if you should find from the evidence that the defendants jointly undertook to treat the limb, each would be responsible for the acts of the other in treating the limb, and you would be warranted in finding against both the defendants if the evidence shows that any injury or damage resulted from the want of care or skill on the part of either or both defendants. On the other hand, if you should find that, by an express agreement, or from the conversation and conduct of the parties and the circumstances of the case, as shown by the evidence, that the undertaking was separate on the part of each defendant, then each would only be responsible for his own acts in treating said limb, and not answerable for the acts of the other. And in such case you cannot find for the plaintiff, although both the defendants, or either one of them, may have been guilty of not using proper care and skill in treating the limb." Acting upon the doctrine of this instruction, the court refused to submit to the jury a form of a verdict against one of the defendants and in favor of the other. It is further claimed that the instruction thus set out is

in palpable conflict with section 366, Civil Code 1852, and continued in force by section 570, Rev. St. 1881, and with the cases resting upon it. That section is as follows: "Though all the defendants have been summoned, judgment may be rendered against any of them severally when the plaintiff would be entitled to judgments against such defendants if the action had been against them severally." Under the construction heretofore given by this court to that section of our Code, the instruction cannot be sustained. *Draper v. Van Horn*, 12 Ind. 352; *Hubbell v. Woolf*, 15 Ind. 204; *Fitzgerald v. Genter*, 26 Ind. 238; *Carmien v. Whitaker*, 36 Ind. 509; *Murray v. Ebright*, 50 Ind. 362; *Stafford v. Nutt*, 51 Ind. 535; *Richardson v. Jones*, 58 Ind. 240. In the case of *Hubbell v. Woolf*, *supra*, following the case of *Blodget v. Morris*, 14 N. Y. 482, it was held, in terms, that this provision of the Code applies to all actions indiscriminately, whether founded upon contract or upon tort; that it is immaterial whether the complaint alleges a joint or a joint and several liability; that the right of recovery is, in this respect, to be regulated by the proof, and not by the allegations of the complaint; that, in other words, every complaint is, in the respect stated, to be treated as both joint and several where there are two or more defendants; that the object of the provision obviously is to prevent a plaintiff who proves a good cause of action against part of the defendants, but not against all, from being put to the expense and delay of a new action; that the provision simply applies to actions upon contract the same rules which, at common law, governed actions for torts. This has ever since been accepted as the proper construction of the provision in question, and is, we have no doubt, a construction which ought to be adhered to. There was evidence to which the instruction under consideration had a material application; and, as it is in direct antagonism to the doctrine of the cases cited, the judgment ought to be reversed.

The judgment is reversed, with costs, and the cause remanded for a new trial.

ON REHEARING.

(Filed July 10, 1883.)

NIBLACK, C. J. The appellees in their original brief made the point that the instructions copied into the transcript, and purporting to have been given at the trial, had not been properly made a part of the record, and that, consequently, this appeal presented no question upon any of those instructions. Without making a distinct ruling upon the point thus made, we considered the instructions at the hearing, and, as has been seen, set out and passed judgment upon one of them upon the assumption that it had been made, and was a part of the record. The further point was made that there was nothing connected with the instructions, as they are copied into the transcript, from which we could infer that they were the only instructions given by the court at the trial, and that hence it does not affirmatively appear that no other instruction was given, either modifying or in effect withdrawing the eleventh instruction, which we have held to be erroneous. By a petition for a rehearing the points thus originally made are renewed, and we now proceed to consider them. This cause was known as "No. 624" in the court below. In noting the proceedings at the trial, the instructions referred to are copied into the transcript at the appropriate place, and are made to appear as having been given on the 16th day of April, 1884, the day on which the argument was concluded, and the jury retired to consider of their verdict. The instructions are in the form of a series, and have a caption giving the name of the state, the name and term of the court, and the title of the cause, with a heading entitled, "Instructions by the Court." This is followed by 17 consecutively numbered instructions, signed at the close of the last one by the judge who tried the cause. On the margin of each instruction is written the words: "Given, and excepted to by defendants. April 16, 1884,"—which was also signed by the

judge. These instructions are indorsed: "No. 624. Instructions filed April 16, 1884. MERRITT C. SKINNER, Clerk." These memorandums, signatures, and indorsements brought the instructions into the record, under the provisions of section 535, Rev. St. 1881, without a formal bill of exceptions, and without any order of court making them a part of it. *Childress v. Callender*, 108 Ind. 394, 9 N. E. Rep. 292; *Railway Co. v. Beyerle*, 110 Ind. 100, 11 N. E. Rep. 6. Furthermore, in the absence of anything in the record indicating the contrary, the inference ought to be that the instructions given in the form of a series as above were all the instructions given by the court, and that they constituted the general instructions of the court required to be given by section 533, Rev. St. 1881. The inference ought also to be that the instructions were in writing, although it was not essential that they should have been so when given, unless required to be by one of the parties. It is true, as claimed, that this court has frequently held that where the court below has refused to give an instruction which stated the law correctly, and was applicable to the facts of the case, but where the record disclosed nothing as to whether any instructions were given, we will presume that the court below did its duty, and gave general instructions covering all the matters in controversy, and will not reverse the judgment, upon the ground that the instructions may have been refused because the subject-matter of it had already been given to the jury. The rule of practice has, however, no application to the case before us, where a series of general instructions was given, and one of the series is adjudged to be erroneous. The giving of a fatally erroneous instruction can only be cured by a plain withdrawal of the instruction, and the withdrawal of such an instruction will not be presumed, but must be affirmatively shown. *Kingen v. State*, 45 Ind. 518; *Railway Co. v. Shuckman*, 50 Ind. 42; *Binns v. State*, 66 Ind. 428. It is still further insisted that the verdict was so clearly right upon the evidence that it ought not to be disturbed, notwithstanding the erroneous instruction set out in the opinion. While much of the evidence was entirely favorable to the appellees, there was a sharp conflict in the evidence in other respects, and hence the case presented was one in which the jury should have been very carefully and correctly instructed.

We have made some verbal corrections and changes in that part of the opinion which treats of the question of contributory negligence, not affecting any of the conclusions originally announced, and with the opinion as it now stands we are content. The petition for a rehearing is therefore overruled.

(147 Mass. 255)

BATES v. OLD COLONY R. Co.

(*Supreme Judicial Court of Massachusetts. Suffolk. June 20, 1888.*)

1. CARRIERS OF PASSENGERS—LIABILITY FOR PERSONAL INJURIES—SPECIAL CONTRACT—EXPRESS MESSENGERS.

The privilege accorded by a railroad company to an express messenger, holding a passenger's season ticket, of riding in the baggage car, where passengers were not allowed to ride, is a sufficient consideration for an agreement by such messenger to absolve the railroad company from all liability for accident or injury resulting therefrom, even if caused by the company's servants.

2. SAME—LIMITING LIABILITY.

The above contract will not be held void as unreasonable or against public policy; since by it the messenger is accorded a privilege which the company is not obliged to give, and the effect of the contract is not to limit the liability of the railroad company, but to leave it the same as if the express agent had no right in the baggage car, and simply to secure him from being ejected therefrom.

3. SAME—PUB. ST. MASS. CH. 112, § 188.

Pub. St. Mass. c. 112, § 188, providing that railroad corporations shall give to all persons or companies reasonable and equal terms, facilities and accommodations, for the transportation of themselves, their agents and servants, etc., does not require a railroad company to allow an agent of an express company to ride on the baggage car, with the same rights as to injuries caused by accidents as belong to passengers riding in ordinary passenger cars.

Exceptions from superior court, Suffolk county; SHERMAN, Judge.

Tort by plaintiff, Benjamin F. Bates, against the Old Colony Railroad Company, to recover damages for personal injuries. The plaintiff was a messenger for the New York & Boston Despatch Express Company, and was injured in an accident at a crossing on defendant's road on November 4, 1885; the accident being caused by a misplaced switch. At the trial in the superior court the jury found for the plaintiff for \$10,000, and the defendant excepted. The facts are stated in the opinion.

J. H. Benton, Jr., for defendant.

The baggage car is a place of danger, as a matter of law, and it was the duty of the defendant to make and enforce a regulation that passengers should not ride in it. *Railroad Co. v. Langdon*, 92 Pa. St. 21. While the question has not been raised in this commonwealth whether the baggage car is, as a matter of law, a known place of danger, so that a passenger cannot recover for an injury received while riding in it, the decisions necessarily cover this proposition in principle. *Hickey v. Railroad Co.*, 14 Allen, 429, and citations. That an agreement under which the plaintiff got something to which he was not otherwise entitled, was carried in a place where he would not otherwise have had a right to be carried, was a reasonable and proper agreement. The plaintiff relies on the case of *Railroad Co. v. Lockwood*, 17 Wall, 357, and other American cases, including the dictum of Mr. Justice GRAY in *School-Dist. v. Railroad Co.*, 102 Mass. 556. In the last-named case, however, the special contract spoken of was simply a limitation in the bill of lading for carriage at the usual price, and in the usual manner, and therefore the remarks of the learned justice do not apply to a case where the limitation is by special contract, made in consideration of carriage for less than the regular price, or of carriage in a place or in a manner in which the carrier is not bound to carry. The court have recently said that the question whether a carrier can exempt itself from the consequences of its own negligence is not settled in this commonwealth. *Graves v. Railroad Co.*, 137 Mass. 83. The reasoning of the court in the case of *Railroad Co. v. Lockwood*, *ubi supra*, so far from being against the defendant's contention, really supports it, because it puts the decision upon the proposition that the carrier in that case had extorted from the person carried an agreement which he was compelled to make in order to induce the carrier to do that which it was bound to do without the agreement, *i. e.*, to carry him in the same manner and for the same price for which others were carried. The plaintiff cites the *Lockwood Case* to the proposition that a common carrier cannot, by express agreement, limit its liability for the negligence of its servants and agents in performing a contract to transport at a less price than it is entitled to receive, or in a different manner from that in which it is bound to transport. The opinion in that case, however, does not deal with this proposition, but simply with the general question whether a railroad company, carrying passengers for hire on one of its trains, at the usual rate and in the usual manner in which all passengers by such train are carried, can lawfully stipulate not to be answerable for their own or their servants' negligence with reference to such carriage. Neither do the authorities cited in that opinion, which are as follows, sustain this proposition: *Laing v. Colder*, 8 Pa. St. 479; *Railroad Co. v. Baldauf*, 16 Pa. St. 67; *Goldey v. Railroad Co.*, 30 Pa. St. 242; *Powell v. Railroad Co.*, 32 Pa. St. 414; *Railroad Co. v. Henderson*, 51 Pa. St. 315; *Farnham v. Railroad Co.*, 55 Pa. St. 53, and *Express Co. v. Sands*, Id. 140; *Transportation Co. v. Oil Co.*, 63 Pa. St. 14; *Jones v. Voorhees*, 10 Ohio, 145; *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 Ohio St. 362; *Wilson v. Hamilton*, Id. 722; *Welsh v. Railroad Co.*, 10 Ohio St. 65; *Railroad Co. v. Curran*, 19 Ohio St. 1; *Railroad Co. v. Pontius*, Id. 221; *Knoulton v. Railway Co.*, Id. 260; *Fillebrown v. Railway Co.*, 55 Me. 462;

Sager v. Railroad Co., 31 Me. 228, 238; *Railroad Co. v. Allen*, and *Railroad Co. v. Heaton*, 31 Ind. 894, 397; *Flinn v. Railroad Co.*, 1 Houst. 472; *Orndorff v. Express Co.*, 3 Bush, 194; *Swindler v. Hilliard*, 2 Rich. Law, 286; *Berry v. Cooper*, 28 Ga. 543; *Steele v. Townsend*, 37 Ala. 247; *Express Co. v. Crook*, 44 Ala. 468; *Whitesides v. Thurlkill*, 12 Smedes & M. 599; *Express Co. v. Moon*, 39 Miss. 822; *Insurance Co. v. Railroad Co.*, 20 La. Ann. 302. The plaintiff claims that, as he was an express messenger, he rode in the baggage car as a matter of right, and, although he was there under the terms of the contract, he had a right to be there without making the contract, and that therefore the contract was invalid, upon the ground that it was an unreasonable condition affixed by the defendant to the performance of its public duty to carry the plaintiff where he was carried without such a condition. This manifestly depends upon whether the defendant was, as a common carrier, under legal obligation to express matter, and messengers in charge of it, in the baggage cars attached to its passenger trains, for everybody who wished to engage in the express business on its roads. See *Express Cases*, (in March, 1886,) 117 U. S. 1, 6 Sup. Ct. Rep. 542, 628, 1190. Before the decision in the *Express Cases* it was contended by some express companies, and was decided by the United States courts in some circuits, that railroad companies were obliged to transport the traffic of express companies at common law; but this decision settled that, in the absence of any statute expressly requiring it, a railroad company is not required to be a common carrier of another common carrier, *i. e.*, of an express company, and therefore any right of an express company to have its traffic carried upon the passenger trains of railroads must depend upon contract or upon some express statutory provision. The plaintiff also relies on Pub. St. c. 112, § 188, and possibly on Pub. St. c. 73, § 1, enacted first, (St. 1869, c. 252.) But we contend that the plaintiffs' contention must rest wholly upon the effect which should be given to the provisions of Pub. St. c. 112, § 188, and that these provisions do not require a railroad company to become a common carrier of other common carriers; that is, of express companies. It is simply a provision that railroad companies shall treat all persons alike, which it is not denied that was done in this case. Again, the plaintiff came in as the servant of the express company, and had no rights in the baggage car, except as such servant, and under the right which the express company had under its contract with the defendant. As a passenger merely, he had no right in the baggage car. The statute is simply declaratory of the common-law duty, except so far as that duty may have been modified in this state by the decisions in *Railroad Co. v. Gage*, 12 Gray, 393, and cases following that decision, and as to such exceptions it is a return to the principle of the common law, as declared in *McDuffee v. Railroad Co.*, 52 N. H. 457; *Express Cases*, 117 U. S. 1, 6 Sup. Ct. Rep. 542, 628, 1190; *Sargent v. Railroad Corp.*, 115 Mass. 416. Was the contract between the plaintiff and defendant just and reasonable between them? How can a man, who obtains by a contract that which he is not entitled to without it, say that the contract is not as to him just and reasonable? Such contracts have always been sustained by the English courts, even under the railway traffic act of 1854. *Hart v. Railroad Co.*, 112 U. S. 342, 5 Sup. Ct. Rep. 151. See authorities cited in opinion of Mr. Justice BLACKBURN, in *Peek v. Railway Co.*, 10 H. L. Cas. 491-507. See *Simons v. Railway Co.*, 18 C. B. 805; *Railway Co. v. Dunham*, 18 C. B. 826, (decided in 1856;) *Whits v. Railway Co.*, 2 C. B. (N. S.) 7, (decided in 1857;) *Pardington v. Railroad Co.*, 1 Hurl. & N. 392; *McManus v. Railway Co.*, 4 Hurl. & N. 327; *Garton v. Railway Co.*, 1 Best & S. 112; *Peek v. Railway Co.*, 10 H. L. Cas. 473; *Allday v. Railroad Co.*, 5 Best & S. 903; *Doolan v. Railway Co.*, 2 App. Cas. 792; *Railroad Co. v. Brown*, 8 App. Cas. 703; *Railway Co. v. Macarthy*, 12 App. Cas. 218. Was the contract void as against public policy? See Sir GEORGE JESSEL, M. R., in

Printing Co. v. Sampson, L. R. 19 Eq. 462-465. Dissenting opinion of ALLEN, J., in *Smith v. Railroad Co.*, 24 N. Y. 222; *Wells v. Railroad Co.*, Id. 181; *Railroad Co. v. Lockwood*, 17 Wall. 379, 381; *Graves v. Railroad Co.*, 137 Mass. 34. Upon all questions of this character, the courts are bound to solve all doubts against the exercise of their power to declare the contract void as against public policy. *Richardson v. Mellish*, 2 Bing. 242; *Com. v. Pease*, 16 Mass. 91; *Ward v. Allen*, 2 Metc. 53; *Ball v. Gilbert*, 12 Metc. 397; *McKee v. Manice*, 11 Cush. 357; *Bills v. Comstock*, 12 Metc. 468; *Kingsbury v. Ellis*, 4 Cush. 578; *White v. Buss*, 3 Cush. 448; *Hunt v. Frost*, 4 Cush. 54; *Frost v. Belmont*, 6 Allen, 152; *Love v. Harsey*, 114 Mass. 80; *Phippen v. Stickney*, 3 Metc. 384; *Gibbs v. Smith*, 115 Mass. 592; *Case v. Gerrish*, 15 Pick. 49; *Fuller v. Dame*, 18 Pick. 472-481; *Rice v. Wood*, 113 Mass. 133; *Smith v. Townsend*, 109 Mass. 500; *Holcomb v. Weaver*, 136 Mass. 265; *Guernsey v. Cook*, 120 Mass. 501; *Denny v. Lincoln*, 5 Mass. 385; *Ayer v. Hutchins*, 4 Mass. 370; *Snell v. Dwight*, 120 Mass. 9; *Alger v. Thacher*, 19 Pick. 51; *Taylor v. Blanchard*, 13 Allen, 370; *Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. Rep. 629; *Collins v. Locke*, 4 App. Cas. 674; *Hate v. Railway Co.*, 2 Johns. & H. 80; *Coal Co. v. Coal Co.*, 68 Pa. St. 173; *Kellogg v. Larkin*, 3 Chand. (Wis.) 133. Why should the ordinary rights of choice and power to contract, which belong to every man in every other instance, be taken away in the case of contracts with common carriers? *Railroad Co. v. Hale*, 6 Mich. 263; *Dorr v. Navigation Co.*, 11 N. Y. 485. [See, also, *Smith v. Railroad Co.*, 24 N. Y. 222; *Perkins v. Railroad Co.*, Id. 196. The English courts, before the passage of the act of 1854, were frequently appealed to to declare contracts limiting the liability of carriers for negligence to be void, but they uniformly refused to do so. *Carr v. Railway Co.*, 7 Exch. 707. Did the contract in this case induce the defendant to be negligent in the carriage of others? If any contract which relieves the carriers from any part of the responsibility which will arise in case it is negligent is therefore void, then the decision of this court in *Graves v. Railroad Co.*, 137 Mass. 33, and the decision of the supreme court of the United States in *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. Rep. 151, are wrong. See *Griswold v. Railroad Co.*, 53 Conn. 371, 4 Atl. Rep. 261, and citations; *Wells v. Railroad Co.*, 24 N. Y. 181.

Samuel C. Darling, for plaintiff.

The plaintiff was a passenger for hire. *Patt. Ry. Acc. Law*, § 212; *Smith v. Railroad Co.*, 24 N. Y. 222; *Austin v. Railway Co.*, L. R. 2 Q. B. 442; *Flinn v. Railroad Co.*, 1 Houst. 469; *Railroad Co. v. Curran*, 19 Ohio St. 1; *Graham v. Railroad Co.*, 66 Mo. 536; *Railroad Co. v. Lockwood*, 17 Wall. 359; *Yeomans v. Navigation Co.*, 44 Cal. 71; *Railroad Co. v. Henderson*, 51 Pa. St. 315. Postal clerks riding upon a postal car run over a railway are passengers within the legal meaning of the term, although they ride free under the mail contract, and passes are issued to them under the contract, containing a condition exempting the company from liability for injuries resulting from negligence. *Seybolt v. Railroad Co.*, 31 Hun. 100; *Nolton v. Railroad Corp.*, 15 N. Y. 444; *Blair v. Railway Co.*, 23 Amer. Rep. 55; *Collett v. Railway Co.*, 16 Q. B. 984; *Railroad Co. v. Woodworth*, 26 Ohio St. 585; *Com. v. Railroad Co.*, 108 Mass. 11. If, then, the plaintiff was a passenger for hire, the question distinctly raised in this case, as in the *Lockwood Case*, cited above, is whether a railroad company, carrying passengers for hire, can lawfully require a release from such passengers of all claim for injuries that they may receive through the railroad company's, or its servants' negligence in reference to such carriage. *Macauley v. Railway Co.*, 42 Law J. Q. B. 4; *Hall v. Railway Co.*, 44 Law J. Q. B. 164; *Gallin v. Railroad Co.*, Id. 89. These cases are all cases of gratuitous carriage, and the stipulation against liability was held to include negligence of the carriers' servants, but it is be-

lieved no case has yet been reported in which a similar stipulation in any contract of carriage of passengers for hire has been considered. In this commonwealth, the exact question has never been decided, but, we respectfully submit, a line of analogous decisions seems to point to the same judgment as that in the *Lockwood Case*. *Todd v. Railroad Co.*, 3 Allen, 18; *Squire v. Railway Co.*, 98 Mass. 239; *School-Dist. v. Railway Co.*, 102 Mass. 552, cited by the court in the *Lockwood Case*, 17 Wall. 371; *Com. v. Railway Co.*, 108 Mass. 7; *Graves v. Railway Co.*, 137 Mass. 33; *Hill v. Railway Co.*, 144 Mass. 284, 10 N. E. Rep. 836. An examination of the decisions upon this question of stipulating against negligence in the courts of the various states of the Union shows, beyond doubt, we think, that the weight of American authority is against it, both in the carriage of merchandise and of passengers. *Steele v. Townsend*, 37 Ala. 247; *Express Co. v. Crook*, 44 Ala. 468; *Berry v. Cooper*, 28 Ga. 543; *Railroad Co. v. Allen*, 31 Ind. 397; *Orndorff v. Express Co.*, 3 Bush, 194; *Insurance Co. v. Railway Co.*, 20 La. Ann. 302; *Sager v. Railway Co.*, 31 Me. 228, 238; *Express Co. v. Moon*, 39 Miss. 822; *Davidson v. Graham*, 2 Ohio St. 131; *Welsh v. Railway Co.*, 10 Ohio St. 75, 76; *Farnham v. Railway Co.*, 55 Pa. St. 53; *Mann v. Birchard*, 40 Vt. 326; *Swindler v. Hilliard*, 2 Rich. Law, 286. See, also, Smith Lead. Cas. (Hare & W. notes,) §§ 322, 331; Story, Bailm. (9th Ed.) §§ 570, 571. Similar adjudications in the case of passenger carriage may be found in *Flinn v. Railway Co.*, 1 Houst. 472; *Railway Co. v. Henderson*, 51 Pa. St. 315; *Jacobus v. Railway Co.*, 20 Minn. 125, (Gil. 110); *Railway Co. v. Woodworth*, 26 Ohio St. 585; *Rose v. Railway Co.*, 39 Iowa, 247. See, also, 2 Redf. R. R. (5th Ed.) § 178, subdiv. 5. The leading case, however, in favor of our contention, is that of *Railroad Co. v. Lockwood*, 17 Wall. 358. "It certainly cannot be said that a man has either a moral or legal right to speculate with his own life, or to make any contract tending to remove the safeguards which the law places around it." SUTHERLAND, J., dissenting, in *Wells v. Railroad Co.*, 24 N. Y. 194. See *Com. v. Railway Co.*, 108 Mass. 12. The agreement and release are without consideration, because under Pub. St. c. 112, § 188, the defendants were under legal obligation to permit plaintiff to ride in the baggage car as an express messenger. The relation of railroad corporations to express companies and their messengers is fully discussed in the recent case, entitled *Express Cases*, 117 U. S. 1, 6 Sup. Ct. Rep. 542, 628, 1190. "Railroad companies are not obliged, either by the common law or by usage, to do more, as express carriers, than to provide the public at large with reasonable express accommodation, and they need not, in the absence of a statute, furnish to all independent express companies equal facilities for doing an express business upon their passenger trains." We contend that chapter 339 of the laws of 1867, (approved June 1, 1867,) now re-enacted in Pub. St. c. 112, § 188, is such a statute. We claim that under that statute railroad corporations must either do the express business themselves, or allow express companies to carry it on over their roads. We will briefly refer in their chronological order to the statutes and decisions upon this matter, and first to the statutes: Act 1867, c. 339, cited, but not construed, in *Sargent v. Railroad Corp.*, 115 Mass. 416. Construed as to equality of fares in *Spofford v. Railroad*, 128 Mass. 328. Gen. Laws, N. H. 1878, c. 163, § 2, originally enacted in exactly same language, July 6, 1867; construed in *Malduffee v. Railway Co.*, 52 N. H. 439. Laws Me. 1868, c. 193, approved February 29, 1868, re-enacted in St. Me. 1883, p. 494, c. 51, § 134; construed in *Express Co. v. Railway Co.*, 57 Me. 188. As to the cases cited under the statutes: The *Sargent Case* was decided upon the legal effect of a contract entered into before the statute (chapter 339, of 1867) was enacted. 115 Mass. 422. The agreement and release are unreasonable, because the defendants owe the same duty to one season ticket-holder that they do to another. Receiving the same compensation for carrying the plaintiff in the baggage car that they did for carrying every holder of a similar season ticket

In the passenger car, the duty as to careful carriage ought to be the same; because the defendants could easily obviate the alleged increase of risk of carriage in the baggage car by attaching it to the rear of the train; because the plaintiff had no option. If he failed to sign the release, no reasonable alternative rate, based upon the alleged increased risk of allowing him to ride in the baggage car as an express messenger, was offered him by the defendants. Of course, when a real freedom of choice between the alternatives is not offered to the passenger, the condition of exemption ought not to protect the railways. Patt. Ry. Acc. Law, § 421. Because no increase of carefulness is exacted of defendants as to carriage in the baggage car, beyond what they must exercise in every case with reference to passengers in the passenger cars of the same train, no extra burden of care or responsibility is therefore imposed upon them in the case of an express messenger. *Peek v. Railroad Co.*, 32 Law J. Q. B. 241, followed in 1880 in *Ashendon v. Railroad Co.*, 5 Exch. Div. 190; *Allday v. Railway Co.*, 34 Law J. Q. B. 5; *Booth v. Railway Co.*, 36 Law J. Exch. 83. See, also, 17 & 18 Vict. c. 31, Railway and Canal Traffic Act of 1854.

W. ALLEN, J. The rules of defendant prohibited passengers from riding in baggage cars, and the plaintiff had no right as a passenger to ride where he was riding at the time he was injured. He was there under a special contract, by which, in consideration that the defendant would allow him to ride in the baggage car he assumed all risk of accident and injuries resulting therefrom, and agreed to hold the defendant free and discharged from all claims and demands growing out of any injuries received by him while so riding. The parties plainly intended to include injuries resulting from the negligence of the defendant's servants. We need not consider whether the contract would be construed or held to include injuries to which riding in the baggage car did not contribute. There was evidence tending to show that the plaintiff would not have been injured had he been in a passenger car, and that his presence in the baggage car directly contributed to the injury. The ruling of the court ordering a verdict for the plaintiff was a ruling that the plaintiff was entitled to recover for injury caused by the negligence of the defendant's servants, although his riding in the baggage car contributed to the injury. In considering the correctness of this ruling, the contract of the plaintiff must be taken to have been that he would assume the risk of injury from the negligence of the defendant's servants to which his riding in the baggage car, under the permission given by the defendant, should contribute. The objection is that the contract is void, as without consideration, unreasonable, and against public policy. We see no objection to the contract as construed and applied in this case. It was the duty of the defendant, as a carrier of passengers, to transport persons over its road, on their paying the established fare, and to see that its servants used due care to secure the safety of its passengers. It was its duty to give, to persons paying the established rates, tickets which would be evidence of their right to carriage, and of the defendant's obligation to carry them with due care. The defendant was ready to do this, and did sell to the plaintiff a season ticket which gave to him all the rights of a passenger. The contract in question was made to give him a right which did not belong to him as a passenger. The plaintiff, having the rights of a passenger, desired to ride in the baggage car. The regulations of the defendant, as well as personal prudence, forbade him to ride there, and, if he had attempted to do so, he not only would have assumed all risks of injuries resulting therefrom, but would have been liable to be expelled from the car by the defendant. It is difficult to see upon what ground it can be contended that an agreement of the plaintiff that, in consideration that the defendant would permit him to ride in the baggage car, he would assume all risk of injuries resulting therefrom, is unreasonable or illegal. The defend-

ant was under no obligation to give the permission, and the effect of the plaintiff's agreement was only that the liability of the defendant should not be increased by the permission that the plaintiff, if he should be injured in consequence of being in the baggage car, should not be entitled to recover damages of the defendant, on the ground that he was there by its permission. The contract did not diminish the liability of the defendant. It left the risk assumed by the plaintiff in riding in the baggage car what it would have been without the contract; it only secured him against being ejected from the car.

The question of the right of carriers to limit their liability for negligence in the discharge of their duty as carriers, by contracts with their customers or passengers in regard to such duties, does not arise under this contract, as construed in this case. See *Railroad v. Lockwood*, 17 Wall. 358. *Griswold v. Railroad Co.*, 53 Conn. 371, 4 Atl. Rep. 261. It was not a contract for carriage over the road, but for the use of a particular car. The consideration of the plaintiff's agreement was not the performance of anything by the defendant which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff. The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger. Having these rights, he sought something more. The contract by which he obtained what he sought did not impair his rights as a passenger, and he was under no compulsion to enter into it.

It is contended that the plaintiff, as the servant of the express company, had a right, by statute, to ride in the baggage car, and that, therefore, the case comes within the decisions that it is unreasonable, and against public policy, for a person, as a condition of his becoming a passenger on a railroad, to agree that he will take the risk of the negligence of the servants of the railroad in transporting him. The express company is a common carrier, and it is not contended that a railroad corporation is bound to transport, in the baggage cars of its passenger trains, the merchandise and servants of another common carrier, unless required to do so by some statute. See *Sargent v. Railroad Corp.*, 115 Mass. 416; *Express Cases*, 117 U. S. 1, 6 Sup. Ct. Rep. 542, 628, 1190. The statute relied on is Pub. St. c. 112, § 188, in these words: "Every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property upon its railroad, and for the use of its depot or other buildings and grounds, and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange." The statute cannot be construed to require railroad corporations to discriminate in favor of express companies, and to carry their merchandise and messengers in the baggage cars of passenger trains on reasonable terms, equally favorable to all express companies. If that were the meaning of the statute, no questions as to the equality of the terms given to the plaintiff or the company he represented would arise. The same contract was required of all other express messengers who rode in baggage cars. The only question that would arise is whether the terms granted were reasonable. The fact that the plaintiff was riding in the baggage car as an express messenger, in charge of merchandise, which was being transported there, shows more clearly that the contract by the express company and the plaintiff was not unreasonable as against public policy. He was there as a servant, engaged with the servants of the railroad corporation in the service of transportation on the road. His duties were substantially the same as those of the baggage-master in the same car; the one relating to merchandise carried for passengers, and the other to merchandise carried for the express company. His actual relations to the other servants of the railroad corporation engaged in the transportation were substantially the same as those of the baggage-master, and would have been the same had he been paid by the corporation instead of by the express company. Had the

railroad done the express business, the messenger would have been held by law to have assumed the risks of the negligence of the servants of the railroad. It does not seem that a contract between the express company and the plaintiff on the one hand, and the defendant on the other, that the express messenger, in performing his duties, should take the same risk of injury from the negligence of the servants of the railroad engaged in the transportation that he would take if employed by the railroad to perform the same duties, would be void as unreasonable or against public policy. When we add the considerations that the plaintiff was a passenger whose rights as such were not impaired by the agreement, and that the agreement was to assume the risks of injuries resulting from his riding in baggage cars, in consideration of being permitted to ride there to conduct the express business, it seems clear that the contract is a valid and sufficient defense to an action against the defendant for injuries resulting from the negligence of the defendant's servants, to which the fact that the plaintiff was riding in the baggage car under the agreement contributed. Exceptions sustained.

(147 Mass. 240)

NANTASKET BEACH R. CO. v. RANSOM, (two cases.)

SAME v. MASON.

(*Supreme Judicial Court of Massachusetts. Suffolk. June 20, 1888.*)

1. **REVIEW, WRIT OF—WHEN LIES—CIVIL ACTIONS—EMINENT DOMAIN—PROCEDURE.**
 Pub. St. Mass. c. 112, § 99, gives either party dissatisfied with the estimate of the county commissioners, of damages for land taken for railroad purposes, the right to apply for a jury. Id. c. 49, § 105, provides that, in all cases in which a sheriff's jury may be had, application may be made by petition to the superior court, etc. *Held*, that judgment entered on the verdict of a jury appointed on such petition is a judgment on a civil action, within chapter 187, § 22, providing that, if judgment is rendered in a civil action by the superior court, the supreme judicial court may, on petition, grant a review, though it was not commenced by writ.
2. **SAME—REFUSAL NO BAR TO SUBSEQUENT APPLICATION.**
 The refusal of the justice of the superior court to order notice of petition for review presented to him, where there is no record of the petition, which was not filed, and upon which there was no judgment, is not a bar to a subsequent petition for review.

Reported cases from supreme judicial court; DEVENS, Judge.

Petitions by the Nantasket Beach Railroad Company against Charles A. Ransom, Sarah E. Ransom, and Lyman Mason, respectively, for writs of review of judgments of the superior court of Plymouth county.

R. M. Morse, Jr., and H. L. Harding, for petitioner.

"Final judgments in civil actions commenced by writ may be re-examined and tried anew upon writ of review." *Fuller v. Storer*, 111 Mass. 282. The writ of review is unknown at common law, and adopted from the courts of equity. *Buriell v. Burrell*, 10 Mass. 221. In equity, bills of review will lie, under Lord BACON's ordinance of 1619, (1) for error of law appearing in the decree; (2) for new matter which has arisen since the decree, or, with leave of court, for newly-discovered evidence. 1 Sand. Ord. c. 109; Story, Eq. Pl. § 404; *Dexter v. Arnold*, 5 Mason, 303; *Massie v. Graham*, 3 McLean, 41. An examination of the statutes shows that there is no expressed limitation of the right of review to cases begun by writ. *Insurance Co. v. Winslow*, 3 Gray, 420; *Brewer v. Holmes*, 1 Metc. 289; *Thayer v. Goddard*, 19 Pick. 64. St. 1788, c. 11, § 2, (substantially in force now,) in terms gives power to review any judgment if the verdict upon which it is rendered could have been set aside before judgment. And verdicts for damages for land taken by right of eminent domain can be set aside, although proceedings were begun by petition. Pub. St. c. 49, § 52; *Railroad Co. v. Railroad*, 3 Cush. 58; *Walker v. Railroad*, Id. 1; *Railroad Co. v. Railroad Co.*, 6 Al-

len, 98; *Com. v. Norfolk*, 5 Mass. 434; *Harding v. Medway*, 10 Metc. 465. The authorities which may be cited to sustain the point that only cases begun by writ are reviewable, are those of award upon submission to referees, petitions for partition, decrees of probate, or divorce. See *Hubon v. Bousley*, 123 Mass. 368. The absence of a writ was not the ground of decision in *Dickenson v. Davis*, 4 Mass. 520. The real reason was that the cause was not "triable on review." See *Stone v. Davis*, 14 Mass. 360. The case of *Borden v. Brown*, 7 Mass. 93, was a petition for partition under St. 1783, c. 41. Inasmuch as the law then in force gave the court power to review "civil actions, without being limited to particular cases, any omission in the aforesaid act notwithstanding," it seems a narrow construction to hold that "reviews are provided only where the original action is commenced by writ." See *Lucas v. Lucas*, 3 Gray, 138. *Sturdivant v. Greeley*, 4 Greenl. 538, denies the doctrine of *Borden v. Brown*. The third class of cases comprises those seeking a review of decrees of probate or divorce. *Pope v. Pope*, 4 Pick. 129; *Lucas v. Lucas*, 3 Gray, 136. See *Fuller v. Storer*, 111 Mass. 282; *Hubon v. Bousley*, *supra*. It is believed that not a case can be found which gives any reason why the action must be commenced by writ. *Thayer v. Goddard*, 19 Pick. 62. That it is immaterial how the issues arrived at is shown by the cases in which a judgment on an agreed statement of facts has been reviewed. *Stockbridge v. West Stockbridge*, 13 Mass. 302; *Ward v. Clapp*, 6 Metc. 414; *Petersham v. Dana*, 12 Mass. 429. This action to recover land damages is brought, by the terms of the statute, within the class of cases for which the statutes of review were passed. See St. 1788, c. 11; St. 1791, c. 17; St. 1827, c. 77, § 12; Pub. St. c. 49, § 105; *Miller v. Commissioners*, 119 Mass. 485; *Williams v. Taunton*, 126 Mass. 287. The right to review on the present petition was not lost by reason of the former application. *Davenport v. Holland*, 2 Cush. 11; *Burrell v. Burrell*, 10 Mass. 221; *Hayes v. Collins*, 114 Mass. 54. A decision on a petition for a review can be revised for erroneous ruling in matters of law. *Dearborn v. Mathes*, 128 Mass. 194; *Davenport v. Holland*, 2 Cush. 1; *Converse v. Carter*, 8 Allen, 568; *Richardson v. Lloyd*, 99 Mass. 475. See *Woodward v. Leavitt*, 107 Mass. 453.

Lyman Mason, for defendants.

These are not cases of final judgment in civil actions which can be re-examined and tried anew by the supreme judicial or superior court. Pub. St. c. 187, §§ 17-19. It is held that, to entitle a party to a writ of review, the action must have been commenced by writ, and not by petition or complaint, and must be a civil action. 6 Dane, Abr. c. 189, § 2; *Dickenson v. Davis*, 4 Mass. 520; *Borden v. Brown*, 7 Mass. 93; *Fuller v. Storer*, 111 Mass. 282; *Hubon v. Bousley*, 123 Mass. 368. The supreme court will not, in the exercise of its discretion, grant a petition for review of a judgment rendered in the superior court, after a trial had by order of the judge, where the aggrieved party was heard on the question of postponing the trial, and afterwards had an opportunity of applying to the same court for relief, and to present all the facts upon which the petition for review is provided, if there is not clear proof of misapprehension, corruption, or incapacity on the part of the judge. *Converse v. Carter*, 8 Allen, 568, 569, (1864.) The power of setting aside the proceedings of a subordinate court acting on a matter within its discretion, by an application for review, is to be exercised cautiously and sparingly, and only in cases in which it is apparent that the rights of the parties could not otherwise have been secured. *Lucas v. Lucas*, 3 Gray, 139; *Borden v. Brown*, 7 Mass. 93; *Stone v. Davis*, 14 Mass. 360. The case of *Converse v. Carter*, 8 Allen, 568, does not sustain petitioner's proposition. It was the duty of the petitioners to show that their counsel filed these petitions in the proper court, and brought the matter before the court, and show what the decision of that court was; otherwise the presumption is that the court held they had no case

for review, and therefore declined to grant an order of notice. A decision of a single justice refusing a review which involves no question of law is final, and not open to exception. *Weeks v. Adamson*, 106 Mass. 517. A petition for review is addressed to the discretion of the judge, and his decision thereon can be revised upon exceptions or report only for erroneous rulings in matters of law. *Hayes v. Collins*, 114 Mass. 56. The only judgment that can be given on a petition for review is that a writ of review shall or shall not be granted; and if the judge refused to allow an order of notice, it was the duty of petitioner's counsel to except within the time allowed by the rules. *Davenport v. Holland*, 2 Cush. 11.

W. ALLEN, J. These are petitions for writs of review of judgments of the superior court upon verdicts of juries in that court, assessing damages, upon the petitions of the respondents, for lands taken by this petitioner for its railroad. The first question is whether the statute authorizes a review of such a judgment. Pub. St. c. 187, § 16, provides that "trial judgments in civil actions may be re-examined and tried anew as provided in the following sections." Section 22 provides that "if judgment is rendered in a civil action, either by the supreme judicial court or superior court, the supreme judicial court, except when a review is provided as of right, may, on petition, grant a review on such terms as it deems reasonable." Pub. St. c. 112, § 95, authorizes railroad corporations to take land, and provides that they shall pay damages therefor, which, upon the application of either party, shall be estimated by the county commissioners in the manner provided with reference to the laying out of highways. Section 99 gives to either party, if dissatisfied with the estimate of the county commissioners, a right to apply for a jury to assess the damages. The statute in relation to highways gives to a party aggrieved by the estimate of damages made by the county commissioners a right to a trial by a sheriff's jury upon a written application to the commissioners. Pub. St. c. 49, §§ 32-37. Section 105 of the same chapter (chapter 49) provides that, "in all cases in which it is provided by law that a sheriff's jury may be had for any purpose, application for a jury may be made by petition to the superior court, and thereupon, after such notice as the court shall order to the adverse party or parties, a trial may be had at the bar of said court in the same manner as other civil cases are there tried by jury." In the cases at bar the applications to the county commissioners to assess damages were made by the respondents. The petitions to the superior court for a jury were made by these petitioners; and the question is whether the judgments of that court upon verdicts of the jury are judgments in a "civil action," within the meaning of the statute authorizing writs of review. In substance, the proceedings are civil actions. The trials were of issues of fact by juries. The verdicts were for damages, and executions issued on the judgments. The statute itself includes the proceedings with "other civil cases." These were "cases" to ascertain and enforce the collection of damages due from these petitioners to the respondents; and the only ground upon which it is claimed that they are not "civil actions" is that they were not commenced by writ. We regard it as immaterial in this respect whether the statute authorized them to be commenced by petition or by writ. The issues and the course of trial would be the same whether the defendants were required to come in on a writ of summons, or upon notice ordered on the filing of the petition. If the legislature should abolish all original writs, and require all actions to be commenced by petition, writs of review would survive. In *Dickenson v. Davis*, 4 Mass. 520, it was decided that review would not lie of a judgment of the court of common pleas upon the report of referees appointed by a justice of the peace under the statute. The court say: "Where a review is grantable, the case must be triable on a review. It must therefore be commenced by writ containing a declaration, to which a plea may be pleaded, and an issue joined and tried. The origin

of the judgment complained of in this case was not by writ, but by general rule of reference before a justice, containing no demand alleged with sufficient certainty to admit of a plea and of a trial at law upon any issue that could be regularly joined." It is obvious that the court does not refer to the form of original process as determining the question of jurisdiction in review, but to the writ containing the declaration as part of the pleadings. Review would not lie, not because the original process was not a writ, but because, in the form of proceeding, there could be no cause of action stated, and no pleadings, and no issue which would be tried. The same point is decided, and the reasons for the decision given more at large, in *Stone v. Davis*, 14 Mass. 360; but no reference is there made to the absence of a writ. In *Pope v. Pope*, 4 Pick. 129, it was decided that the court had no authority to grant a review or a new trial on an issue arising on an appeal from the judge of probate after judgment had been entered on the appeal; and in *Lucas v. Lucas*, 3 Gray, 136, it was decided that there was no authority to grant a review in libels for divorce. *Borden v. Brown*, 7 Mass. 93, decided that a review did not lie of a judgment on a petition for partition of lands. The court say: "Reviews are provided only where the original action is commenced by writ." Said Chief Justice SHAW in 1854: "Perhaps, that would now be holding the matter rather too strictly." 3 Gray, 139. In *Hubon v. Bousley*, 123 Mass. 368, it was held that review would lie of a judgment on a petition to enforce a mechanic's lien. The petition was inserted in a writ of summons. The statute provided that the petitions might be filed, and an order of notice issued, or that it might be inserted in a writ of summons. The court say: "We can have no doubt that a final judgment upon such a petition—at least where, as in this case, that petition was inserted in a writ—may be the subject of a writ of review." It can not be contended that the right to review the judgment depended upon the form of the process. The cases at bar are actions to recover damages. The petitions are statements of the causes of action. There are issues which have been tried, and which are triable on review. To hold that they are civil actions, within the meaning of the statute, if service of the petition is made by inserting it in a writ before it is filed, and that they are not civil actions if service is made by inserting the petition after it is filed in an order of notice, is to find a distinction which is not within the language or reason of the statute, and which is not established by any decision. The decisions that the statute does not apply to decrees in probate and divorce, and that it does not operate to grant a trial, in court, of facts found by arbitrators under a submission before a justice of the peace, nor to give a review of a partition of lands made by commissioners under St. 1783, c. 41,—which is all that is decided and in the cases cited above,—do not sustain the *dicta* upon which the respondent's rely that a review cannot be had of an action unless it is commenced by writ.

The only other question presented in the report is whether the refusal of the justice of the superior court to order notice of petitions for review presented to him by the petitioner is a bar to these proceedings. The record of the dismissal of a former petition upon its merits might be a bar to a second petition. But there is no record of the former petitions. They were not even filed; and were never in court; there was no judgment upon them, and no decision which could be revised by the full court. The respondent cannot establish a bar to this petition by parol proof of the acts of the judge *in pais* in reference to a paper which is not matter of record. See *Burrell v. Burrell*, 10 Mass. 221; *Hayes v. Collins*, 114 Mass. 54. Writs of review to issue.

(147 Mass. 294)

WHIPPEN v. WHIPPEN.

Supreme Judicial Court of Massachusetts. Suffolk. June 21, 1888.)

DIVORCE—DESERTION—RECRIMINATION—ADULTERY—POLYGAMY.

A man whose wife had deserted him, and been absent seven years, went through the form of marriage with another woman, and cohabited with her. He did not at that time actually know that his wife was alive, but it did not appear that he believed her to be dead, and there was not, by reason of her residence, any legal presumption of her death. *Held*, that he was guilty of adultery, and should accordingly be refused a divorce founded on the desertion, without regard to the question whether he could be prosecuted for polygamy under Pub. St. Mass. c. 207, § 5, excepting from the provisions of the preceding section a person whose consort has been continually beyond the sea or has deserted the other for seven years together, the latter not knowing the former to be living within that time.

Report from supreme judicial court, Suffolk county; C. ALLEN, Justice.

Libel for a divorce, charging a desertion by the libellee, February 5, 1875. The libel was filed June 25, 1887. The desertion was proved. Immediately thereafter the libelee moved from Boston, where she had lived with the libellant, to Cambridge, and her place of residence was known to the libellant; and she has ever since lived in Cambridge and Boston, at different places, but under no concealment. There was no presumption of her death. On October 23, 1888, the libellant married again. At this time the libelee had remained absent from him for seven years together; he not actually knowing her to be living within that time.

John F. Wakefield, for libellant.

The question to be determined is whether, from the facts found by the single justice before whom the libel was heard, the libellant comes into court with clean hands. Pub. St. c. 207, §§ 4, 5. The statute of polygamy should operate as a legal defense to adultery when the alleged criminal acts are the marrying and cohabiting with a woman whose husband has been absent more than seven years, and not known to the defendant to have been alive during that period. *Com. v. Thompson*, 6 Allen, 591. See 2 Bish. Mar. & Div. § 78; Stew. Mar. & Div. § 813. If the libellant did not commit adultery, and if the second marriage was not a crime, then there is no recrimination, as there is no evidence of any less degree than might be necessary to sustain a suit for adultery. *Pastoret v. Pastoret*, 6 Mass. 276; 2 Greenl. Ev. § 52; *Com. v. Thompson*, *supra*. See Bish. St. Crimes, §§ 663, 666. The fact of a second marriage is not proof of adultery, without proof of actual cohabitation and sexual intercourse. *Reemie v. Reemie*, 4 Mass. 586. There was no criminal intent after said seven years, and the statute of polygamy is a defense to adultery. *Com. v. Mash*, 7 Metc. 472. If the statutes make the second marriage voidable in the full sense of the matrimonial law, in distinction from void, a cohabitation under it is not adultery. *Valleau v. Valleau*, 6 Paige, 207; 1 Bish. Mar. & Div. § 710; *Id.* §§ 711, 800. Charles D. Whippen was not obliged to take his wife back after February 6, 1878, and could have obtained a divorce then, as the desertion was complete without any fault or recrimination by the libellant. *Clapp v. Clapp*, 97 Mass. 531; *Hall v. Hall*, 4 Allen, 39. Even if libellant has been guilty of adultery, even though committed after suit brought, or after a decree nisi, or, as in this case, after seven years from the desertion alleged, the court will not, in general, grant the divorce. Yet, when there is some special fact, taking the particular case out of the reason of the general rule, and sufficiently calling for clemency, it will act, notwithstanding the recriminatory plea. *Morgan v. Morgan*, L. R. 1 Prob. & Div. 644; *Conradi v. Conradi*, *Id.* 514; 2 Bish. Mar. & Div. § 82; *Noble v. Noble*, L. R. 1 Prob. & Div. 691; *Joseph v. Joseph*, 34 Law, J. Mat. Cas. 96; *Coleman v. Coleman*, L. R. 1 Prob. & Div. 81. The period of continued absence for seven years, without being heard of, will constitute presumption of

death. 2 Greenl. Ev. § 41; *Loring v. Steineman*, 1 Metc. 204; *Com. v. Mash*, 7 Metc. 472. If the libelant has not been guilty of a polygamous second marriage, without presumption of death, followed by cohabitation and sexual intercourse and adultery with criminal intent, and without mistake, since his marriage to Annie C. Whipple, then he should have the divorce *nisi* for desertion.

W. ALLEN, J. We understand the finding in the report of the libelant's marriage to include the fact of cohabitation. The argument for the libelant is that, as the libelee had at that time deserted him, and been absent from him for seven years, he not actually knowing her to be living within that time, he was not guilty of polygamy, and that cohabitation under such a marriage would not be adultery. Assuming, without deciding, that the words "not knowing," in the statute defining polygamy, (Pub. St. c. 207, §§ 4, 5,) have the same meaning as the words "not actually knowing," in the report, and that, upon the facts stated in the report, the libelant could not be convicted of polygamy, it does not follow that the cohabitation was not adulterous. Even if the libelant could not be punished, under the statute, for the marriage, it was void, and did not affect his former marriage. He had a wife, from whom he had not been divorced; and, unless there was a presumption of her death, cohabitation with another woman was adultery. *Com. v. Mash*, 7 Metc. 472; *Com. v. Thompson*, 6 Allen, 591, 11 Allen, 23. The report expressly finds that there was no presumption of the death of the wife. If the facts had been such as to raise that presumption, there would be much reason for granting a divorce to the libelant, not only because he would not have been guilty of adultery under the criminal law, but because, by reason of her presumed death, he could not have obtained a divorce from his wife. *Bodwell v. Bodwell*, 113 Mass. 314. St. 1884, c. 219, was enacted subsequently. But where there is no presumption of her death, and it does not appear that he did not have reason to believe, and that he did not believe, that she was alive, or that he did not have information of her which would have led to actual knowledge had he made inquiry, the fact that he did not have actual knowledge that she was living is no excuse for cohabiting with another woman after a form of marriage with her. The fact that she had given him cause of divorce from her for desertion did not prevent his subsequent adultery from being such a violation of his marital duties as would preclude him from taking advantage of her wrong. Libel dismissed.

(147 Mass. 326)

BAILEY *et al.* v. HEMENWAY *et al.*

(Supreme Judicial Court of Massachusetts. Suffolk. June 23, 1888.)

FRAUDS, STATUTE OF—CONTRACTS RELATING TO LAND—TRUSTS—RESULTING TRUSTS.

The three plaintiffs entered into an oral agreement with defendant that the four should buy certain lands in Maine in equal shares. The defendant took a bond for a deed securing two-fifths to himself, and one-fifth to each of the plaintiffs; but it did not appear that the money to buy the land was contributed equally. The plaintiffs prayed that it might be decreed that defendant held one-twentieth of the land in trust for each of the plaintiffs. *Held*, that there was no resulting trust, and the statute of frauds was accordingly a defense.

Reserved case from supreme judicial court, Suffolk county; HOLMES, Judge.

Bill in equity by James H. Bailey, William C. Halway, and John X. Ames against Charles P. Hemenway, William B. Bacon, Charles J. Morrell, and Cornelius Sullivan, to enforce an alleged trust. The bill, as originally filed, was deannured to, and as to the first three defendants was dismissed by consent of plaintiffs, leaving the bill as recast to run against the defendant Sullivan alone. The case was heard in the supreme judicial court before a single justice, and reserved for the full court.

E. R. Hoar and T. N. Talbot, for plaintiffs.

Upon the question of jurisdiction, the plaintiffs cite the following decisions: *Barrell v. Benjamin*, 15 Mass. 354; *Wright v. Oakley*, 5 Metc. 400; *Peabody v. Hamilton*, 106 Mass. 217; *Pingree v. Coffin*, 12 Gray, 304; *Brown v. Desmond*, 100 Mass. 267; *Spurr v. Scoville*, 3 Cush. 578; *Massie v. Watts*, 6 Cranch, 158-160. Also, *Dudley v. Bachelder*, 53 Me. 403. The defendant's knowledge was not the knowledge of his individual co-partners. His action in this regard was without their "knowledge, consent, privity, or subsequent approbation." *Lacey v. Hill*, 4 Ch. Div. 549. In respect of payment, the trust fails only when the plaintiff has "made no payment" when he did not pay "any part of the purchase money." *Botsford v. Burr*, 2 Johns. Ch. 405; *Bartlett v. Pickersgill*, 4 East, 576, note; *Smith v. Burnham*, 3 Sum. 435; *Pinnock v. Clough*, 16 Vt. 500. See *McGowan v. McGowan*, 14 Gray, 119, and *Crop v. Norton*, 2 Atk. 74, 9 Mod. 233. See, also, *Wray v. Steele*, 2 Ves. & B. 388; *McDonough v. O'Neil*, 113 Mass. 92; *Heard v. Pilley*, 3 L. R. 4 Ch. 548; *Page v. Page*, 8 N. H. 187; *Boyd v. McLean*, 1 Johns. Ch. 583; *Buck v. Pike*, 11 Me. 9; *Pillsbury v. Pillsbury*, 17 Me. 107.

William G. Russell and J. B. Richardson, for defendants.

MORTON, C. J. The statutes of Maine, like those of this commonwealth, provide that no action shall be maintained upon any contract for the sale of lands, or any interest in or concerning them, unless the contract, or some memorandum thereof, is in writing, and signed by the party to be charged; and that there can be no trust concerning lands, except trusts arising or resulting by implication of law, unless created or declared by some writing signed by the party or his attorney. The bill in this case, as amended, proceeds upon the ground that the three plaintiffs and the defendant Sullivan entered into an agreement that they would buy certain land and other property in Maine; that each was to have an interest of one-quarter in the purchase; that the defendant came to Boston, and, in violation of the agreement, procured a bond from the owners of the land and property, conditioned that they should convey the same, one-fifth to each of the plaintiffs, and two-fifths to the defendant; and it alleges that the plaintiffs, respectively, furnished money and credits, requisite for making said purchase, in the proportion of one-fourth each. The prayer is that the court decree that the defendant holds one-twentieth of the said two-fifths interest which he has under said bond as the trustee and for the sole benefit of each of the plaintiffs. The defendant pleads the statute of frauds, alleging that the subject of the agreement was principally land, and that the alleged agreement was not in writing, and there was no memorandum or note thereof in writing, and denying that the plaintiffs furnished each one-quarter of the money and credits necessary for the purchase. The master to whom the case was referred has found that an oral agreement was made, substantially as alleged in the bill, and that it was not reduced to writing, and no memorandum or note thereof in writing was signed by the defendant, and that the property purchased was principally land.

It is clear that the agreement in question, as it relates principally to land, is within the statute of frauds, and that no trust in the land, or in the equitable title acquired by the defendant under the bond, can be enforced against him unless there is a trust arising or resulting by implication of law. The doctrine in regard to resulting trusts is settled by numerous decisions, a few only of which need be referred to. When the money for the purchase of land is paid or furnished by one person, and the deed is taken in the name of another, there is a resulting trust created by implication of law in favor of the former. It is also true that, when one person pays the money for a specific share—an aliquot part—of the land, such as one-half or one-quarter, or other fixed fraction of the whole, and the title to the whole is taken in the name of

another, a trust results in favor of the former for such aliquot part. But a general contribution of a sum of money towards the entire purchase is not sufficient to produce this result. When, therefore, one makes an oral contract with another that the latter shall buy land on joint account, and he, in violation of the contract, takes the deed to himself, no trust results in favor of the former, as to one-half of the land, unless it is shown that he furnished the money for the one-half; in other words, that it was bought with his money. *McGowan v. McGowan*, 14 Gray, 119; *Fickett v. Durham*, 109 Mass. 419; *McDonough v. O'Neil*, 118 Mass. 92; *Parsons v. Phelan*, 134 Mass. 109; *Collins v. Sullivan*, 135 Mass. 461; *Dudley v. Bachelder*, 53 Me. 403; *Smith v. Burnham*, 8 Sum. 435. These principles are decisive of the case at bar. The plaintiffs and the defendant entered into an agreement that he should purchase the land in question on their joint account, each to have one-quarter interest in the purchase. There was no written contract and no memorandum in writing signed by the defendant. He took a bond for a deed of the land by which he was to have two-fifths, and each of the plaintiffs was to have one-fifth. There being no memorandum in writing, no trust can arise or be attached to the two-fifths held by the defendant unless the facts show a resulting trust by implication of law. To produce this result, it must appear that each of the plaintiffs contributed and furnished one-quarter part of the money and credits paid for the bond. The master has stated in detail the manner in which the defendant raised the money and credits necessary to procure the bond. Without going into particulars, it is enough to say that it was not obtained by each of the parties paying or furnishing an aliquot fourth part. The plaintiffs each made a general contribution for the purpose, varying in amounts; the defendant contributed part, and raised a part by a mortgage of his personal property; and a part was furnished by the firm of which the parties are members. Upon no aspect of the evidence can it be held that each contributed a greater part of the purchase money, so that the plaintiffs can claim that it was their money and credits, in the proportion of one-quarter each, which purchased the land or the bond. The fact that they afterwards offered to equalize the payments, or, as the master states, "to indemnify and reimburse Sullivan any contribution he had made in excess of one-fourth," is of no avail, except as evidence that one-fourth had not been furnished by each. A resulting trust depends upon the fact that the money of the person claiming it was used in the purchase, and it cannot be raised by any future payments or tender. "The trust," says Chancellor KENT, "results from the original transaction at the time it takes place, and at no other time, and it is founded on the actual payment of the money, and on no other ground. It cannot be mingled or confounded with any subsequent dealings whatever." *Botyford v. Burr*, 2 Johns. Ch. 405; *Richards v. Manson*, 101 Mass. 482. We are, for these reasons, of opinion that there was no trust resulting by implication of law upon which this bill can be maintained.

In view of the result we have reached, the defendant's claim that, this being a case of foreign parties litigating respecting land in another state, the court ought, in its discretion, to refuse to entertain jurisdiction, need not be discussed at length. There is no doubt that the court has jurisdiction; and, as the case has been fully heard, we have deemed it best to decide it upon its merits. Bill dismissed.

(147 Mass. 342)

DORAN v. COHEN.

(Supreme Judicial Court of Massachusetts. Suffolk. June 27, 1888.)

ATTACHMENT—BOND FOR DISSOLUTION—DISCHARGE OF SURETY—PLEADING—AMENDMENT.

In a suit against the owner of a steam-boat for running down a sail-boat, the original declaration set out that the sail-boat was rendered unfit for use, that it was worth \$200, and that plaintiff "was damaged to that extent, and otherwise." *Held*,

that an amendment adding a count making a claim also for personal injuries by the collision did not introduce a new cause of action, and accordingly the sureties on a bond to dissolve an attachment were not thereby released.

Exceptions from superior court, Suffolk county; HAMMOND, Judge.

Action of contract by Francis Doran against Samuel Cohen, the defendant being surety on a joint and several bond given to dissolve an attachment in an action of tort brought by the plaintiff against one Swift. The superior court, hearing the case without a jury, found for the defendant, and the plaintiff excepted.

John H. Ponce, for plaintiff.

The statute relied on by the defendant (Pub. St. c. 167, § 85) has not been interpreted as relieving a surety, who has received no notice of an amendment, in every case. *Tucker v. White*, 5 Allen, 323. See, also, *Wood v. Denny*, 7 Gray, 540; *Haven v. Snow*, 14 Pick. 33, 34; *Miller v. Clark*, 8 Pick. 412. The amendment in the present case did not introduce a new cause of action. "Attorney's testimony was, therefore, rightfully admitted." *Freeman v. Creech*, 112 Mass. 180, and *Ball v. Clafin*, 5 Pick. 303, are to the same effect. *Cutter v. Richardson*, 125 Mass. 72; *Smith v. Palmer*, 6 Cush. 513. Damages for injuries to person and property may be covered in the same action. *Johnson v. Holyoke*, 105 Mass. 80.

R. J. McKelleget, for defendant.

The count added to the declaration after the same was filed in court and after the bond was given introduced a claim for damage to the plaintiff's person in addition to the one for damage to his property. This undoubtedly increased the liability by letting in a new and distinct demand, and, as the surety had no notice of the amendment, the effect was to discharge him. Pub. St. c. 167, § 85; *Willis v. Crooker*, 1 Pick. 203; *Freeman v. Creech*, 112 Mass. 180; *Kellogg v. Kimball*, 142 Mass. 124, 7 N. E. Rep. 728. The surety must have understood that he made himself responsible in no possible event for more than the amount recoverable under the original declaration. *Prince v. Clark*, 127 Mass. 599-601. Amendments in form merely will not dissolve an attachment or discharge bail. To have this effect, the amendment must be such as to let in some new demand or new cause of action. *Smith v. Palmer*, 6 Cush. 513; *Wood v. Denny*, 7 Gray, 540; *Haven v. Snow*, 14 Pick. 33, 34; *Wight v. Hale*, 2 Cush. 493; *Haynes v. Morgan*, 3 Mass. 210. No amount of testimony would prove that a count for an injury to a sail-boat and a count for personal injury are for the same cause of action, even if both were caused by the same collision. *Miller v. Clark*, 8 Pick. 412; *Cutter v. Richardson*, 125 Mass. 72; *Wood v. Denny*, 7 Gray, 540.

MORTON, C. J. The sureties upon a bond to dissolve an attachment are not discharged by an amendment of the declaration, unless its effect is to let in a new cause of action, and thus to impose upon them a liability greater than that which they assumed by signing the bond. The original declaration may be imperfect and insufficient, but any amendment to cure such defect will not discharge a surety or release bail, unless it introduces a new cause of action. The obligation of the surety is to pay the plaintiff in the action the amount he shall recover therein, and the surety cannot take advantage of formal defects in the declaration. *Wood v. Denny*, 7 Gray, 540; *Cain v. Rockwell*, 132 Mass. 193; *Kellogg v. Kimball*, 142 Mass. 124, 7 N. E. Rep. 728. In the case before us, the two counts of the declaration are for the same cause of action. The gist of each is that the defendant negligently managed his steam-boat so as to run down the sail-boat of the plaintiff when he was sailing in it, using due care. Each count sets out the same tortious act of the defendant as the cause of action. They differ only in that the original count sets out that the

plaintiff's sail-boat was rendered unfit for use, that it was worth \$200, and that he was "damaged to that extent, and otherwise;" while the amended count alleges that he was injured in his person. The plaintiff could not legally maintain more than one action for the same tortious act. He could not divide the tort, and have one action for the injury to his property and another for the injury to his person. *Bennett v. Hood*, 1 Allen, 47; *Trask v. Railroad Co.*, 2 Allen, 331. This is upon the ground that he could not maintain two suits for the same cause of action. As the two counts are for the same cause of action, we are of opinion that the allowance of the second count as an amendment did not discharge the sureties on the bond to dissolve the attachment. Exceptions sustained.

(147 Mass. 313)

HARRIS v. CARTER.

(Supreme Judicial Court of Massachusetts. Suffolk. June 21, 1888.)

PARTNERSHIP—ACCOUNTING—DIVISION OF PROFITS—INTEREST ON CAPITAL.

An oral agreement of partnership specified the amount of capital to be furnished by each partner, but not how the profits should be divided, and it appeared that, if interest should be allowed on capital furnished, one partner, who before his admission to the firm was employed by the other at \$3,000 a year, with 7 per cent. interest on \$10,000 of his used in the business, would have been entitled to \$950 a year, and had drawn out more than his share of the profits and his entire capital. During the 12 years the partnership lasted, annual statements were made by the book-keeper, with *memoranda* on them that interest on capital was not computed. *Held*, that the profits should be evenly divided, without regard to the capital furnished.

Reserved case from supreme judicial court, Suffolk county; DEVENS, Judge.

Bill in equity by Amos H. Harris against Solomon Carter for an account of the business and affairs of a copartnership formerly existing between the plaintiff and defendant. Heard in the supreme judicial court, before DEVENS, J., and reserved for the full court. The facts appear in the opinion.

George D. Noyes, for plaintiff.

Henry G. Nichols, for defendant.

As to the division of profits, the general rule is stated in the most recent work on the law of partnership as follows: "In the absence of agreement or evidence as to the proportions of profit and loss to be divided between the partners, the presumption is in favor of the equality of the shares. It makes no difference that one partner has contributed all the capital, and the other only services or skill, for the court cannot set a proportional value upon these respective contributions. * * * It follows, from the same reasons, that if the contribution to capital is in unequal proportions, the profits and losses are not presumably to be shared in the ratio of the shares of capital, but equally." *Bates*, Partn. § 181; *Peacock v. Peacock*, 16 Ves. 49, 2 Camp. 45; *Thompson v. Williamson*, 7 Bligh. (N. S.) 432. See, also, *Towner v. Lane's Adm'r*, 9 Leigh, 262; and *HOFFMAN, J.*, in a dissenting opinion in the case of *Hassbrouck v. Childs*, 3 Bosw. 114; 1 Dom. Civil Law, tit. 8, § 5. See, also, *Poth. Partn. notes* 15, 16, 73; *Story, Partn. (7th Ed.)* § 25. See *Jackson v. Crapp*, 32 Ind. 422. As no agreement was made for salaries to the partners, and no settlement of partnership accounts has ever been made, profits are to be ascertained by adding what has been drawn out by the partners to the amount of other net assets on hand at the time of dissolution; and, subtracting the original capital, the balance is to be considered profits, and these should be divided in proportion to the contributions of capital, and whatever has been withdrawn by either partner in excess of the amount so ascertained to be his share will constitute a debt to the firm. *Story, Partn. (7th Ed.)* § 21, note 4. As to interest on capital, see 2 *Ewell, Lindl. Partn.* *788, note 2; *Miller v. Craig*, 6 Beav. 433. See, also, *Gyger's Appeal*, 62 Pa. St. 73; *Buckingham v. Ludlum*, 29 N. J. Eq. 345; *Beacham v. Eckford*, 2 Sandf.

Ch. 116; *Morris v. Allen*, 14 N. J. Eq. 44; *Ligare v. Peacock*, 109 Ill. 94; *Pond v. Clark*, 24 Conn. 370. See, also, 1 Greenl. Ev. § 197; per Lord HARDWICKE, in *Willis v. Jernegan*, 2 Atk. 252. The defendant is not estopped to claim interest by the fact that no interest account was kept on the books. *Stoughton v. Lynch*, 2 Johns. Ch. 209.

W. ALLEN, J. The only exceptions taken to the master's report are to his findings that the profits and losses should be equally borne by the partners, and that no interest should be allowed to either partner upon capital or upon sums drawn out. The oral agreement of copartnership specifies the amount of capital to be supplied by each partner, and was silent as to almost every other particular. Nothing was said in it about sharing profits and losses, or about interest, or about sums to be drawn out by the partners; though it was understood that each partner was to draw out what was necessary for expenses of living. The capital was about \$63,000, \$10,000 of which was put in by Harris, and the rest by Carter. The partnership continued for 12 years with no more definite agreement; each partner drawing what was needed for his personal expenses, and at its dissolution the assets were less than the amount of the capital put in. The profits referred to in the report are the amount of the net earnings so drawn out by the partners. The intention of the parties to share these profits equally is manifest. There was no agreement that interest should be paid, and the circumstances negative such an intention. Nothing was said about it until after the dissolution of the partnership. The plaintiff had been a salesman with the firm of Carter & Wiley, of which the defendant was a member, on a salary of \$3,000, and had also the interest at 7 per cent. on \$10,000 which he lent to the firm, and he gave up his salary, and put his money into the new partnership, from which he received, upon an average, less than \$2,500 a year. It was understood that the business was not profitable or prosperous. The average amount of profits was less than \$4,500 a year. The whole amount drawn out by both parties during the 12 years exceeded by more than \$8,000 the whole amount of the profits. Interest on the capital deducted from the average earnings would have left \$700 as the average annual profits. The change from clerk to partner, if interest was to be allowed on capital, would have reduced the plaintiff's income, not borrowed from capital, from \$3,700 to \$950 a year, to the corresponding advantage of the defendant. Yet the parties went on for 12 years with the understanding that each should draw out what was necessary for his living expenses, and each in fact drawing out one-half of the earnings and more; the excess drawn out by each having nearly the proportion to the excess drawn out by the other that the capital put in by him bore to the capital put in by the other. The whole amount drawn out was \$64,859, which was \$8,560 in excess of the profits. Of this excess \$7,331 was drawn out by the defendant, and \$1,229 by the plaintiff, which was nearly the proportion of the capital put in by them. There can be no doubt that the understanding was that the parties should have a right to draw out what was necessary for their personal expenses equally, to the extent of the profits, and beyond that in the proportions of the capital put in by them respectively. If interest was not to be credited to capital, the plaintiff in fact drew out \$127.28 less, and the defendant that amount more, than they were respectively entitled to; if interest was to be allowed on capital, the plaintiff drew out not only his own capital, but over \$6,000 that belonged to the defendant. This result must have been obvious to the parties had their attention been given to the matter. Annual statements were made by the book-keeper to the partners, which called their attention to the matter of interest on capital, and it is incredible that the parties should have pursued the course they did, without mentioning the subject, if they had not understood that interest was not to be allowed. Interest on capital never was computed or included in the

annual statement, and the only reference to it in the statement was a memorandum by the book-keeper saying that interest on capital was not computed. The evidence not only fails to show an agreement that interest was to be allowed upon the capital, but affords a strong inference to the contrary. We think that the findings of the master which were excepted to were correct, and that the account is correctly stated by him in conformity with them. Decree for plaintiff.

(147 Mass. 335)

HECHT *et al.* v. BATCHELLER *et al.*

(*Supreme Judicial Court of Massachusetts. Suffolk. June 23, 1888.*)

NEGOTIABLE INSTRUMENTS—TRANSFER WITHOUT RECOURSE—INSOLVENCY OF MAKER.

The payees of a promissory note sold it through a broker, "without recourse," two hours after the makers had made a voluntary assignment under the laws of Ohio for the benefit of creditors; neither buyer, seller, nor broker knowing of that fact. *Held*, that the buyer could not recover of the seller on the ground of failure of consideration or mistake, as he got the identical note he bargained for, nor on an implied warranty, and that he must bear the loss himself.

Exceptions from superior court, Suffolk county; MASON, Judge.

Action of contract by Isaac Hecht and another against Alfred H. Batcheller and another, which was tried in the superior court without a jury, upon the following agreed statement of facts: On or about November 1, 1886, the defendants, boot and shoe manufacturers at Boston, sold to J. & S. B. Sachs, shoe dealers, of Cincinnati, Ohio, a bill of goods, and, in payment, received a promissory note for \$2,091.38, signed by J. & S. B. Sachs, and dated November 3, 1886. On or before November 27, 1886, the defendants, in the usual course of business, placed said note with Rogers, Wood, Loring & Co., of Boston, brokers in commercial paper, with directions to sell the same. The plaintiffs, for a long time previous to November 27, 1886, were in the habit of buying commercial paper, including commercial paper of J. & S. B. Sachs, both through said brokers and others. About 1 o'clock on that day, J. H. Hecht, one of the plaintiffs, inquired, on behalf of his firm, of said brokers, what paper they had to sell, and was shown a lot of notes, including the J. & S. B. Sachs note above mentioned. The plaintiffs then purchased that note for \$1,950.22 in cash; neither the defendants, nor any one in their behalf, indorsing the note, or making any representation in respect to it. The note was immediately delivered to the plaintiffs, who paid said amount by check. Neither the plaintiffs nor the defendants nor the brokers had, at the time of the sale of the note, any knowledge about the solvency or insolvency, or the continuance in business, of the makers of the said note, further than what was generally known to the business community of Boston at the time; and both the plaintiffs and defendants knew the financial standing of said J. & S. B. Sachs as given by the mercantile agencies. At 7 minutes past 11 o'clock, Boston time, on said November 27, 1886, that is, about two hours before the sale of the note to the plaintiffs, the firm of J. & S. B. Sachs failed, and made a voluntary assignment of all their assets for the benefit of their creditors, and ceased to do business thereafter. Both the plaintiffs and defendants first learned of the failure of J. & S. B. Sachs at 3.30 P. M. on said November 27th. Immediately after receiving information of the failure, the plaintiffs offered to return the note to the defendants, and demanded a return of the money paid by them therefor, claiming that it had been paid under a mistake; but the defendants declined to take back the note or return the money. It was also agreed that "it is the universal custom of note brokers not to offer for sale the paper of any person whom they have reason to believe to have failed or made an assignment." And the case was submitted to the court upon the facts, with a right to draw such inferences as a jury might draw therefrom. The defendants requested the court to rule: (1) Upon the agreed facts, judgment should be for the defendants. (2) From the agreed facts as stated, there are no inferences of further facts

which the court or jury could or ought to draw. (3) If the court finds that neither the plaintiffs nor defendants, at the time of the sale of the note spoken of or inquired about, knew anything relative to the then continuance in business of the makers of the note, and that, during the transaction, plaintiffs and defendants both stood upon an equal footing, judgment should be for the defendants. The court refused so to rule, and found for the plaintiffs, and the defendants excepted.

Tyler B. King, for defendants.

It is well settled that one who sells a promissory note without indorsing it, or (which is the same) indorsing it "without recourse," guaranties what is called the genuineness of the instrument. But he does not warrant the solvency of the maker, nor any circumstances connected with the maker's life or means or business which would or might affect the mind of a purchaser, unless he makes special representations of this nature at the time of the sale. The agreed facts disclose no such representations in the case at bar. *Craft v. Fleming*, 46 Pa. St. 140; *Jones v. Ryde*, 5 Taunt. 488; *Ex parte Roberts*, 2 Cox, 171; *Gurney v. Womersley*, 4 El. & Bl. 133, 139; Chalm. Dig. Bills & N. art. 224 *et seq.*; Byles, Bills, 160; 2 Rand. Com. Paper, § 786; *Brown v. Montgomery*, 20 N. Y. 287; *Watson v. Chesire*, 18 Iowa, 202. The defendants' sixth request for rulings should have been granted. *Fenn v. Harrison*, 3 Term R. 759, (words of Lord Chief Justice KENYON); *Fyrdell v. Clark*, 1 Esp. 447. A promissory note comes into the world complete when it is signed and delivered. Where a note has been sold without indorsement, any mistake (to avoid the sale) must have been a mistake in regard to the genuineness of the note. This principle was recognized by the civilians before the time of Justinian. This same principle has, it is believed, been maintained constantly in the American decisions, with, perhaps, one exception, only. This case, which is believed to be at variance with all other English and American cases, is *Harris v. Bank*, 15 Fed. Rep. 786. But, in rendering this opinion, the court expressly say that they follow the principle laid down in *Bank v. Lightbody*, 13 Wend. 101; *Roberts v. Fisher*, 43 N. Y. 159. See *Camidge v. Allenby*, 6 Barn. & C. 373. Most clear in opposition to this is *Bayard v. Shunk*, 1 Watts & S. 92. With this compare, also, *Alexander v. Owen*, 1 Term R. 225; *Ellis v. Wild*, 6 Mass. 321; 1 Benj. Sales, § 53; *Scott v. Littledale*, 8 El. & Bl. 315.

Samuel D. Warren, Jr., and *Louis D. Brandeis*, for plaintiffs.

As the makers of the note had, at the time of the supposed sale, already made an assignment for the benefit of their creditors, and gone out of business, the note had ceased to be "business paper," and the plaintiffs were entitled, upon offering to return the note, to recover the amount paid. Where an agreement is made for the sale of a specific thing, and there exists in the minds of the parties a mutual mistake as to some attribute of the thing, the sale will be either valid or void according to the relation which that attribute bears to the thing itself. Pol. Cont. (11th Ed.) 427, 436. See *Iron Co. v. Insurance Co.*, 134 Mass. 433, 436; *Kennedy v. Mail Co.*, L. R. 2 Q. B. 580, 586, 587. If the thing contracted for proves to be substantially different, that is, different in kind, from what the parties supposed it to be, the result is the same as if it did not exist at all. See *Cooper v. Phibbs*, L. R. 2 H. L. 149, 170; *Fleetwood v. Brown*, 9 N. E. Rep. 352; *Couturier v. Hastie*, 5 H. L. Cas. 673; *Allen v. Hammond*, 11 Pet. 63; *Hitchcock v. Giddings*, 4 Price, 135. The books contain cases closely analogous in their facts to the one at bar. *Harris v. Bank*, 15 Fed. Rep. 786; *Stewart v. Orris*, 47 How. Pr. 518; *Leger v. Bonnaffe*, 2 Barb. 475. See *Benedict v. Field*, 16 N. Y. 595; *Wood v. Sheldon*, 42 N. J. Law, 421; *Thrall v. Newell*, 19 Vt. 202; *Roberts v. Fisher*, 43 N. Y. 159; *Emmerson's Case*, L. R. 1 Ch. 433; *Paine v. Hutchinson*, L. R.

3 Ch. 888. There are no decisions in Massachusetts upon the precise point, but such intimations as are to be found in our cases are favorable to the plaintiffs. *Small v. Mining Co.*, 99 Mass. 277; *Day v. Kinney*, 131 Mass. 37. If the defendants actually did, expressly or impliedly, warrant the note as the note of a firm then doing business, the plaintiffs are clearly entitled to recover; and it is well settled that, where goods are sold as goods of a certain description, the description becomes a term of the contract, and imports a warranty that the goods sold are the goods described, and that they substantially agree with the description. *Henshaw v. Robins*, 9 Metc. 83. Indeed, independently of the doctrine of warranty, the misrepresentation, that is, the representation that the note was the note of a firm then in business, though honestly made, would entitle the plaintiffs to rescind the transaction, and recover the money paid. *Spurr v. Benedict*, 99 Mass. 463; *Fane v. Fane*, Wkly. Notes, (1875), 161. There was ample evidence to justify a finding of such warranty or misrepresentation. *Gompertz v. Bartlett*, 2 El. & Bl. 849. The settlement with J. & S. B. Sachs did not bar the plaintiffs' right to recover. If the liability rests on a breach of warranty, or upon the misrepresentation, plaintiffs could have sued to recover the money without even offering to surrender the note; and, as the fifth and seventh rulings requested by defendants were unrestricted in their application, it was clearly proper to refuse them. *Coolidge v. Brigham*, 1 Metc. 547. A mutual mistake does not render the contract voidable merely, but absolutely void. *Lightbody v. Bank*, 11 Wend. 9, 13 Wend. 101. See *Greene v. Bateman*, 2 Woodb. & M. 359; *Josting v. Kingsford*, 13 C. B. (N. S.) 447; *Barnett v. Terry*, 42 Ga. 283.

MORTON, C. J. The defendants, being the owners of a promissory note which they had taken in the ordinary course of business, sold it through a broker to the plaintiffs. It was afterwards ascertained that, two hours before this sale, the makers of the note had made "a voluntary assignment of all their assets for the benefit of their creditors, to be administered under the insolvent laws of Ohio," of which state they were residents. Neither of the parties to this suit, nor the broker employed by the defendants, knew of the assignment at the time of the sale, but they all supposed that the makers were doing business as theretofore. The plaintiffs contend that they are entitled to recover upon either of two grounds: *First*, that there was a mutual mistake of the parties as to the thing sold, and therefore no contract was completed between them; and, *second*, that there was a warranty, express or implied, by the defendants, that the makers of the note were then carrying on business, and had not failed or made an assignment.

1. It is a general rule that where parties assume to contract, and there is a mistake as to the existence or identity of the subject-matter, there is no contract, because of the want of the mutual assent necessary to create one; so that, in the case of a contract for the sale of personal property, if there is such mistake, and the thing delivered is not the thing sold, the purchaser may refuse to receive it, or, if he receives it, may, upon discovery of the mistake, return it, and recover back the price he has paid. But to produce this result the mistake must be one which affects the existence or identity of the thing sold. Any mistake as to its value or quality, or other collateral attributes, is not sufficient if the thing delivered is existent, and is the identical thing in kind which was sold. *Gardner v. Lane*, 9 Allen, 492, 12 Allen, 39; *Spurr v. Benedict*, 99 Mass. 463; *Iron Co. v. Insurance Co.*, 134 Mass. 433; 1 Benj. Sales, § 54. In the case at bar, the subject-matter of the contract was the note of J. & S. B. Sachs. The note delivered was the same note which the parties bought and sold. They may both have understood that the makers were solvent, whereas they were insolvent; but such a mistake or misapprehension affects the value of the note, and not its identity. *Day v. Kinney*, 131 Mass. 37. In the case of *Day v. Kinney*, *ubi supra*, the makers of the

note sold were in fact insolvent, but they had not stopped payment, or been adjudged insolvent, and the decision is confined to the facts of the case. But we think the same principles apply in this case. The makers of the note had made an assignment for the benefit of their creditors; but this did not extinguish the note, or destroy its identity. It remained an existing note, capable of being enforced, with every essential attribute going to its nature as a note which it had before. Its quality and value were impaired, but not its identity. The parties bought and sold what they intended, and their mistake was not as to the subject-matter of the sale, but as to its quality. We are therefore of opinion that the sale was valid, and that the plaintiffs cannot recover the amount they paid as upon a failure of consideration.

2. The other question is one of some difficulty, created, in part, by the manner in which the case is brought before us. The case was submitted to the superior court upon an agreed statement of facts, "with a right to draw such inferences as a jury might draw therefrom." The court found for the plaintiffs, but upon what ground does not appear. If, upon the facts stated, and any inferences of fact which the court might reasonably draw therefrom, its finding can be justified, this court cannot revise its finding. *Railroad Co. v. Wilder*, 137 Mass. 536. When a man sells a note, the law implies a warranty that it is genuine, and that he has such a title as to give him the right and power to sell it. *Loddell v. Baker*, 1 Metc. 193; *Bank v. Morton*, 4 Gray, 156; *Merriam v. Wolcott*, 3 Allen, 258. This is upon the ground that the offer of the note is in itself a tacit affirmation or representation that it is genuine, and that the proposed seller has a right to sell it, and from such affirmation the law implies a warranty which enters into the contract. But it is settled that he does not warrant the solvency of the maker. *Day v. Kinney*, *ubi supra*; *Burgess v. Chapin*, 5 R. I. 225; *Beckwith v. Farnum*, Id. 230. Applying these principles to this case, if the brokers, who acted for the defendants, at the time of the sale, made any express or tacit representations that the note was a note of a firm then in business, which the parties understood as forming part of the contract, and the plaintiffs relied upon it, it might, in law, amount to a warranty that the note was as he affirmed it to be. But the difficulty of the plaintiffs' case is that there was no warranty in terms, and there are no facts agreed which justify an inference that the parties intended any such warranty as a part of the contract. The fact that both parties supposed and believed that the makers continued in business is immaterial. In the sale of a horse, both parties may believe the animal is sound. Probably in most cases of the sale of notes, both parties believe and understand that the maker is solvent; but no warranty can be implied or inferred from that fact. So the facts that the plaintiffs would not have bought, and the defendants' broker would not have sold, without disclosing the facts to the purchaser, if they had known that the maker had failed, are immaterial. The statement of facts states that the transactions of buying and selling commercial paper, conducted through brokers, "are confined to the paper of persons actually carrying on business." If the statement had stopped here, it might imply that there was a usage of brokers not to sell paper of makers who had failed, and that an intending purchaser had the right to rely upon the offer by the broker of a note for sale as an affirmation that the note offered was the note of a man or firm then in business. But the statement goes on, in explanation of its meaning, as follows: "In other words, it is the universal custom of such brokers not to offer for sale the paper of any person whom they have reason to believe to have failed or made an assignment." As thus explained, it goes little further than to prove that it is the custom of brokers not to commit a fraud by concealing facts known to them. It does not go far enough to show any usage to warrant the note of any person when the broker has no reason to believe that he has failed. The plaintiffs rely upon the case of *Harris v. Bank*, 15 Fed. Rep. 786, in which the question here raised was

decided in their favor. We think this case is in conflict with the weight of the authorities. In that case the court relies upon the authority of *Roberts v. Fisher*, 43 N. Y. 159, but that is a case of the payment of a debt by a worthless note. There are cases like *Roberts v. Fisher*, where it has been held that, if one pays a debt by a worthless note or draft or check, the debt is not extinguished. *Small v. Mining Co.*, 99 Mass. 277; *Weddigen v. Fabric Co.*, 100 Mass. 422. The distinction between such a transaction and the sale of a note in the market is obvious. Where a man offers a note, draft, or check in payment of a bill, unless something is said to the contrary, he offers it as an equivalent for money, and thus tacitly represents that it is as good as money. But the offer of a note for sale, without recourse to the seller, does not involve any representation as to the solvency of the parties to it, or as to its value. We think the principles we have stated are decisive of the case before us. The defendants sold the note in good faith. So far as the evidence shows, neither party, at the time of the sale, spoke of or inquired about or knew anything about the failure of the makers. They stood upon an equal footing, and they had equal means of knowing the standing of the maker. It was understood that the defendants were selling the note without recourse to them. They did not expressly warrant the value of the note, and we are of opinion that no warranty could fairly be inferred from the circumstances of the solvency of the makers, or that they continued in business. We are therefore of opinion that the first three instructions requested by the defendants should have been given, and that, upon the facts of the case, the court was not justified in finding for the plaintiffs. Exceptions sustained.

(147 Mass. 330)

LAZARUS *et al.* v. SWAN.

(Supreme Judicial Court of Massachusetts. Suffolk. June 28, 1888.)

ASSIGNMENT—EQUITABLE ASSIGNMENT—PROMISE BY CONSIGNEE TO PAY PROCEEDS TO CONSIGNOR'S CREDITOR.

Defendant's consignor instructed him to pay the proceeds of a cargo to plaintiffs, and informed plaintiffs that he had so instructed defendant. Defendant then promised plaintiffs that he would remit the proceeds as fast as the cargo was sold, but refused to accept a draft on account of it. Subsequently the consignor countermanded the instructions, and drew on defendant a draft, which he paid. It did not appear that plaintiffs had made any change in their position in reliance on defendant's promise. *Held*, that the promise amounted only to an assurance by defendant that he should obey instructions, and was without consideration, and that defendant, therefore, was not liable.

Contract by Alfred S. Lazarus and another against Walter S. Swan, to recover \$10,007.09 money had and received to the plaintiff's use. The case was heard by the full court upon agreed facts.

James E. Leach, Frank A. Farnham, and Johnson, Gallup & Hurry, for plaintiffs.

The doctrine of an equitable assignment is briefly stated in *Griffin v. Weatherby*, L. R. 3 Q. B. 758, 758, by BLACKBURN, J. The principles of such an assignment which are applicable to this case have been definitely settled in numerous cases, and are as follows: The order to pay or assignment of the debt cannot be revoked after it has been accepted by the holder of the fund. *Hodgson v. Anderson*, 3 Barn. & C. 842; *Robertson v. Fauntleroy*, 8 Moore, 10. There is a good consideration for the defendant's promise to pay plaintiffs. *Walker v. Rostron*, 9 Mees. & W. 411; *Fruhling v. Schroder*, 2 Scott, 185; *Crownfoot v. Gurney*, 9 Bing. 372. Defendant's promise makes an agreement to pay a debt of his own, and not of another, and is not within the statute of frauds. *Wyman v. Smith*, 2 Sandf. 331. The fact that the amount covered by the assignment is not ascertained does not affect the question. *Fruhling v. Schroder*, 2 Scott, 185; *Crownfoot v. Gurney*, 9 Bing. 372. The

agreement cannot be altered without the consent of all parties. *Walker v. Rostron*, 9 Mees. & W. 411. From the above cases it appears that a direct privity is established by the acceptance of the order and promise to pay, and defendant thereupon becomes primarily liable to the plaintiff. Particular attention is called to the case above cited of *Fruhling v. Schroder*, 2 Scott, 135, which is similar to the present case in many particulars. See, also, 2 Chit. Cont. (Amer. Ed.) 913, 1375, note *i*, 1379, note *p*, (erroneously printed *r*), note *g*, and note *r*. The English doctrine has been universally followed in America in numerous cases. See, for instance, *Christmas v. Russell*, 14 Wall. 69, 84; *Wyman v. Smith*, 2 Sandf. 381; *Tripp v. Brownell*, 12 Cush. 376, 380. The plaintiffs have now shown that the defendant was indebted to them in the full sum, whatever it might prove to be, that resulted from the sale of the cargo; a direct privity having been established between them by the defendant's promise to pay over the proceeds. The liability is just the same as if it were a debt due for goods sold by plaintiffs to defendant. To avoid this liability, some express agreement must be shown, or else conduct on the part of plaintiffs which would estop them from proceeding against the defendant. In this case the agreement or estoppel must be affirmatively shown by defendant, who must also show, in case of estoppel, that the plaintiffs acted with knowledge of their rights, and especially that he, defendant, relying upon the plaintiffs' acts, took action resulting in his own damage. This the defendant has wholly failed to do. The only acts of plaintiffs which can be advanced to show such abandonment, or which can be relied on to show an estoppel, are these two: Drawing bills of exchange on Danbon & Co., October 19, 1885, and proving a claim in bankruptcy against Danbon & Co., in January, 1886. No such effect can be given these acts. It is evident, from the authorities cited above, that, after the liability of defendant to plaintiffs became fixed, it could only be altered by agreement of all parties, in which the minds of all must meet. No such agreement having been shown, the plaintiffs had a right to bring this suit to collect their debt. Because the acts of the plaintiffs had no relation to the defendant, but were wholly collateral to the matter between them and defendant, and because the defendant has not connected his own acts with those of the plaintiffs, the plaintiffs contend that all evidence of those acts subsequent to their letter of July 22, 1885, is wholly immaterial, irrelevant, and should not be considered by the court.

Robert D. Smith and M. M. Weston, for defendant.

The first question is whether Swan did make an express promise to Lazarus. *Henderson v. Rothschild*, 33 Oh. Div. 459; *Morgan v. Lariviere*, L. R. 7 H. L. 423. There was no novation, because Lazarus did not discharge Danbon, and take Swan for his debtor. This is shown by the plaintiff's subsequent actions, and by his declaration that he forebore to sue on his claim against Danbon. *Clement v. Earle*, 130 Mass. 585, note. "Both consideration and promise must be present at the moment of making a contract." Holmes, Com. Law, 216. On the strength of *Tweddle v. Atkinson*, 1 Best & S. 393, 30 Law J. Q. B. 265, it is said that "a third person cannot sue on a contract made by others for his benefit, even if the contracting parties have agreed that he may." Wald, Pol. Cont. (4th Eng. Ed.) 201, 203-207; *Rogers v. Stone Co.*, 130 Mass. 581; *Clement v. Earle*, Id. 585. See *Manter v. Churchill*, 127 Mass. 31; *Morrill v. Lane*, 136 Mass. 93. The plaintiff cannot hold the defendant on his promise to Danbon & Co., because the plaintiff was not a party to that agreement. *Mellen v. Whipple*, 1 Gray, 317. If the defendant then made "an express promise to the plaintiff, still it cannot help the case, because it was void for want of consideration." *In re Engineering Co.*, 16 Ch. Div. 125; *Bank v. Rice*, 107 Mass. 37, 98 Mass. 288; *Pettes v. Peppard*, 120 Mass. 523. The count for money had and received will not lie. *McCulloch v. Insurance Co.*, 1 Pick. 278. The cases in which counts for money had and re-

ceived have been sustained upon an implied contract are those in which "the defendant has in his hands money which in equity and good conscience belongs to the plaintiff." Here is no such fund in the defendant's hands. *Bank v. Lodge*, 98 U. S. 123. The plaintiffs' case seems strong in equity, yet even in such a case this doctrine leads to some anomalies. See *Allen v. Thomas*, 3 Metc. (Ky.) 198. See *Hall v. Marston*, 17 Mass. 575; *Lilly v. Hays*, 5 Adol. & E. 548. Assuming that the proceeds of the cargo are to be regarded as a fund with which the defendant was to pay the plaintiffs, it was held, not as agent of or trustee for the plaintiff, but as the agent of Danbon, with authority to pay over to the plaintiff. The authority could be and was revoked by the principal. Therefore the defendant's duty to pay the plaintiffs ceased. *Denny v. Lincoln*, 5 Mass. 385; *Clement v. Earle*, 130 Mass. 585, note; *Dixon v. Pace*, 63 N. C. 608; *Henderson v. Rothschild*, 33 Ch. Div. 459. Notes to *Lampleigh v. Brathwaite*, 1 Smith, Lead. Cas. (8th Amer. Ed.) 271. There seems to be a class of cases in which there is a trust, assignment for the benefit of creditors, and the like, in which *assumpsit* will lie as an equitable action. See *Frost v. Gage*, 1 Allen, 262; *Putnam v. Field*, 103 Mass. 556; *Morrill v. Lane*, 136 Mass. 93, and cases cited; *Townsend v. Long*, 77 Pa. St. 143. This is not a case of a trust. The theory of a trust which may take the relation of the parties out of the rules of the common law is used to explain some cases like *Gregory v. Williams*, 3 Mer. 582. See *In re Engineering Co.*, 16 Ch. Div. 25. See *In re Flavell*, 25 Ch. Div. 89; *Sykes v. Beadon*, 11 Ch. Div. 170; *Dickinson v. Dodds*, 2 Ch. Div. 463. Lazarus never gave up, or modified, or postponed, or forebore to press, his claim against Danbon. Again, he took payment for the acceptances in N. Danbon's notes. These notes are payment, as the commercial law of Porto Rico is presumed to be like that of Massachusetts. *Chase v. Insurance Co.*, 9 Allen, 311; *The Duero*, L. R. 2 Adm. & Ecc. 393. Lazarus never agreed to abstain from suing Danbon & Co., or gave them time. He treated Danbon & Co. as still liable to pay the whole debt. *Hunt v. Nevers*, 15 Pick. 500. This is not a question as to which one of two equally innocent parties shall bear a loss, but whether a creditor can, without changing his position or giving any consideration, obtain second or double payment of a debt, or obtain from a promise of a third person, given without consideration, additional and cumulative security for his debt. Not only this, but whether the creditor, having, as he supposes, obtained an additional and cumulative promise from the defendant, and retaining his claim in full force against the original debtor, can deal with the latter in such a way as to discharge him, by receipt of payment in negotiable securities, without consultation with the person who stands in the position of surety, or can sell his original claim to a third person. *Guild v. Butler*, 127 Mass. 386.

MORTON, C. J. Danbon & Co., on June 19, 1885, shipped from Porto Rico, by the brig Hyaline, a cargo of molasses consigned to the defendant at Boston, for sale on commission on their account. On June 23, 1885, they wrote to the defendant a letter, inclosing a bill of lading of the shipment, and adding: "On the safe arrival with you of the above-mentioned vessel, we would thank you to be very active in placing the cargo, if it is suited to the market, and the net proceeds resulting you will please hand to Messrs. A. S. Lazarus & Co., of New York, to whom we have written by the same mail, informing them that you would remit them, for our account, the sum resulting from the sale of the molasses." On the same day they wrote a letter to the plaintiff, inclosing a duplicate bill of lading, in which they state that the defendant "has instructions to place in your hands the net proceeds of said cargo as soon as possible." This letter was received by the plaintiffs on July 6, 1885. Danbon & Co., on July 5, 1885, wrote a letter to the defendant, stating that they had drawn on him two drafts on account of the molasses shipped to him, one of which, for \$5,000, was expressed to be drawn against the cargo of the Hy-

v. 17 N.E. no. 6—42

MASS. DEC. 15—18 N.E.—45

line; which letter contained the instruction that "you will please suspend our order to remit to A. S. Lazarus & Co., of New York, the net proceeds of the cargo per Hyaline, and in due time we will telegraph you what to do to reimburse the above-named gentlemen." On the same day, July 5th, they wrote to the plaintiffs that they had "given orders to Mr. Swan, of Boston, not to send you any funds until he shall receive our advice by cable." It does not appear when these last letters were received, but, by the ordinary course of the mails, it would take a letter from 10 to 14 days to reach Boston from Porto Rico, and one day less to reach New York. On July 7, 1885, the plaintiffs wrote the defendant informing him that they had received the letter of June 23, 1885, from Danbon & Co., and adding: "Doubtless by now you have received the invoice and bill of lading. We should like to hear for what amount and at what date you would accept a draft of ours against said shipment; Messrs. Danbon & Co. having sent you the bill of lading clean, and without having drawn against the same." To this the defendant replied on the next day: "We have received from Messrs. Danbon & Co. the shipping documents of cargo molasses per Hyaline, with instructions concerning disposal, and to remit net proceeds of sale to you, which we shall do in due course; possibly remitting you on account as collections are made, should the entire cargo not be closed out promptly." On July 9, 1885, the plaintiffs again wrote the defendant, asking, "If you are willing to accept a draft of ours at thirty or sixty days for an amount say of \$3,000 or \$4,000, on account of proceeds;" to which the defendant replied, "Yours of yesterday received, and in reply would say that we should not accept your draft as suggested by you, but will give you proceeds of sale as soon as in hand." On July 15, 1885, the defendant, having received Danbon & Co.'s letter of July 5, 1885, wrote to the plaintiffs as follows: "We have later advices from Messrs. Danbon & Co., informing us of having made drafts upon us for proceeds 'Hyaline' cargo molasses, and canceling instructions to pay same to you." Some subsequent correspondence ensued between the parties, the plaintiffs claiming that the defendant was liable to them, and the defendant denying his liability, which it is not necessary to refer to more particularly. It is admitted that the plaintiffs did not give Danbon & Co. any new credit, or change their position towards Danbon & Co., between June 19 and July 18, 1885; and that the net proceeds of the cargo of the Hyaline and of other cargoes were applied by the defendant to the payment of Danbon & Co.'s drafts upon him, leaving a balance due from Danbon & Co. to him of \$789.61. Upon this state of facts it is clear that there is no express promise by the defendant to pay the proceeds of the Hyaline to the plaintiffs upon which they can rely.

The letters of the defendant do not contain words of promise or agreement, but merely notify the plaintiffs of the instructions he has received from Danbon & Co., and his intention to carry out his instructions. Besides, there is no consideration for such promise shown. *Rogers v. Stone Co.*, 130 Mass., 581; *Clement v. Earle*, Id. 585, note. But the plaintiffs rely upon the ground that the transaction amounted to an equitable assignment to them, by Danbon & Co., of the proceeds of the cargo of the Hyaline, and that when the defendant received such proceeds, he, having been notified of the assignment, was bound to account to them. The doctrine of equitable assignments is well settled. If a person transfer to a creditor, on account of a debt, a fund in the hands of a third person, and the holder of the fund is notified of the transfer, he is bound, if he has no prior claim upon the fund, to hold it in trust and for the benefit of the creditor, who may enforce his claims in equity, or at law if the holder promises to pay them. *Griffin v. Weatherby*, L. R. 3 Q. B. 753; *Tripp v. Brownell*, 12 Cush. 376; 2 Story, Eq. Jur. § 1041 *et seq.* But there must be an assignment by the owner of the fund; that is to say, a transfer or appropriation of the fund to the creditor's use. For instance, if in this case, the consignors of the molasses had drawn and sent to the plaintiffs an order

upon the defendant to pay the fund to the plaintiffs, and he had been notified of it, he would have been liable in some form of action to the plaintiffs, as such an order is in its nature a transfer of the fund, and as he had no prior claims which could prevent the consignors from consigning it. But the difficulty with the plaintiffs' case is that the evidence does not show any assignment or transfer of the fund to them. The only evidence upon which they rely as showing an assignment is the statement in the letter of June 23, 1885, from Danbon & Co., that the defendant "has instructions to place in your hands the net proceeds of said cargo as soon as possible." This is not an order on the defendant, nor an assignment of the fund. It cannot be held to have this effect without greatly enlarging the natural meaning of the language. It does not purport to convey the fund to them in payment of or as security for their debt. We cannot infer from the language used or the surrounding circumstances that it was the intention of Danbon & Co. to set apart and appropriate the fund to the use of the plaintiffs. The language does not import this, and we cannot, by any fair construction, give it this meaning. We are therefore of opinion that the plaintiffs fail to show an equitable assignment to them. In this view of the case, it is not necessary to consider the other questions argued by the counsel. Judgment for defendant.

(46 Ohio St. 30)

MONNETT v. MONNETT *et al.*

(Supreme Court of Ohio. May 22, 1888.)

1. CONTRACT—INTERPRETATION—PAROL EVIDENCE TO EXPLAIN.

M. executed and delivered to T. J. M. a written instrument the terms of which are that the Woollen-Mill Company of Bucyrus, Ohio, having sold to M. one-half of the woollen-mill property for the sum of \$7,500, \$2,500 to be paid April 1, 1877, the other \$5,000 with the following provisions: "After M. receives dividends to the amount of ten per cent. on the money he puts into the mills, T. J. M. is to receive dividends, as interest on the five thousand dollars, *pro rata* with the firm for the term of five years, and, if the mills do not pay dividends up to ten per cent. on the money put in by M. at the expiration of five years, he may continue the same conditions until they do." *Held*, that within the rules of evidence which forbid oral testimony to contradict or vary the terms of written agreements, but permit such testimony to prove the circumstances under which they were made, to enable the courts to put themselves in the place of the parties, with all the information possessed by them, the better to understand the terms employed in the contract, and arrive at the intention of the parties, it is competent to show that the Woollen-Mills Company of Bucyrus, Ohio, was the name of a copartnership which consisted of T. J. M. and another person, who, at the date of the instrument, were the owners of the woollen-mills property referred to; that the half thereof stated in the instrument as having been sold to M. was the plaintiff's undivided interest in the property, and that the other copartner's undivided interest was, about that time, sold to another person for the like price; also that after M. executed the instrument, and delivered the same to T. J. M., he paid to him the \$2,500 therein stipulated to be paid April 1, 1877, and that thereupon T. J. M. and his copartner united in a deed of conveyance to M. and the other purchaser; the consideration therein expressed being \$15,000.

2. SAME.

That the purchase price of T. J. M.'s undivided interest in the property is \$7,500, to be paid him by M., the purchaser; \$2,500 thereof to be paid April 1, 1877, but the other \$5,000 not until the expiration of five years, during which time T. J. M. is to receive, as interest thereon, a share of the dividends remaining after M. shall receive dividends equal to 10 per cent. on the amount invested by him in the mill. If the dividends do not equal that amount, the provision for the payment of interest to T. J. M. fails, which enables M. to retain the \$5,000 of the purchase money for five years without interest, and to continue, after the expiration of that period, to retain it, on the same conditions as to interest, until the mill shall pay dividends equal to 10 per cent. on his investment. But the principal of \$5,000 is payable, in any event, at the end of five years from the date of the instrument, unless M. should then elect to continue the conditions in regard to interest; and a sale by him, before that time, of his interest in the property, is a conclusive election not to do so, whereupon the principal becomes payable absolutely.

3. SAME.

That in an action brought on the instrument by T. J. M. against M.'s administrators to recover the \$5,000, where the reformation of the instrument is not sought

by the defendants, and their pleadings do not entitle them to such relief, parol evidence is inadmissible to prove that the \$3,500 stipulated to be paid April 1, 1877, was the full purchase price of the property, or that the plaintiff was to be paid no part of the \$5,000 unless the net earnings of the mill should exceed 10 per cent. on the amount of money invested in the mill by M.

4. SAME—PROVINCE OF COURT AND JURY.

In the trial of such action, the interpretation of the instrument belongs to the court, and it is error to submit its construction to the jury.¹

(*Syllabus by the Court.*)

Error to circuit court, Crawford county.

The plaintiff in error, who was plaintiff below, on the 20th day of May, 1882, commenced his action in the court of common pleas of Crawford county against the administrators of the estate of Abraham Monnett, deceased, upon the following written instrument: "BUOYRUS, OHIO, February 22, 1877. The Woolen-Mill Company of Bucyrus, Ohio, having sold to A. Monnett, of Marion county, Ohio, one-half of woolen-mill property for the sum of seven thousand five hundred dollars (\$7,500.00); two thousand five hundred dollars (\$2,500.00) to be paid April 1, 1877, the other five thousand (\$5,000.00) with the following provisions: After the above A. Monnett receives dividends to the amount of 10 per cent. on the money he puts into mill and manufactures, T. J. Monnett is to receive dividends, as interest on the five thousand dollars (\$5,000.00) above named, *pro rata* with the firm for the term of five years; and, if the mills do not pay dividends up to 10 per cent. on the money put in by A. Monnett, above named, at the expiration of the five years, he may continue the same conditions until they do. A. MONNETT." Indorsed: "Received, on the within article, two thousand five hundred dollars, April 1, 1877." The case made by the petition, with its amendments, is that the Woolen-Mills Company mentioned in the writing was at its date the name of a copartnership consisting of the plaintiff and James G. Frazer, who were the owners of the woolen-mill property. The plaintiff sold his undivided interest in the property to Abraham Monnett for the sum of \$7,500, and Abraham Monnett executed and delivered to him the written instrument sued on. About the same time, Frazer's undivided interest in the property was sold to Quincy A. Rouse and William Rouse; and afterwards, on the 2d day of April 1877, the plaintiff and Frazer, by their joint deed, conveyed the whole of the property to the purchasers; the consideration therein named being \$15,000. The Rouses paid \$7,500, their half of the purchase price; and Abraham Monnett, in pursuance of his written obligation, paid the plaintiff the \$2,500 which by its terms became due April 1, 1877, and which is credited thereon. In April, 1878, Abraham Monnett sold and conveyed his undivided half of the property to Horace Rouse, whereby it is claimed he put it out of his power to further comply with the stipulations of his written agreement; and, after the expiration of five years from its date, the plaintiff brought his action against Abra-

¹ Where a written contract is unambiguous in its terms, its interpretation or construction is a matter of law for the court. *Warner v. Thompson*, (Kan.) 10 Pac. Rep. 110; *Folsom v. Cook*, (Pa.) 9 Atl. Rep. 93; *Bell v. Keepers*, (Kan.) 14 Pac. Rep. 542; *Dawes v. Peebles*, 6 Fed. Rep. 856; *Wallingford v. Railroad Co.*, (S. C.) 2 S. E. Rep. 19; *Insurance Co. v. Roe*, (Wis.) 36 N. W. Rep. 594; *Harris v. Kelly*, (Pa.) 18 Atl. Rep. 523. But where the contract has relation to a trade, profession, or business of a technical character, and is expressed in terms of art, or in words having a technical or peculiar sense in such trade, profession, or business, resort must be had to the testimony of experts, or those acquainted with the particular art or business to which the words relate; and, when such testimony is conflicting, the question of the meaning of such terms and words must be referred to the jury. *Railway Co. v. Rust*, 19 Fed. Rep. 239. While it is the province of the courts to construe contracts, yet where the meaning of a contract is obscure, and depends upon facts *alunde* in connection with the written language, the question of construction may be one of fact for the jury. *Coquillard v. Hovey*, (Neb.) 37 N. W. Rep. 479. It is the province of the jury to decide what an oral contract is, where the evidence is conflicting as to the intent of the parties to such contract, and as to its terms, and it is error to withhold such question from the jury. *Patten v. Pancoast*, (N. Y.) 15 N. E. Rep. 898.

ham Monnett's administrators (he in the mean time having died) to recover the \$5,000 alleged to be due, together with interest from April 1, 1877. Before the commencement of the action, a claim therefor, duly authenticated, was presented to the administrators for allowance, and was by them rejected. Four answers were filed by the defendant; but the real defense, and the only one made on the trial, was that contained in the second paragraph of the amended answer, which avers that the written instrument sued on "is ambiguous and uncertain, and does not clearly set out the true agreement made by said parties. That the true agreement made by said parties, and intended to be expressed by said written memorandum, was as follows: Plaintiff sold to said A. Monnett his interest in said woolen-mill property for the sum of twenty-five hundred dollars, to be paid, and which was in fact paid, by said A. Monnett on April 1, 1877, which sum was in full of the purchase price thereof; but plaintiff retained a conditional interest in the earnings of said woolen-mill, as follows: It was agreed that said A. Monnett was first to receive dividends out of the net earnings and profits of said woolen-mills equal to ten per cent. on the amount of money by him put into said mill and manufactures, after which plaintiff was to receive, as his interest in the net earnings and profits thereof, a *pro rata* dividend thereof with the firm for five years, (to the amount of five thousand dollars;) provided said woolen-mills earned that amount in excess of the ten per cent. first to be paid to said A. Monnett; but, if said woolen-mill did not earn an excess over said ten per cent. to be paid to said A. Monnett, then plaintiff was to receive nothing, nor have any other or further interest therein." The answer contains no prayer for the reformation of the instrument; but in an answer previously filed, "by leave of the court, to conform to the proof in the case," containing substantially the same allegations, there is such prayer. The plaintiff replied, controverting the allegations of the answer, and, without objection by either party, the case was tried to a jury. A verdict was returned for the defendant; and, a motion for a new trial having been overruled, a bill of exceptions was taken, purporting to put out all of the evidence and charge of the court, from which it appears that the evidence offered by the defendant on the trial in support of his defense consisted of conversations the witnesses claimed to have had with the plaintiff concerning the terms of the sale to Abraham Monnett, and some testimony relating to the financial condition and business habits of Abraham and the plaintiff. This evidence was permitted to be given over the plaintiff's objection, and he duly excepted. The court in the charge, after stating the points made by the pleadings, said to the jury: "The court finds the said written memorandum attached to the plaintiff's petition, marked 'Exhibit A,' is ambiguous and uncertain in its terms and conditions, and submits the construction thereof to the jury. In giving construction to the same, the intention of the parties will govern. The contract is what Abraham Monnett and Thomas J. Monnett agreed and intended it to be." To this the plaintiff excepted. The court further charged the jury "that the plaintiff must make out his case by a fair preponderance of the evidence;" and also that "the defendants must make out their case by a fair preponderance of the evidence;" and, "if the contract is as claimed by the plaintiff, the verdict must be for the plaintiff;" and, "if the contract is as claimed by the defendants, the verdict must be for the defendants." Judgment was entered on the verdict, and the plaintiff prosecuted error to the circuit court, where the judgment was affirmed, and thereupon filed his petition in error in this court.

S. R. Harris, Jacob Scroggs, and F. S. Monnett, for plaintiff in error. Finley, Eaton & Bennett, W. C. Davis, and J. C. Tobias, for defendants in error.

WILLIAMS, J., (after stating the facts.) 1. The written instrument on which the plaintiff brought his action is either capable of construction, or it is void for uncertainty; for if the terms employed by the parties, though in-

tended for a contract, be so incomplete or ambiguous that, after applying to them all the helps which the rules of interpretation afford or permit, they are still so uncertain that what the parties mutually assented to cannot be ascertained, the consequence is the same as when there is no assent,—there is no contract. But, if possible, with such helps, they should be given such construction as will uphold the contract, and give effect to the intention of the parties, rather than one which renders them void for uncertainty; and, to avoid the latter alternative, the words will be taken most strongly against the person employing them, especially where he is the only party subscribing the contract. The words of obligation in a contract “are interpreted most strongly against the obligor; for it is presumed that he used those most favorable to his interests, and all doubtful terms or ambiguous words are to be construed against him. He who speaks should speak plainly, or the other party may explain to his own advantage.” *State v. Worthington*, 7 Ohio, 171. Though the rules of evidence forbid oral testimony to contradict or vary the terms of written agreements, they permit proof of the circumstances under which they were made, the surroundings of the parties, their relations to each other, and to the subject-matter of the contract, to enable the court called upon to interpret them to put themselves in the place of the parties, with all the information possessed by them, the better to understand the terms employed in the contract, arrive at the intention of the parties, and give effect to the agreement. Consistently with these rules, it was, without objection, shown in the trial that the Woolen-Mill Company of Bucyrus was the name of a copartnership which consisted of the plaintiff and another, who, at the date of the instrument sued on, were the owners of the woolen-mill property therein mentioned, and that the half of the property therein stated as having been sold to A. Monnett was the plaintiff’s undivided interest in it. The answer admits this, for it avers: “The plaintiff sold to said A. Monnett his interest in said woolen-mill property.” It was also shown, and not controverted, that Abraham Monnett executed the written obligation, delivered the same to the plaintiff, and paid to him the \$2,500 stipulated to be paid April 1, 1877, and that a deed of conveyance was soon thereafter executed to Abraham Monnett, vesting in him the undivided half of the property, which he afterwards sold and conveyed to another person. Aided by these extrinsic facts, no serious difficulty is encountered in the construction of the instrument. It recites that the sale was for the sum of \$7,500, and provides that \$2,500 thereof is to be paid April 1, 1877. It is true, it does not state that A. Monnett is to pay it, nor contain any direct promise to pay to the plaintiff. But since A. Monnett purchased the property of the plaintiff, and executed and delivered to him the written instrument stating the purchase by him, and the terms and amounts of the payments therefor, it would be idle to say the \$2,500 was not to be paid by Abraham Monnett to the plaintiff. About this there is no controversy, and accordingly A. Monnett, contemporaneously with the execution of the deed to him, paid to the plaintiff this \$2,500. The obligation to pay the balance of the purchase price of the property is equally clear. Whatever of uncertainty there is, relates to the time and mode of payment. The language of the instrument, that “two thousand five hundred dollars to be paid April 1, 1877, the other five thousand with the following provisions,” plainly imputes that the five thousand dollars is to be paid, as well as the twenty-five hundred dollars, and by the same person, and to the same person, except as otherwise controlled by the “following provisions.” There is nothing in these provisions which discharges the obligation to pay the five thousand dollars, or extinguishes the right of the plaintiff to receive it. They are not only consistent with, but confirm and accentuate, both the obligation of A. Monnett to pay, and the right of the plaintiff to receive payment. They provide that, after A. Monnett receives dividends to the amount of 10 per cent. on the money by him invested in the mills, the plaintiff is to receive a share of the remaining dividends as interest on the \$5,000 for the term of five

years. The right of the plaintiff to the interest, in the event provided for, would seem to establish his title to the principal also; and, as A. Monnett is the party binding himself to that obligation, the duty became his to pay the plaintiff the interest as it accrued, according to its terms. If the mills should not pay a dividend of 10 per cent. on the money invested by A. Monnett, the provision for the payment of interest to the plaintiff fails; the result of which is that A. Monnett retains the \$5,000 of the purchase money for the property for the five years, without interest, and he might, at the expiration of that period, continue to retain it, on the conditions as to interest, until the mill should pay dividends equal to 10 per cent. on his investment. Under these stipulations, the principal of \$5,000 became due, in any event, at the expiration of five years from the date of the obligation, unless A. Monnett should there elect to continue the conditions in regard to the interest therein set forth, which he did not do. On the contrary, he sold and conveyed away his undivided half of the property, ceased to have any interest in or control over it, and thus put it out of his power to perform the stipulations for the payment of interest which were beneficial to the plaintiff, and which, no doubt, constituted the consideration, at least in part, for the credit given on that part of the purchase price of the property. This was a conclusive election on the part of Abraham Monnett not to prolong the time for the payment of the \$5,000 on the conditions specified, and the money became payable absolutely. This, we think, is the proper interpretation of the obligation, aided by such extrinsic facts, either admitted by the pleadings or not controverted on the trial, as, consistently with the rules of evidence, might be properly considered in giving construction to it; and the trial court erred in submitting its construction to the jury. The extrinsic circumstances material to its construction were undisputed and definitely ascertained; and, if they were not, it was still the duty of the court to give construction to the instrument, for the construction of all written instruments belongs to the court alone; "and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed, or words of art or phrases used in commerce, and no surrounding circumstances to be ascertained, or conditionally, when those words or circumstances are necessarily referred to them." *Neilson v. Harford*, 8 Mees & W. 806, 823.

2. It follows, also, that the court erred in admitting the evidence given by the defendants to contradict the terms of the instrument, and ingraft upon it others it did not contain, unless such evidence was competent, under the pleading, with the view to its reformation. We know the rule which forbids the introduction of parol evidence to control written contracts does not extend to proof of the consideration, or of promises or agreements wholly collateral to the writing, like agreements between sureties or joint promisors, nor where express reference is made in the written instrument to a parol contract, or the written instrument does not purport to be a complete expression of the contract, or evidently appears to express only some part of it, and that which is sought to be proven does not contradict its terms, but is consistent with them. But the evidence admitted in this case does not fall within either of these classes. Its purpose and effect was to prove that the instrument did not contain the true agreement between the parties, and to establish a contract materially different from that expressed by it. Such evidence cannot be admitted except when the reformation of the instrument is sought in equity. *Holzworth v. Koch*, 26 Ohio St. 33; *Neil v. Board of Trustees*, 31 Ohio St. 15; *Denton v. Whitney*, Id. 89. And the party seeking it must, by proper allegation in his pleading, show his right to such relief. *White v. Denman*, 1 Ohio St. 110. The defendant does not seek this remedy, and his pleadings are insufficient to entitle him to it.

3. Conceding, however, that, by great liberality of construction, the answer of the defendant may be considered sufficient to support a decree for the refor-

mation of the contract, and the evidence, therefore, competent, and that the plaintiff, by submitting to the trial of the case to the jury without objection, waived his right to have that issue tried by the court, there was error in the charge of the court, which permitted the jury to find the issue for the defendants upon a preponderance of the evidence. The rule is firmly adhered to in this state that, to warrant the reformation of an instrument on the ground of mistake, the proof must be clear and convincing; a mere preponderance of evidence is not sufficient. *Potter v. Potter*, 27 Ohio St. 84.

4. It having been held by this court in *Insurance Co. v. Boyle*, 21 Ohio St. 119, that a contract may be reformed and final judgment rendered thereon in the same action, and when the case made by the pleadings and the facts found by the court warrant the reformation, and the proper final judgment is rendered without a formal decree reforming the contract, it is not error for the court to affirm the judgment, we have made a somewhat careful examination of the evidence to ascertain whether it is of such character and degree as to establish with reasonable certainty the agreement contended for by the defendants, or fairly sustain a reformation of the instrument; and it is quite clear it is insufficient for either purpose. With the exception of the letter written by the plaintiff to Abraham Monnett, which, in substance, affirms the claim asserted by the plaintiff in this action, the evidence consists wholly in the attempted repetition of portions of conversation with the plaintiff, and of portions of the contents of the written agreement, from having heard it read. A few specimens will show their value. George W. Hall testified: "I said to him, [the plaintiff:] 'I understand you have sold out your woolen-mill to Abraham Monnett, your brother.' 'Well,' says he, 'I sold part of it, not all. I sold part. I got twenty-five hundred dollars, and retain interest as a silent partner.' After the mill making a certain per cent., Abraham was to get a certain per cent., and Thomas [the plaintiff] was to get a certain per cent." In his cross-examination, the witness further said: "He [the plaintiff] did not undertake to give the terms of the contract, only that he was to receive a certain per cent., *pro rata* with Abraham. I do not know just what the conditions were. If the mills made so much, he was to have a certain per cent. after Abraham got out his per cent., or something of that kind, on what capital his brother invested." William Rouse testified: "I understood from all of them, and from his offer to me, that it was to be twenty-five hundred dollars, and five thousand dollars after the mill paid ten per cent. on fifteen thousand dollars,—some such a proposition, as I understood it." Kirk Warner testified that the plaintiff told him "he had an article showing Abraham Monnett owed him, I think, five thousand dollars on the woolen-mills, and that he would get it, and show it to me. He got up, and went to his secretary, and got the article, but did not give it to me, but sat down and read it himself. After he got done reading, I asked him if Abraham Monnett signed that article. He turned it over, and I saw that it looked like Abraham's handwriting. I think it was to run five years; and, if the mills run to pay ten per cent. *pro rata*, he was to get an interest in the profits at the end of five years; if it did not, I think that was to end it." The other testimony is of the same class, and does not materially differ from the examples selected. The only effect of such testimony is to show how imperfectly, and sometimes confusedly, the memory retains the contents of a somewhat intricately worded document from hearing it once read or stated. If written agreements could be successfully assailed by such testimony, few would escape, for it is the rare exception when their contents can be accurately remembered and repeated from having casually once heard them read or stated. There being otherwise no dispute about the facts which entitle the plaintiff to judgment, there is no reason why the case should not now be finally disposed.

Judgments of the circuit court and court of common pleas reversed, and judgment for the plaintiff.

(110 N. Y. 12)

RANK v. GROTE et al.¹*(Court of Appeals of New York. June 5, 1888.)***1. EJECTMENT—WHEN LIES—PARTNERSHIP—RIGHTS OF PARTNERS.**

Ejectment will not lie by the devisee of one tenant in common against the other tenant to recover land in which each holds the legal title to designated interests, but which is really the property of a partnership existing between such tenants, purchased for the use of the firm, and paid for with its funds.

2. WITNESS—COMPETENCY—TRANSACTION OF DECEDENT.

In such action, the grantor of plaintiff's testator is competent, at the request of defendant, to testify as to a personal transaction between witness and such testator and defendant, his former partner, to whom testator had conveyed an interest in the land derived from said witness; such case not falling within Code Civil Proc. N. Y. § 829, providing that one interested in the event of a suit, or one through whom such interested party derives title, shall not be examined as a witness on behalf of himself, or of such interested person, against the executor, heir, survivor, * * * or any person deriving his title through a person since deceased, as to any personal transaction had between such deceased person and such witness, he neither having an interest in the suit, nor being a person through whom defendant claimed.

3. EVIDENCE—PAROL—TRUSTS.

In such case, oral evidence to alter the effect of the deed from the original grantor to testator, by showing the land to have been bought with partnership funds for partnership purposes, is admissible for the purpose of holding the grantee as a trustee for said firm.

Appeal from general term, superior court, city of New York.

Action of ejectment by Mary C. Rank against Augustus H. Grote and A. J. Knapp to recover the possession of real estate in New York city. Verdict and judgment for defendants, and plaintiff appealed. Code Civil Proc. N. Y. § 829, provides that a party to or person interested in the result of a suit, or one through whom such interested person or party claims or derives title, shall not be examined as a witness, on behalf of himself or such interested person, against the executor, heir, survivor, * * * or any person deriving his title through a person since deceased, as to any personal transaction had between such deceased person and such witness.

Amasa J. Redfield, for appellant. *G. W. Cotterill*, for respondents.

PECKHAM, J. The documentary evidence in this case showed title in the plaintiff to a one-third interest in the land in question. That is all the evidence which was offered on her part. The defendant then offered evidence which was received for the purpose of explaining the documentary proof given on the part of the plaintiff, and to show that the real estate in question was actually partnership property, purchased for the purposes of the partnership, and paid for with partnership funds. After a careful perusal of all the evidence taken on the trial, (and it was uncontradicted,) we think the case for the defendant was so conclusively proved as to leave no question for the jury. It is quite unnecessary to set forth here the evidence which was thus taken. We have given the able argument of the appellant full consideration, but our opinion in regard to the conclusive character of the evidence for the defendant remains the same.

It is conceded that, if the title to the real estate was in the partners surviving, this action of ejectment cannot be maintained. Upon the trial the defendants called as a witness William Steinway, who was the grantor of the premises in question in the deed from William Steinway and wife to Frederick Grote. The grantee, Frederick Grote, was the deceased partner in the firm, the surviving members of which, as defendants alleged, were the owners as such of the land in question. When the witness Steinway, being such grantor, was asked by the counsel for defendants to state the personal trans-

¹ Affirming 50 N. Y. Super. Ct. 275.

action which took place between the witness and the deceased grantee and partner at the time of the sale of the premises and the execution of the deed, the plaintiff's counsel objected to the evidence as not admissible for several reasons, one of which was that section 829 of the Code prohibited it. We do not think the evidence is within the mischief of the statute. The witness was wholly disinterested in the question in reference to which he was sworn. To make it out partnership property did not render the surviving partners personally liable to pay for the land, in the absence of any personal obligation; for the method of payment was agreed upon, and was in writing, and did not include the personal obligation of either. Nor does it seem to us that the facts of this case make out the witness to be a person from, through, or under whom the defendants derived their interest or title within the meaning of the statute under consideration. The person from, through, or under whom the title came, within that meaning, was, as we think, Frederick Grote, the deceased partner and grantee. The plaintiff claims by will from him, and the defendants seek to destroy that claim by proof that the surviving partners have title through Frederick Grote as the grantee for the partnership, and for which he was a trustee, and from whom each had a deed of a designated interest in the property. This makes Frederick Grote the individual who had the whole legal title, and the defendants did not derive their title from, through, or under Steinway, and do not succeed to his title or interest, within the meaning of the section mentioned; but do derive such title from Frederick Grote. The evidence was not, therefore, objectionable on that ground. The other ground of objection was that the oral evidence was inadmissible to alter the effect of the deed from Steinway to Frederick Grote. Such evidence is clearly admissible for the purpose of holding the grantee as trustee for the firm. See *Fairchild v. Fairchild*, 64 N. Y. 471. There are no other exceptions which require notice. The judgment should be affirmed, with costs.

All concur.

(110 N. Y. 94)

HORNBOSTEL v. KINNEY *et al.*¹

(Court of Appeals of New York. June 12, 1888.)

1. PATENTS FOR INVENTION—LICENSE—CONSTRUCTION—FORFEITURE.

A licensee of a patent under an agreement that, should he and his sublicensees "fail to use said process in the treatment of at least 250,000 pounds of tobacco per annum, * * * then and thereupon said exclusive license shall cease, determine, and be forfeited; but said [licensee] shall, in such event, nevertheless have the license, though not exclusive, to use said process * * * for the period and within the district aforesaid,"—is not required to subject at least 250,000 pounds of tobacco annually to the process, or pay a royalty on that amount, as the penalty for a forfeiture is provided for by the agreement.

2. TRADE-MARKS—WHAT CONSTITUTES—INJUNCTION.

In a suit for an injunction to restrain the use of the trade-mark "Sweet Caporal," on a brand of cigarettes the tobacco of which was treated by the "Hornbostel process," the evidence tended to show that the public was ignorant of the existence of such process; that the process was of no value, there being other and more efficient means of obtaining the same end; that defendant had abandoned the use of said process, and notified plaintiff to that effect; that the word "Sweet" was prefixed to the word "Caporal," which had always belonged to defendant, as a means of determining the amount of sales of tobacco subject to plaintiff's process, no agreement being made that the same should constitute a trade-mark. The court refused to find that the trade-mark "Sweet Caporal" had become widely known and valuable because of the use of said process in treating the tobacco and in the manufacture of the cigarettes. *Held*, that an injunction was properly refused.

Appeal from superior court, general term, city of New York.

Action by Ida Hornbostel against Francis S. Kinney *et al.* on an agreement conferring upon the defendants the right to use a patented process known as

¹ Affirming 52 N. Y. Super. Ct. 41.

the "Hornbostel process," and to enjoin the use of the trade-mark "Sweet Caporal." From a judgment of the general term in favor of defendants, plaintiff appeals.

Lewis Johnson, for appellant. *John S. Davenport*, for respondents.

PECKHAM, J. We do not think the plaintiff's contention as to the meaning of the agreement entered into between herself and the individual defendant can be sustained. That contention is that the agreement between the parties contemplates the treatment of, at least, the minimum amount annually of 250,000 pounds of tobacco, by defendant, by the "Hornbostel process," and the payment of the stipulated royalty therefor during the life of the patent, and that, if the defendant ceased entirely to use the "process" above mentioned, the liability to pay the royalty to plaintiff on the stated minimum amount of tobacco annually would still remain. The liability of the defendant is bounded by the written agreement entered into between the parties, and the material part thereof is as follows: "Should, however, said Francis S. Kinney, and his sublicensees, fail to use said process on the treatment of at least 250,000 pounds of tobacco per annum, from and after May 1, 1879, then and thereupon said exclusive license shall cease, determine, and be forfeited; but said Kinney shall, in such event, nevertheless have the license, though not exclusive, to use said process in the treatment of tobacco to be used in the manufacture of cigarettes, and in the treatment of smoking tobacco, for the period and within the district aforesaid." By the prior portion of the agreement the license was exclusive during the continuance of the patent of the right to use said process in the treatment of tobacco for cigarettes. It is thus seen that the exclusive character of the license, taking the whole agreement into consideration, depended upon the application of the process to at least 250,000 pounds of tobacco annually; and that, if such an amount of tobacco were not subjected to such process, the exclusive character of the license ceased, determined, and became forfeited, and the defendant thenceforward was subject simply to the obligation of paying the agreed-upon royalty of one cent a pound for each pound of tobacco which he subjected to this process. This statement of the terms of the agreement seems to me the strongest argument against the contention of the plaintiff. There is nothing in the agreement, or in the surrounding circumstances in proof in the case, from which a covenant can be implied that the defendant should at all events subject at least 250,000 pounds of tobacco annually to this process, or pay a royalty upon that amount the same as if he had. The penalty for a failure to thus subject annually that amount of tobacco to the process is provided for by and contained in the agreement; and that is that the exclusive character of defendant's license shall cease and be forfeited. Authority for implying the covenant is thought by the plaintiff to rest in the case of *Booth v. Rolling-Mill Co.*, 74 N. Y. 15. That case, however, holds that, in order to imply a covenant in a contract under seal, (which this contract is,) there must exist a manifest and clear intention that one of the parties shall do the act in regard to the doing of which the covenant is to be implied. To make the case fit the facts here, we should have to hold that there was in the contract in question a clear intention manifested that the defendant should, at all events, during each year of the life of the patent, subject at least 250,000 pounds of tobacco to the process, and pay the royalty thereon annually. On the contrary, a perusal of the whole contract leaves us in no doubt there was no such intention, but simply an intention to revest in the plaintiff the right to license others upon the failure of defendant to subject the stated amount of tobacco annually to the process. Judge ALLEN, in the case above cited, well says: "It is a cardinal principle that every agreement or covenant must be interpreted according to its peculiar terms, and so as to carry out the intent of the parties; and it follows that the ruling upon, and the interpretation

of, one agreement will seldom aid in the construction of another, except as it may illustrate some general rule of interpretation applicable to both." The case cited is so different in its facts, and in the character and purpose of the agreement construed, from the one under consideration here, that it lends no aid as to the proper interpretation of the latter. We feel quite clear that there is no foundation for the plaintiff's theory of an implied covenant to manufacture.

Upon the second proposition of plaintiff, in which she desires an injunction preventing defendant from using the trade-mark "Sweet Caporal," which she alleges he is using, and which she also alleges distinguishes the cigarettes made from tobacco subjected to the above-mentioned process, the findings and refusals to find of the trial judge are fatal to her contention. He was requested to find that the brand or trade-mark "Sweet Caporal," under which the cigarettes were sold, became widely known and valuable in the community because of the use of the said invention or process in treating the tobacco, and in the manufacture of the cigarettes, and because of the liking of consumers therefor, and the belief and confidence of the public that said cigarettes were made from tobacco treated by said process. This was refused by the judge. The evidence seems to show that the public were entirely ignorant of the existence of any such process, and consequently of its effect upon tobacco. There was evidence also tending to prove that the process itself was of no value; that there were other and just as efficient means of attaining the same end; and, finally, that the defendant had given up and abandoned the use of the process since December, 1879, and had at that time notified the plaintiff to that effect, and that the corporation defendant had never used the process, and the right to use it had never been assigned to it by the individual defendant. The evidence also tended to show that the word "Sweet" was first prefixed to the word "Caporal" (which had always belonged to the individual defendant) as a means for him to discover the amount of the sales of tobacco subjected to the plaintiff's process, and thus to give him some means of forming an opinion of the value of the process; but that there was no intention of making any agreement, and no agreement was in fact made, that, as between these parties, the adoption of that means should result in the making of a brand or trade-mark in which they should have common rights, and which the defendant should have no right to use unless he continued to use the plaintiff's process. Upon the findings and refusals to find made by the trial judge, we think no right to an injunction was shown, and the judgment should therefore be affirmed, with costs.

All concur.

(110 N. Y. 114)

In re DAWSON.¹

(*Court of Appeals of New York*. June 19, 1886.)

GARNISHMENT—PAYMENT OF MONEY TO SHERIFF—DEFAULT OF SHERIFF.

Where, in an action for breach of contract, a debt owing to defendant is attached, and paid by the debtors to the sheriff, on the default and absconding of the sheriff before judgment, the loss falls on plaintiffs, who caused the attachment to issue, and not on defendant, the remedy of plaintiffs being on the sheriff's bond.

Appeal from general term, supreme court, First department.

Henry D. Hotchkiss, for appellant. *Robert S. Rudd*, for respondent.

EARL, J. In June, 1885, Wilson & Knowlton commenced an action in the supreme court against Dawson, to recover damages for breach of contract, and obtained an attachment against Dawson's property on the ground of his non-residence. The attachment was issued to Alexander V. Davidson, then sheriff of New York county, and he attached a certain debt owing from Mc-

¹ Affirming 47 Hun, 634.

Donald, Pearce & Co. to Dawson. Such proceedings were thereafter taken in that action on behalf of the plaintiffs that McDonald, Pearce & Co. paid upon the debt attached, to Davidson, as sheriff, the sum of \$2,316.48. Thereafter, and before judgment and execution in the action, Davidson misappropriated the money, and absconded. The question now to be determined is, who is to bear the loss of the sheriff's misconduct and default,—the plaintiffs or the defendant? We think the loss should fall upon the plaintiffs. If this money had been seized by virtue of an execution, and the defendant had been deprived thereof, it is well settled that the loss would fall upon the plaintiffs, and that to the extent of the property thus taken the judgment and execution would be satisfied. *People v. Hopson*, 1 Denio, 578; *Peck v. Tiffany*, 2 N. Y. 456. In those cases the loss was held to fall upon the judgment creditors, because property of the defendants was taken and lost to them in consequence of legal measures instituted by the creditors. We think the same rule, and for precisely the same reason, should be applied to a case of property seized by virtue of an attachment. An attachment differs from an execution in that by virtue of it the property of the alleged debtor is seized in advance, for the satisfaction of any judgment that may thereafter be recovered in the action, and during the pendency of the action the property is held by the attaching officer as security for the judgment thereafter to be recovered. As in the case of an execution, the property is seized at the instigation of the attaching creditor, and for his benefit; and if it is lost to the debtor the loss should fall upon the creditor, and he should take his remedy against the sheriff upon his official bond. When one of two innocent parties must suffer by the wrong of a third party, it is frequently difficult to find an intelligible ground for placing the loss upon the one rather than upon the other, and the difficulty is solved without any other reason by holding that that one should bear the loss who put it in the power of the third party to commit the wrong. That rule may be applied here. The plaintiffs not only caused the attachment to be issued to the sheriff, but they procured the order which compelled McDowell, Pearce & Co. to pay the defendant's money to the sheriff. If this money had been seized by virtue of an execution, it would at once have operated as a payment *pro tanto* upon the execution. Here, in theory of law, the money is in the possession of the sheriff, and when execution was issued to him it was at once applicable thereon, and must be deemed to have been so applied. If the sheriff had been found within his county, and the execution had actually been delivered to him, he could not have returned the same unsatisfied, but could have been compelled to return the same satisfied as to the amount of money received by him upon the attachment, (Code, § 708,) and such a return would have been conclusive in favor of the defendant, and would have left the plaintiffs with their remedy against the sheriff for money received by him. We are therefore of opinion that the order should be affirmed, with costs.

All concur.

(110 N. Y. 150)

BENNETT v. LEEDS MANUF'G CO.

(Court of Appeals of New York. June 19, 1888.)

PLEADING—ANSWER—DENIAL UPON INFORMATION AND BELIEF.

Under Code Civil Proc. N. Y. § 500, subd. 1, declaring that the answer must contain "a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief;" and in view of the provisions of section 524, that the denials in a pleading, "unless they are therein stated to be made upon information and belief, * * * must be regarded as having been made upon the knowledge of the person verifying the same," etc., and section 526, that the verification must state that the pleading is true to the knowledge of the person making it, except as to those matters therein stated to be alleged on information and belief,—a denial, in a verified answer, of a material allegation in the complaint, "upon information and belief," is good.

Appeal from general term, supreme court, First department.

Action by Charles J. Bennett against the Leeds Manufacturing Company. Plaintiff moved, at special term, for judgment on the answer as frivolous, which was granted and affirmed by the general term, and defendant appeals. *James B. Dill*, for appellant. *Henry M. Brigham*, for respondent.

ANDREWS, J. The defendant was sued upon a contract which the plaintiff, in his verified complaint, upon information and belief, alleged was made by the corporation. The defendant, in its answer, also verified, denied in like manner, upon information and belief, certain material allegations in the complaint; and the sole question is whether this form of denial is authorized by subdivision 1 of section 500 of the Code, which declares that the answer must contain "a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief." Upon reason, this form of denial in a pleading would seem to be justified. Information is the source of much, indeed of the most, that we call knowledge. We affirm or deny the existence of an alleged fact either from personal knowledge of its existence, or because we have information thereof which we credit. This latter is the source of most of our knowledge of the facts of history; and in the ordinary affairs of life we accept and act upon facts known to us only by information as fully and confidently as though they were personal incidents in our experience. But assertions of facts are frequently made, of which facts we neither have absolute knowledge, nor are they accredited in such a way as to satisfy us of their existence. We may not be able either to affirm or deny their existence, or even to form a judgment or belief in respect to them. It is obvious that each of these several conditions may exist in the case of a defendant brought into court to answer a complaint, as to the facts alleged upon which the complaint is founded. The facts alleged may be true or false to his personal knowledge. If he has no personal knowledge of their truth or falsity, nevertheless he may have information which satisfies him that they are either true or false, and a belief founded thereon. Still, again, he may have no information upon which he can affirm or deny the facts alleged; or, if he has some information, it may not be such as to create a belief one way or the other as to their existence, or whether the assertions made are true or untrue. In the first and third cases supposed, concededly the defendant can put the plaintiff to his proof. He may do this in the one case by a direct and positive denial, and in the other by denying any knowledge or information sufficient to form a belief as to the existence of the alleged facts. If the defendant is in the condition of having information, and a belief founded thereon, that the facts alleged are untrue, but no actual knowledge, unless he can deny absolutely the allegations of the complaint, or deny them upon information and belief, he will be precluded, in such a case, where the complaint is verified, from answering at all, and judgment may go against him by default, although he might be able on a trial to establish a complete defense to the action. It may be safely assumed that it was not in the mind of the legislature, in framing the rules of pleading, to permit such a result, or to put a defendant so situated in a position where he could not, by his pleading, compel the plaintiff to prove his complaint. Section 500 of the Code does not prescribe the form of a denial, except that it must be general or specific, or, where the defendant has no knowledge or information as to any material fact alleged sufficient to form a belief in regard to the same, his denial may be in that formula. Reading section 500 in connection with sections 524 and 526, it is, we think, very clear that a general or specific denial under the first subdivision of section 500 may be upon information and belief. By section 524, "the allegations or denials in a verified pleading must in form be stated to be made by the party pleading. Unless they are therein stated to be made upon the information and belief of the party,

they must be regarded, for all purposes, including a criminal prosecution, as having been made upon the knowledge of the person verifying the same. An allegation that the party has not sufficient knowledge or information to form a belief with respect to the matter must, for the same purposes, be regarded as an allegation that the person verifying the pleading has not such knowledge or information." This section, on its face, applies to all pleadings, the answer as well as the complaint, and to denials in the answer as well as to affirmative defenses or counter-claim. It assumes that, when a party has no personal knowledge, an averment or denial may be made upon information and belief, and treats every positive averment or denial as having been made on personal knowledge, and declares, in substance, that it is to be so regarded in criminal prosecutions. Section 526, which prescribes the form of verification, requires it to be stated therein that the pleading is "true to the knowledge of the person making it, except as to those matters therein stated to be alleged on information and belief," etc. This section also recognizes allegations (which manifestly include denials) made upon information and belief as proper forms of pleading. We think, therefore, upon reason as well as upon the construction of the Code, a denial, in a verified answer, of a material allegation in the complaint, "upon information and belief," is good. Any other conclusion would lead, in some cases, to great injustice. There are diverse authorities upon the question, but the great preponderance of authority supports the conclusion we have reached. *Brotherton v. Downey*, 21 Hun, 436; *Wood v. Raydure*, 89 Hun, 144; *Musgrove v. Mayor*, 51 N. Y. Super. Ct. 528; *Macaulay v. Printing Co.*, 14 Abb. N. C. 316. See, also, *MacLay v. Sands*, 94 U. S. 586; *Jones v. City of Petaluma*, 36 Cal. 230. It follows that the judgment of the general and special terms, and the order striking out defendant's answer, should be reversed.

All concur.

(110 N. Y. 83)

THROOP GRAIN CLEANER CO. *et al.* v. SMITH.¹

(Court of Appeals of New York. June 12, 1888.)

1. FRAUDULENT CONVEYANCE—RIGHT TO QUESTION.

The question whether a transfer of an indebtedness was made with intent to defeat a levy upon the same can be raised by a judgment creditor only.

2. ASSIGNMENT—WHAT CONSTITUTES—QUESTION OF LAW—ATTACHING CREDITORS.

A. & Co., being indebted to the F. Co., drew sight drafts in favor of the latter on a debtor of their own for the exact amount of his indebtedness, forwarding the same by letter to the F. Co., saying: "We send drafts on S. [the debtor] for amount due from him. We charge the amount to you in general account, and want you to credit the same, and collect it. Please have no error in receiving and treating the drafts as belonging to you." The F. Co. replied, saying that they had forwarded the drafts for collection, and credited them on A. & Co.'s account. The drafts were entered in the F. Co.'s book of drafts as due from the debtor. At the time of drawing the drafts, A. & Co. notified their debtor that they had assigned his account to the F. Co. Held that, as matter of law, the delivery and acceptance of the drafts was a valid transfer of the debt which they represented, as against a subsequent attaching creditor of A. & Co., although it appeared that the parties, pursuant to an agreement made before the levy of the attachment, permitted A. & Co. to allow the debtor the amount of a counter-claim after the assignment, and it did not appear whether the F. Co. actually credited A. & Co. with the drafts in their books of account.

3. SAME—CONSIDERATION—CREDIT ON ANTECEDENT DEBT.

An agreement to credit upon a preceding debt is a valuable consideration for an assignment of a chose in action.

4. SAME—STATUTE OF FRAUDS—APPEAL—OBJECTION NOT RAISED BELOW.

The question whether an assignment of a debt is valid under the statute of frauds cannot be raised on appeal when exception is not taken below.

Appeal from general term, supreme court, Fifth department.

¹Reversing 46 Hun, 652, *mem.*

Proceedings by the Throop Grain Cleaner Company and Hiram K. Edwards, sheriff of Onondaga county, to subject to an attachment against Allis & Co. a debt due from defendant, H. Cordenio Smith, but which was claimed by the Farrell Foundry & Machine Company to have been transferred to them prior to the attachment. From an order of the general term reversing the order of the trial term nonsuited plaintiffs, defendant appeals.

M. M. Waters, for appellant. *Rollin Tracy*, for respondents.

RUGER, C. J. Assuming that the proceedings by which the plaintiffs attempted to secure a lien by attachment upon the debt alleged to be due from the defendant to E. P. Allis & Co. were regular and valid, we are brought directly to the real question in the case, viz., whether, at the time of such levy, the debt attempted to be levied upon was then due to Allis & Co., or had been previously transferred by them to the Farrell Foundry & Machine Company. Both Allis & Co. and the Farrell Company were non-residents of this state; Allis & Co. residing at Milwaukee, in the state of Wisconsin, and the Farrell Company in the state of Connecticut. The Throop Grain Cleaner Company and H. Cordenio Smith both resided in this state. The attachment referred to was issued in an action in the supreme court of this state between the Throop Grain Cleaner Company, plaintiff, and Allis & Co. as non-resident defendants, and jurisdiction is claimed to have been acquired by the court in that action upon the allegation that Allis & Co. had property in the state subject to levy under attachment. The only property of that character claimed to exist was the alleged indebtedness of Smith to Allis & Co. The attempted levy under the attachment was made on May 21, 1881. It is contended by the defendant that, previous to that time, Allis & Co. had transferred their debt against him to the Farrell Company, and that, at the time of such levy, it was a debt owing by him to the Farrell Company.

The trial court held, as matter of law, that the debt had been transferred previous to the levy, and therefore nonsuited the plaintiffs. One of the main questions litigated upon the trial was whether the alleged transfer by Allis & Co. was made with the intent and design, on their part, of defeating an intended levy upon such debt by the plaintiffs. If this were proved, it was contended by the plaintiffs that the alleged transfer would be fraudulent and void as to them. It may be assumed that such was the intent of Allis & Co., without affecting the result of this action, for the plaintiffs do not occupy a position which enables them to raise any question as to the *bona fides* of such transfer. This can be done only by a judgment creditor in an action to enforce the equity of the creditors of Allis & Co. *Anthony v. Wood*, 96 N. Y. 180; *Gibson v. Bank*, 98 N. Y. 96. This equity was not the subject of a levy under an attachment, even if an attempt had been made to effect it. We may, therefore, in the further consideration of the case, lay out of view all of the evidence tending to show that the attempted transfer was made in bad faith, as it has no bearing upon the real issue in the case. The plaintiffs, however, upon the trial, requested to be allowed to go to the jury on the question of fact as to whether the evidence showed a valid transfer of the debt prior to the attempted levy. This was refused by the trial court, and the plaintiffs duly excepted to its ruling. The learned general term was of the opinion that the evidence did not show, as matter of law, that a transfer had taken place. There was no conflicting evidence upon the question of the alleged sale, as it was effected entirely by written correspondence; and if a contract was thereby made, free from latent ambiguity or language of doubtful significance, a question of law is presented for the consideration of the court, and not a question of fact for the jury. *Dwight v. Insurance Co.*, 103 N. Y. 341, 8 N. E. Rep. 654. This question must be determined from an examination of the correspondence passing between the parties, their relation to and the circumstances surrounding the transaction at the time of the making of the

alleged contract, and the acts of the parties in consummating the sale prior to the attempted levy. No claim is made here that the mere delivery to a third person of a check or draft drawn by a creditor upon his debtor affects a legal transfer of the debt; but it is contended that the correspondence accompanying the transfer of certain drafts discloses an intention to effect thereby a transfer of the debt referred to in such correspondence. That an equitable assignment of an account may be effected in this way, even though it is not referred to in the draft or order, admits of no doubt. Thus, it was held in *Rieley v. Bank*, 83 N. Y. 318, that the delivery by a creditor of a check or draft upon his debtor for the whole or a part of a debt, to a payee therein named, to enable him more conveniently to recover such debt, does not preclude such payee, in an action against the debtor, from showing a parol contract, aside from the check or draft, to transfer the debt itself. It was also said, in the same case, that "an assignment of an account may be made without writing or delivery of any written statement of the claim assigned, so as to vest in the assignee a right to proceed in his own name for the recovery of the debt, provided only that the assignment is founded on a valid consideration between the parties." The sole question, therefore, presented in this case, is whether the evidence shows a valid contract, as between Allis & Co. and the Farrell Company, for a transfer of the claim in question; and, if it appears therefrom that it was their intention to transfer such debt, it is the undoubted duty of the court to carry out such intention. The debt arose out of a written contract between Allis & Co. and the defendant, made April 4, 1881, whereby Allis & Co. agreed to sell and deliver to him, free on board cars at Milwaukee, a certain quantity of milling machinery consigned to Smith at Marcellus, N. Y., to be paid for on receipt of goods. These goods were all manufactured and shipped, and many of them had arrived at their destination, before the time of the attempted levy, and the liability of Smith to pay the cost thereof to Allis & Co. had previously thereto become fixed by their delivery on the cars. *Smith v. Edwards*, 29 Hun, 493. On the 10th day of May, 1881, Allis & Co., who were then indebted to the Farrell Company in an amount exceeding the contract liability of Smith to them, made their two sight drafts in favor of the Farrell Company upon Smith for the sums of \$1,050 and \$2,800, respectively, being the precise amount due upon the contract, and transmitted the same to the Farrell Company in a letter of which the following is a copy: "MILWAUKEE, May 10, 1881. *Farrell Foundry & M. Co., Ansonia, Conn.*: We inclose two drafts on H. C. Smith, of Marcellus Falls, the one \$2,800, the other \$1,050, which kindly credit to our account. The \$2,800 will be paid as soon as the rollers for which you have order are delivered at Marcellus Falls. The other is now due. Kindly acknowledge, yours, truly, E. P. ALLIS & Co." By letter of the same date, they also advised the Farrell Company that "our people to-day send drafts on Smith for amount due from him. We charge the amount to you in general account, and want you to credit the same, and collect it. Please have no error in receiving and treating the drafts as belonging to you." These letters were apparently received at the same time by the Farrell Company, and must be treated together as parts of the same transaction, and constituting the conditions upon which the drafts were transmitted. On the 13th of May thereafter, the Farrell Company replied to such letters as follows: "Yours of the 10th at hand. We have sent the two drafts on H. C. Smith forward for collection, and will ship his rolls next week. Will report when drafts are paid. Have written him to honor \$1,050, and to ask bank to hold the other until rolls arrive." They also enter the drafts in their bill-book as drafts due to them from Smith. Allis & Co., also, on May 10, 1881, advised Smith, the debtor, by letter, that they had that day "assigned our account against you to the Farrell Foundry & Machine Co., of Ansonia, Conn. You will kindly honor their drafts when presented." On the 19th day of May, 1881, the Farrell Company advised Smith that they "had credited the drafts

on his [Allis'] account. They became ours, so we cannot see the least risk in your paying us, and would like N. Y. drafts for the amount as you and he agree."

These letters constitute the whole correspondence between the parties in relation to the sale of the demand, and from which it must be determined whether such sale was thereby effected. This correspondence does not seem to us to be susceptible of any other construction than that the drafts were sent forward as representing the indebtedness of Smith to Allis & Co. upon a contract obligation, partly due and partly to become due thereafter, and for the purpose only of facilitating the collection of the amount owing by Smith. We think that this constituted an equitable assignment of the fund in question, under our decision in *Brill v. Tuttle*, 81 N. Y. 454. It can hardly be supposed that the parties intended to go through an idle ceremony, such as the mere delivery of an unaccepted draft would imply; but it was intended thereby to effect the substitution of the liability of a third person to the Farrell Company in place of that of Allis & Co. Thus Allis & Co. say: "We have sent you drafts on H. C. Smith for amount due from him, and want you to credit the same to us, and collect it." This language can mean nothing else than that they intended to transfer a debt due them from Smith, and required the Farrell Company to collect such debt from Smith. This could only be effected by the ownership of the debt represented by the drafts. No liability from Smith to Allis & Co. then existed except the contract obligation to pay for the machinery when received. There was no other transaction to which the correspondence could apply, and the amount of the drafts corresponded precisely with that of the contract obligation. The \$1,050 was stated to be for property already received by Smith, and the \$2,800 draft represented machinery which the Farrell Company were to ship to Smith upon Allis & Co.'s previous order. Smith was not liable upon the drafts either to Allis & Co. or the Farrell Company until they were accepted by him; and when they were delivered to the Farrell Company, unless they represented the contract obligation of Smith to Allis & Co., they had no pecuniary value whatever. It would be quite absurd to suppose that Allis & Co. intended, by the transaction, to sell only their obligation upon the drafts as the makers thereof, or that the Farrell Company supposed they were buying one written obligation of Allis & Co. to apply upon another for the same debt. That it was the intention of Allis & Co. to transfer the debt which Smith owed them is clearly shown, not only by their simultaneous notice to Smith of the assignment of the account, but also by the terms of the letters to the Farrell Company accompanying the drafts, in which they request them to credit the amount to Allis & Co. on account, which plainly implies the transfer of property as the basis of the requested credit. It is clearly implied that the drafts represent an amount due from Smith to Allis & Co. on account for machinery sold; and the expectation, if the Farrell Company accepted their offer, that they would credit the amount on Allis & Co.'s account, and would assume the collection of the claim by whatever means were necessary to accomplish that object. This implication is emphasized by the injunction that they wished no error made by the Farrell Company in "receiving and treating the drafts as belonging to" the Farrell Company. The answer to their propositions expresses no dissent from any of them, but assumes their acceptance, and asserts the intention of the proposed transferees to act upon the assumption of their ownership of the claim due from Smith. They say: "The drafts are received, and we have forwarded them for collection." This seems to us to constitute an unqualified acceptance by the Farrell Company of Allis & Co.'s proposition. The statement that the Farrell Company had forwarded the drafts for collection does not qualify their acceptance in any degree, for that was just what Allis & Co. proposed they should do, and they had no right to send the drafts forward except upon the terms imposed in Allis & Co.'s letters, requiring that they should

be credited to Allis & Co., and should be collected by the Farrell Company as the owners of the claim represented by them. The Farrell Company had no right to collect the drafts on account of Allis & Co., for this was impliedly forbidden by the instructions accompanying the drafts. If they were not willing to credit the amount to Allis & Co. in accordance with the terms of the proposition, they had no authority to use the drafts for any purpose, and the use of the drafts by them was the equivalent of an express acceptance of the terms under which they were transmitted. They could not vary the contract proposed to be made by Allis & Co. except with their assent, and this they never received. What the Farrell Company intended by their letter is clearly shown by their letter to Smith of May 19th, in which they say that they had credited Allis & Co. with the amount of the drafts, and that they had become their property. It was not essential to a valid transfer of this debt that Smith should assent to it, as it could be effected by contract between the creditor and his transferrer alone, but nothing was left undone by either party to protect the Farrell Company's rights as the actual owners of the debt against Smith. Smith could not, after notice from both Allis & Co. and the Farrell Company of the assignment of the debt, safely pay the same to any party but the Farrell Company, and such payment would have been a full satisfaction of his liability to Allis & Co. *Freund v. Bank*, 76 N. Y. 352. The implication is irresistible, from the conduct of the parties and the language of their correspondence, that they all understood that the delivery and acceptance of the drafts were intended to carry with them the debt which they represented, and we think it would be doing violence to the expressed intent of the parties to hold otherwise. We have not been able to discover in the evidence any fact, or reasonable inference to be drawn therefrom, conflicting with the views above expressed. The action of the parties in permitting Allis & Co. to allow the amount of a counter-claim made by Smith, after the alleged transfer, has, we think, no bearing upon the validity of the previous transfer. It was entirely competent for the parties, by consent, to make such deduction; and it was proved that this was done by virtue of an agreement of the Farrell Company, Smith, and Allis & Co. before the attempted levy by the plaintiff. Neither was it of any consequence whether the Farrell Company actually credited Allis & Co. with the amount of the drafts in their books of account. If they, in fact, bought the demand of Allis & Co. before the attempted levy, it was entirely unimportant whether they entered the credit in their account-books. They would still be liable to pay for their purchase, as they had agreed to do. If there had been any doubt as to when the contract of sale had been consummated, this evidence might have affected that question, but no question arises but that the whole correspondence relating to the transfer had been completed before the attempted levy. The statement in the Farrell Company's letter, that they had forwarded the drafts for collection, is not only not inconsistent with the theory of a sale, but is notice to Allis & Co. that they had acted on the latter's proposition, and can be interpreted only as meaning that they had forwarded them under the terms imposed by Allis & Co.'s letter transmitting the drafts. We are therefore of the opinion that the case presented no question of fact which required submission to the jury.

We find no exception in the case authorizing the plaintiffs to raise any question, under the statute of frauds, as to the validity of the transfer of the account in question, and we are therefore of the opinion that such point was not available to them. *Bommer v. Hinge Co.*, 81 N. Y. 468. Even if raised, the contract of sale having been made in another state, our statute would probably have been inapplicable. *Plate Co. v. Green*, 72 N. Y. 17.

Neither can any question arise, in this case, with reference to the sufficiency of the consideration agreed to be paid by the Farrell Company upon the transfer of the debt; for, as between the parties, an agreement to credit it upon a pre-

cedent debt is a valuable consideration. We are therefore of the opinion that the order of the general term should be reversed, and judgment rendered for the defendant upon the order of the trial court, nonsuited the plaintiffs, with costs.

Al. concur.

(110 N. Y. 109)

WALTON v. COE.¹

(Court of Appeals of New York. June 19, 1883.)

1. CORPORATIONS—NEW YORK BUSINESS CORPORATIONS—REMEDIES AGAINST STOCKHOLDERS.

Section 25 of the New York business corporations act (chapter 611, Laws 1875) is identical with section 24 of the act of 1848 for organizing manufacturing corporations, which exempts stockholders from liability for corporate debts in certain cases, except that the act of 1875 omits a clause of the earlier act to the effect that stockholders shall not be liable "until an execution against the company shall have been returned unsatisfied." *Held*, that an action may be maintained against a stockholder in a limited liability company, organized under the act of 1875, for a corporate debt, pending an action against the company and before judgment therein, although section 37 of the act provides that "no execution shall issue against any stockholder individually until execution has been issued against the company, and returned unsatisfied."

2. SAME—CONCURRENT SEPARATE ACTIONS AGAINST COMPANY AND STOCKHOLDER.

Section 34 of the New York business corporations act, (chapter 611, Laws 1875,) providing that stockholders in "full liability companies" may be joined as defendants in any action against the company, does not, by implication, prohibit separate and concurrent actions against a "limited liability company" and a stockholder therein.

Appeal from general term, supreme court, First department.

Action by Frank Walton against E. Frank Coe, as stockholder of a limited liability company, organized under the business corporations act of 1875, (chapter 611, Laws 1875,) to recover an alleged debt due by the company. This appeal is from an interlocutory order reversing a judgment sustaining a demurrer to the complaint.

Henry D. Hotchkiss, for appellant. *W. W. Badger*, for respondent.

ANDREWS, J. This appeal presents the single question, whether a creditor's action against a stockholder in a limited liability company, organized under the business corporations act (chapter 611, Laws 1875,) for a debt of the corporation, upon the liability imposed by section 37, can be maintained after a suit to recover the debt has been commenced against the corporation, but before judgment has been obtained therein against the corporation. It is purely a question of statutory construction. The constitution, by article 8, § 2, provides that dues from corporations shall be secured by such individual liability of the corporators, and other means, as may be prescribed by law, and the liability imposed may be absolute or conditional, immediate or secondary, as the legislature in its discretion may determine. The first thing to be determined in all such cases is, "What liability has been created by the particular statute in question?" (WAITE, C. J., *Terry v. Little*, 101 U. S. 217;) and when this has been ascertained, the liability follows according to the intention of the statute. In this state no uniform practice has been adopted by the legislature. The statutes in some cases impose upon stockholders an immediate and direct liability for the debts of the corporation, which may be enforced by the creditor directly against the stockholder, without his having first proceeded against the corporation; and in other cases they are framed upon what seems to be the more equitable principle, that corporate creditors should resort to the corporate assets for the satisfaction of their debts before proceeding against the individual property of the shareholder. The act of

¹Affirming 47 Hun, 160.

1848, for the organization of manufacturing corporations, recognizes this equitable principle in defining and declaring the liability of stockholders. By the tenth section stockholders are declared to be severally individually liable for the debts of the corporation to an amount equal to their stock, until the whole capital stock shall have been paid in, and a certificate thereof made and recorded. But the liability of stockholders imposed by the tenth section of the act of 1848 is limited and qualified by the twenty-fourth section. That section exempts a stockholder from liability for any debt of the company—*First*, where the debt was not to be paid within one year from the time it was contracted; *second*, unless a suit for its collection is brought against the company within one year after due; *third*, where the stockholder has ceased to be a stockholder, and no suit shall have been commenced against him within two years after that time; and the final condition of liability, contained in the final clause of the section, is, "nor until an execution against the company shall have been returned unsatisfied, in whole or in part." The courts have uniformly construed this section as making the recovery of a judgment against the company, and the issuing and return of an execution thereon unsatisfied, conditions precedent to the commencement and maintenance of an action against a stockholder upon his statutory liability. *Handy v. Draper*, 89 N. Y. 334. It is claimed that the same construction should be applied to the liability clauses in the act of 1875, defining the liability of stockholders in limited liability companies organized under that act. Section 24 of the act of 1848, so far as it bears upon the present question, is *ipsisimi verbis* section 25 of the act of 1875, with the exception that the last clause above quoted in the act of 1848 is omitted in section 25 of the act of 1875. So, also, section 10 in the act of 1848, declaring the liability of stockholders under that act, is re-enacted as section 37 of the act of 1875; but there is added to section 37 of the latter act the words, "No execution shall issue against any stockholder individually until execution has been issued against the company, and returned unsatisfied." It is to be observed that by the omission, in section 25 of the act of 1875, of the last clause in section 24 of the act of 1848, section 25 contains no condition making the issuing and return of an execution against the property of the company, unsatisfied, a prerequisite to the liability declared in that section. It contains, among others, the condition that a suit must have been brought against the company, as in the act of 1848, but does not couple it with the further condition that execution must have been returned unsatisfied before an enforceable liability arises against the stockholder. The provision in the thirty-seventh section of the act of 1875, requiring an execution against the company to be returned unsatisfied, before execution shall issue against a stockholder, is not made a condition to the commencement of a suit by a creditor against the stockholder. The twenty-fifth section does undoubtedly require that a suit must be brought against the company before the stockholder can be sued. But, if such suit against the company be brought, the bringing of a suit against a stockholder during the pendency of that suit is not prohibited by section 37, nor so far as we can perceive would it interfere with its policy. The remedy of the creditor, upon receiving a judgment against the stockholder, would be suspended until after judgment and execution against the company. Under the act of 1875, the equitable principle that recourse must be first had by creditors to the assets of the corporation for the satisfaction of their debts is preserved, whether it is construed as permitting a suit against the stockholder to be prosecuted after suit commenced against the corporation, but before judgment therein, or the opposite construction is given. In neither case can the judgment be enforced against the individual property of the shareholder until the remedy by judgment and execution against the corporation is exhausted. Under section 24 of the act of 1848, a creditor could not bring suit against a stockholder after two years from the time he ceased to be such; and, as he

could not bring suit at all until after judgment and execution against the company, the creditor was subjected to the danger that, by litigation and delay in the suit against the company, his remedy against a stockholder who had ceased to be such might be wholly lost. The change made by the statute of 1875 in the liability clauses of the sections 25 and 37, construed as permitting the two suits to be carried along concurrently, avoids this dilemma. The supposed difficulty which would be created by allowing a judgment to be recovered against a stockholder before judgment had been recovered against the company, which might never be obtained, is rather imaginary than real, since the court having control of the actions can so regulate the proceedings therein as to prevent any serious complications.

The provision in section 34 that, in the case of "full liability companies," stockholders may be joined as defendants in any action against the company, is permissive, and not imperative, and does not, we think, justify an implication that the statute intended to prohibit separate suits against the company and a stockholder in a company of the other class to be prosecuted concurrently. The liabilities of stockholders in the two classes of companies is very different, and there is reason for the different remedies provided.

The case is not free from doubt, but, on the whole, we think the conclusion of the general term was correct. The order should therefore be affirmed, with leave to the defendant to answer within 20 days, upon payment of costs.

All concur, except DANFORTH, J., not voting.

(110 N. Y. 119)

ROCHESTER, H. & L. R. CO. v. BABCOCK et al.¹

(*Court of Appeals of New York*. June 19, 1888.)

1. CORPORATIONS—RAILROAD COMPANIES—SUBSCRIPTION TO CAPITAL STOCK—POWER TO SUBSCRIBE—PRESUMPTION.

Where a construction company had subscribed to the stock of a railroad company, and paid more than 10 per cent. of the subscription in money, it will not be presumed, in a proceeding by the railroad company to condemn land, that it had no power to make such subscription, neither its charter nor the law of its organization being produced, and it not denying or disputing its liability.

2. SAME—PAYMENT OF SUBSCRIPTION.

In a proceeding by a railroad company to condemn land for a right of way, failure of payment of a subscription, and consequent failure of the amount of subscription required, is not shown where it appears that the subscriber had ordered his bankers to transfer the amount of the payment, from his own money on deposit, to the credit of the company, and that the transfer had actually been made, and the company had given a receipt, and applied the amount upon the subscription.

3. EMINENT DOMAIN—PRIOR OCCUPATION FOR PUBLIC USE—PRIVATE RAILROAD SWITCHES.

A railroad company filed its map and profile for a right of way, and served notice thereof on an owner of land over which it passed. Soon thereafter the owner leased the right of way on the premises sought to be taken by the railroad company to another railroad company, upon which to lay a switch leading to a brick-yard, and the construction of the switch was immediately begun. The switch was not needed for the general purposes of the leasing company, nor was it ever completed as far as the brick-yard. *Held*, that the occupation of the premises under the lease was not for such a public use as would bar condemnation by the former railroad company.

4. SAME—FAILURE TO AGREE WITH OWNER—RIGHTS OF LESSEE.

Where a railroad company, seeking to condemn land for a right of way, fails to come to an agreement as to damages with the owner, it is not bound to show negotiations with a lessee of the owner; the latter not being able to give the title and right required.

Appeal from general term, supreme court, Fifth department.

Application by the Rochester, Hornellsville & Lackawanna Railroad Company against Francis G. Babcock, Jr., and the New York, Lake Erie & Western Railroad Company, to acquire title to certain lands. Order appointing commissioners made, and defendants appeal.

¹See 44 Hun, 206.

James H. Stevens, Jr., for appellants. *Frank S. Smith*, for respondent.

FINCH, J. The petitioner alleged its due incorporation, the necessary subscription to its capital stock, and the payment of the 10 per cent. required. It further averred its need of the land sought to be condemned for the purposes of its road, and an unsuccessful effort to agree with the land-owner upon the damages to be paid. The latter denied these allegations, partly upon information and belief, and the issues thus raised were tried and decided in favor of the petitioner. We need not delay over the question argued as to the burden of proof, for the petitioner established its case beyond the need of resting upon presumptions. While the evidence it gave has been somewhat criticised, there seem to be but one or two points about which the argument made demands our attention.

The principal subscription to the stock, and one essential to the required amount, was that of the Central Construction Company, the validity of whose contract is questioned on the ground that it is a foreign corporation, having no power to subscribe to the stock of a railroad company. The appellants claim, upon the evidence, that the construction company is a corporation formed under the laws of New Jersey. Whether it is in truth a partnership or joint-stock association or a corporation is not at all certain or accurately disclosed; but, conceding its corporate character, there is still no proof of its want of power. Its charter is not shown, nor the law of its organization. Its business is stated to be the construction of railroads, as its name implies; and it would be quite strange if it could not subscribe to the stock of the roads which it can build. At all events, we cannot presume, against its act, and the payment of \$40,000 actually made upon its subscription in money and equipment, that it acted beyond its power. It is not before the court; it does not deny or dispute its liability; and it is difficult to see how the land-owner can raise or try the question; yet, if that be possible, no presumption of want of power can be indulged in the face of an actual subscription followed by more than 10 per cent. of payment. It is claimed, however, that the cash payment of \$21,000 by Chapman is not satisfactorily proved. He swears that he paid it by causing his bankers to transfer that amount of his own money on deposit with them to the credit of the petitioner. He adds that the transfer was actually made; that a receipt was given for it; that it was applied, as it was paid, upon the stock subscriptions, and remains intact in the possession of the petitioner, as a deposit to its credit upon the books of the bankers. These facts are not contradicted beyond some criticism upon the manner in which the business was done, and comment upon the absence of books and papers, the need of which might not have been anticipated. It is quite evident that we ought not, upon grounds so slight, to distrust the finding of the referee, confirmed by the court, that the required 10 per cent. was paid.

The appeal of the Erie Railroad Company raises another and different question, founded upon the claim that, under its lease from Babcock, the land-owner, and by reason of the switch constructed to communicate with a brick-yard, it has a prior right for a public use, which the petitioner cannot invade. The latter filed its map and profile on the 13th day of July, 1886, and on the 17th served notice of such filing upon Babcock, and in due season filed its certificates of location. On the 10th of August the Erie Company took a lease from Babcock, for the term of three years, of the right to lay a track across his premises towards a brick-yard. The owners of that plant had made verbal applications for a switch, and on the 10th of August made a written application. That was granted with such willing promptness that the lease is dated that day, and the switch was constructed immediately; the work beginning within two or three days thereafter. It did not, however, reach the brick-yard, because Mrs. Emery, whose lands it was necessary to cross, refused her assent, and served an injunction to prevent the intrusion on her land. The

switch thus constructed was at first torn up where it crossed petitioner's line, and then replaced by the Erie, and cars run upon it to defend its possession. The general term say in their opinion that the question of priority between the two companies has been tried in a separate action, and decided against the Erie, and that case is here on its own appeal. Upon the facts disclosed, however, we are of opinion that the appellant corporation did not establish such an occupation of the switch for a public use as would bar a condemnation by the petitioner. Lands held by a corporation, but not used for or necessary to a public purpose, but simply as a proprietor, and for any private purpose to which they may be lawfully applied, may be taken as if held by an individual owner. *In re Commissioners*, 66 N. Y. 418. The need of the land sought in aid of collateral enterprises remotely connected with the running or operating of the road will not justify an assertion of the right of eminent domain. *Railroad Co. v. Davis*, 43 N. Y. 146. The whole subject has been recently and fully discussed in *Re Railway Co.*, 108 N. Y. 375, 15 N. E. Rep. 429, and the limits of judicial control defined. In the case at bar the lease taken was brief and temporary; the lessor a complaining land-owner, and the lessee watching a competitor; the building of the switch so swift and prompt as to indicate a design of obstruction; the purpose asserted, that of convenience to the owners of a brick-yard, in which no public use was involved; even that purpose inchoate and barred by the refusal of Mrs. Emery, and the brick-yard not even reached, the switch needless for the general purposes of the company, and no such expected use asserted; and the occupation for private gain, and for individual convenience. A switch may be needed for the storage of cars, or making up of trains, or for access to docks, warehouses, and elevators open to public use, and resulting in public accommodation; but nothing of the kind is here pretended, and it is even doubtful whether its sole utility to the builders was anything other than as an obstruction. We ought not, therefore, to deem it a bar to this proceeding.

It is further objected, on behalf of the appellant corporation, that no effort was made to agree with it before the proceedings were instituted. Proof was given of an attempt to settle with the land-owner, (lessor,) and its failure. That failure made a resort to the court, and an appraisal of damages, necessary; and its distribution among the different interests could not be determined until those damages were ascertained. The proof established that the strip of land sought to be taken could not be acquired by agreement; and that was sufficient, without showing a negotiation with the lessee, who could not give the title and right required. We think there was no error in the order, and that it should be affirmed.

All concur.

(110 N. Y. 123)

ROCHESTER, H. & L. R. CO. v. NEW YORK, L. E. & W. R. CO.¹

(Court of Appeals of New York. June 19, 1888.)

RAILROAD COMPANIES—LOCATION OF ROAD—FILING MAP AND PROFILE—LIEN AS AGAINST THIRD PERSONS—INJUNCTION.

A company complying with the general railroad act of New York of 1850, § 22, providing that every company formed under the act, before constructing any part of its road through any county, must make and file a map and profile of the route intended to be adopted, and give a written notice to all occupants of the land affected of the time and place of filing, and that the route designated passes over the land of such occupants, acquires a lien on the land in favor of its right to construct the road, and is entitled to an injunction restraining interference with such road-bed, although proceedings of condemnation under the statute have not been completed.

Appeal from general term, supreme court, Fifth department.

¹Affirming 44 Hun, 206.

The plaintiff corporation was organized June 9, 1886, for the purpose of constructing a railroad commencing in the village of Canisteo, Steuben county, and terminating at a point on the line of the Lackawanna & Pittsburgh Railroad Company in the town of Burns, Allegheny county. It had surveyed and located the line or route of its proposed road, and had made and duly filed a map of the same. Notices were served on the occupants or owners of lands over which the road was located, including these defendants, and by no proceeding has the line so located been changed. The line, as located, for some distance, was along lands of the defendant corporation, upon which its tracks were laid. Plaintiff has acquired the right of way for the greater portion of its route, and is proceeding, in good faith and with diligence, to acquire the land necessary for its route, and to construct its road. At the portion of its line where it adjoined the defendants' lands, and on the lands of the defendant Babcock, the defendant corporation, after it had been served with the notice of plaintiff's proposed route, constructed a switch from its tracks across the plaintiff's line to a brick-yard; taking a lease from Babcock for three years of a piece of land between its road and said brick-yard. After the defendant company had constructed its switch, the plaintiff caused the track to be taken up and removed; and laid down a section of its own track, on which it also placed rails, and procured and served an injunction restraining the defendant company from interfering with its road-bed. But defendant, in disregard of the injunction, on the same day, tore up and removed plaintiff's section of track. The plaintiff had not yet purchased the right of way across Babcock's lands, nor had it instituted proceedings to condemn the same. Defendant Babcock, after receiving the notice from plaintiff of the filing of its map, etc., commenced a proceeding to change the plaintiff's route, which was ultimately dismissed for want of jurisdiction. The injunction obtained by the plaintiff was dissolved at special term; but, on appeal, the general term reversed the order of the special term, and restored the injunction. From the order of the general term, restoring the injunction, the defendant company has appealed to this court.

James H. Stevens, Jr., for appellant. *Frank S. Smith*, for respondent.

GRAY, J., (*after stating the facts as above.*) The learned judge at special term vacated the injunction theretofore granted, restraining the defendant corporation from interfering with the plaintiff's road-bed, on the ground that the plaintiff had not acquired title to the land, nor any right to occupy it. He stated, in his opinion, that the proceeding of defendant was "outrageous," but considered the court could not interfere. In their opinion, the general term considered that a case had been made for the allowance of a preliminary injunction, and that the same should be continued *pendente lite*, on the ground that the plaintiff had acquired a vested and exclusive right to construct and operate its railroad on the line it had located. We think the general term were right in the view they took of the matter. The plaintiff, by its organization under the general railroad act of 1850, became possessed of the franchise to construct and operate a railroad between the terminal points named in its articles, over such a line of route as it should elect. When the initial steps, pointed out in the twenty-second section of the act, had been taken, there only remained for the plaintiff to acquire, through purchase, or through proceedings *in invitum*, the right of way over the lands through which the line of route had been surveyed. By the terms of that section every company formed under the act, before constructing any part of its road through any county, must make and file a map and profile of the route intended to be adopted, and must give a written notice, to all occupants of the land affected, of the time and place of filing, and that the route designated passes over the land of such occupants. Clearly, there is involved in these provisions the intention of the legislature that, after the initial proceedings

have been taken, which the statute points out as the first action of the new corporation, the lands over which the company's route is located shall be subjected to the right of the company thereafter to construct thereon. The legislative scheme contemplates the determination of the line of route to be in the discretion of the company, to be exercised in the mode prescribed by law, and its exercise, when in good faith, and within the limits of its corporate powers, is only reviewable by the court in the case of an application by an occupant or owner of lands feeling aggrieved by the proposed location of the road. This right to locate its line of road, at its election, is delegated to the corporation by the sovereign power; as is the right subsequently to acquire, *in invitum*, the right of way from the land-owner, and any land needed for the operation of its road. In this sovereign power is the source of the franchise which the corporation possesses, to construct and operate a railroad, and its grant is for public, and not for private, purposes. Public considerations enter into the grant of the franchise, and public policy favors the enterprise for the public convenience and use. When, therefore, a corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of its road, and has given the required notice to all persons affected by such construction, and no change of route is made, as the result of any proceeding instituted by any land-owner or occupant, in our judgment, it has acquired the right to construct and operate a railroad upon such line exclusive in that respect as to all other railroad corporations, and free from the interference of any party. By its proceedings it has impressed upon the lands a lien in favor of its right to construct, which ripens into title through purchase or condemnation proceedings. We could not hold otherwise without introducing confusion in the execution of such corporate projects, and without violating the obvious intention of the legislature. The plaintiff's franchises were invaded, and its enjoyment of the statutory privileges disturbed, by the action of the defendant company in so building tracks upon plaintiff's line of route as to obstruct and interfere with its proposed construction. The remedy by injunction was clearly available to the plaintiff on principles of equity jurisprudence. 2 Story, Eq. Jur. § 927; *Osborn v. Bank*, 9 Wheat. 740; *Turnpike Co. v. Ryder*, 1 Johns. Ch. 611; *Railroad Co. v. Railroad Co.*, 12 Phila. 642; *Railroad Co. v. Moss*, 23 Cal. 823; *Railroad Corp. v. Railroad Co.*, 2 Gray, 27. The able opinion at general term, delivered by BARKER, J., renders further consideration of the points in this case unnecessary. The order of the general term appealed from should be affirmed, with costs.

All concur.

(110 N. Y. 630)

COLE v. COLE.¹

(Court of Appeals of New York. June 19, 1888.)

MORTGAGES—RIGHTS OF MORTGAGEE—COVENANT TO PAY INCUMBRANCES—RELEASE TO MORTGAGOR.

A wife joined with her husband in the execution of a deed of land absolute on its face, but in reality a mortgage to secure debts due the grantee from the husband; the mortgagee covenanted to pay prior incumbrances, but quitclaimed, without doing so, to the wife, upon her promise to pay the husband's debts, and bought the land under a sale on one of the prior mortgages. On a bill by the wife to recover the value of the land above the incumbrances, on the theory of a sale, *held*, that she could not, even if she had made it a part of her complaint, hold the defendant liable on account of his covenant to pay the prior incumbrances, as, the grant to him not being absolute, he did not become primarily liable to the prior mortgagees, and, having released the premises, the consideration for his covenant was removed.

Appeal from general term, supreme court, Fifth department.

¹Affirming 44 Hun, 624, *mem.*

Action by Frances M. Cole against Jay M. Cole on a covenant in a deed from plaintiff and her husband, Richard Cole, to pay prior incumbrances. From an order of the general term affirming the judgment of the special term dismissing the complaint, plaintiff appeals.

H. H. Woodward, for appellant. *J. A. Stull*, for respondent.

FRICH, J. The complaint in this case alleged an agreement of purchase and sale of real estate,—the plaintiff being vendor, and the defendant vendee; and asked a recovery of the balance of the price over and above outstanding incumbrances. Upon the foreclosure of one of these, defendant obtained the title, and went into possession; the plaintiff alleging that this was done pursuant to the contract between the parties. The defendant refused to pay, and this action was brought to enforce the contract, and make the purchase money an equitable lien on the land. The action was successfully defended; the special term finding as a fact that no contract was made between the parties, and that the allegations of the complaint stood wholly unproved. Each party testified on the trial, and flatly contradicted each other as to the fact or falsehood of a bargain. The extrinsic circumstances turned the scale in the judgment of the court, and led to a dismissal of the complaint, which the general term has affirmed. Of course, that leaves open no question for our consideration, and no more would need to be said but for a view of the facts taken by the appellant which seeks to substitute a new cause of action, and justify even a larger recovery than that claimed. Richard Cole, the plaintiff's husband, originally owned the farm, but had mortgaged it for about \$3,500. In addition he had borrowed of the defendant about \$1,700, and the latter had become liable as indorser for something over \$2,000 more, which Richard Cole had borrowed of other parties. In this condition of affairs, Richard and his wife, who valued the farm at about \$13,000, conveyed it to the defendant, who by a covenant in the deed assumed and agreed to pay the outstanding incumbrances. But this deed, though absolute on its face, was in reality but a mortgage, and was held by the defendant, beyond the prior incumbrances, as security for the debt of Richard to him. After a time, and without paying the prior liens, the defendant, by a quitclaim deed, conveyed the farm to Richard's wife, the present plaintiff, upon her agreement to pay to the defendant the debt due him from Richard. Beyond this promise the plaintiff paid nothing to the defendant, and the quitclaim deed to her amounted only to an assignment or release of defendant's mortgage, taking the wife's simple promise to pay in place of the security. Thereafter, on a foreclosure of one of the prior mortgages, the defendant became purchaser, and holds the referee's deed, and the possession. Upon these facts, it is now argued that the defendant is liable to the plaintiff for the amount of the prior incumbrances, because he became liable upon his covenant of assumption to the mortgagees, and by his purchase, under their foreclosure, has taken the land of the plaintiff to pay his own debt, for which that land stood only charged as surety for the performance of his obligation. This contention involves a very serious misunderstanding and misapplication of the authorities, and a result in no respect equitable or just. The defendant never became liable to any one as primary debtor for the sums due the mortgagees. If the grant to him had been absolute, so that the grantors parted with their title, and put into his hands the means with which to pay the debt, and he had thereupon covenanted to discharge it, he might have become liable on that covenant to the mortgagees, and made himself the primary debtor. *Lawrence v. Fox*, 20 N. Y. 268. But the grant was not absolute. The deed was simply a mortgage, and the covenant of assumption an agreement to make further advances upon the security of the land for the payment of the mortgagor's debt. *Garnsey v. Rogers*, 47 N. Y. 233; *Pardee v. Treat*, 82 N. Y. 385. If the defendant made the advances, the debt of the land and of the mortgagor would remain, the

creditor only having been changed; and, if he did not make them, his liability would be to the mortgagor only, and entirely personal in its character. He did not make them. On the contrary, he released his mortgage by the deed to one of the mortgagors upon the sole consideration of her personal covenant to pay his debt. She has no right of action upon his covenant to make advances; for he has released to her the consideration and security which supported it. *Wadsworth v. Lyon*, 93 N. Y. 201, has no sort of application to the present facts. If there was adequate foundation for the claim made, it would still be a sufficient answer that no trace of it is to be found in the complaint. The judgment should be affirmed, with costs.

All concur.

(110 N. Y. 134)

PEOPLE v. JOHNSON.¹

(Court of Appeals of New York. June 19, 1888.)

1. **JURY—IMPANNELING—DIVISION OF COUNTY INTO DISTRICTS—DRAWING FROM DISTRICT.**
Laws N. Y. 1832, c. 137 § 3, which is unrepealed, divides Seneca county into two jury districts, and enacts that the clerk of the county shall keep the names of the jurors in such districts separate, and the jurors shall be drawn for each court from the jury district in which the court is to be held; and Code Civil Proc. § 8847, provides that the provisions of Code Civil Proc. §§ 1027, 1032, regarding the drawing of jurors, do not affect "any special provisions of law remaining unrepealed after May, 1877, whereby * * * a county is divided into two or more jury districts." Held, that a challenge to the jury on the ground that they were not drawn from the body of the county, as provided by Code Crim. Proc. § 358, enacting that a trial jury shall be formed "as provided by the Code of Civil Procedure" is properly refused.
2. **CRIMINAL LAW—SENTENCE AND PUNISHMENT—COMMITMENT—DESCRIPTION OF OFFENSE.**
Statement in a commitment that defendant was held to answer upon "a charge of burglary in the third degree," and that in another commitment that he was held upon "a charge of grand larceny in the first degree," are sufficient compliances with Code Crim. Proc. N. Y. § 214, requiring the nature of the crime to be briefly stated in the commitment, to render them admissible in evidence on the trial of an indictment of murder committed while defendant was confined in prison.
3. **HOMICIDE—MURDER—KILLING BY PRISONER IN ATTEMPT TO ESCAPE—PROOF OF COMMITMENT.**
It is not incumbent, upon the prosecution in a trial for murder committed by a prisoner in jail, to put in evidence the proceedings taken upon the examination of the defendant prior to his imprisonment, in order to show that at the time of the murder he was lawfully imprisoned upon a charge of felony; it being shown that he was arrested upon a valid warrant, issued by competent authority, and was examined before a duly-authorized magistrate, and held to answer, and commitments were then made and delivered to the sheriff.
4. **SAME—TRIAL—VIEW BY JURY—MISCONDUCT—DISCRETION OF TRIAL COURT.**
Where the officers in charge of the jury about to view the scene of the murder are not caused to take the oath required by Code Crim. Proc. N. Y. § 412, but defendant's counsel make no objection, the omission is an irregularity which is waived by the failure to object; and under section 465, giving to the trial court power to grant a new trial to defendant where the jury has received any evidence out of the court other than that resulting from a view as provided, or have been guilty of any misconduct by which a fair and due consideration of the case has been prevented, if it can see that the substantial rights of defendant have been prejudiced, a refusal to set aside the verdict for irregularity will not be disturbed.

Appeal from general term, supreme court, Fifth department.

Conviction of Charles Johnson of murder in the first degree. Defendant appeals. Section 412 of the Code of Criminal Procedure, referred to in the opinion is as follows: "The officers mentioned in the last section [those having charge of the jury to conduct them to view the place where the crime was committed,] must be sworn to suffer no person to speak to or communi-

¹ Affirming 46 Hun, 687.

cate with the jury, nor to do so themselves, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time."

Corydon Rood, for appellant. *Frederick L. Allen*, for respondent.

RUGER, C. J. The defendant was jointly indicted with Edward Caldwell and Marcus Fish for the murder of John Walters on the 9th day of January, 1887. Johnson elected to have a separate trial, which was awarded to him, and took place on the 4th and 5th days of April, 1887, and resulted in his conviction of the crime of murder in the first degree. The conviction was affirmed by the general term of the supreme court, and the defendant appeals from the judgment of affirmance to this court. We have carefully examined the evidence appearing in the record, and are of the opinion that it fully supports the verdict of the jury. Indeed, no serious question is made but that Walters received a blow upon the head, inflicted by the defendant with an iron instrument, called a poker or stove-shaker, which fractured his skull, and occasioned his death. The only evidence given on behalf of the defendant was the testimony of one witness to the effect that Cronin, one of the people's witnesses, had made contradictory statements in respect to the affray about which he had testified. The attempted contradiction was quite inconclusive, and left the case made by the people's evidence substantially unaffected by opposing evidence. It is claimed, however, that certain rulings made by the court in the course of the trial and thereafter were erroneous, and for that reason the judgment should be reversed.

The evidence disclosed that the defendant, at the time of the homicide, was confined in the Seneca county jail upon two commitments,—one for the crime of burglary in the third degree, and the other for grand larceny in the first degree; that he, with certain other persons confined in the jail, conspired to break out therefrom by digging a hole through the walls, but, being unable for want of time to accomplish their purpose in this manner, they concluded to assault their jailers when opportunity offered, and thus escape. Their plan, as expressed by Johnson, was to "slug the sheriff," and thus overcome expected obstructions to their escape. About 9 o'clock P. M. of the 9th day of January, the deceased, accompanied by the sheriff and deputy-jailer, Cronin, proceeded in their customary manner to lock up the prisoners for the night. There were some 15 or 20 prisoners in the jail corridor, among whom was the defendant. Cronin unlocked the inside door of the jail, and swung it back into the corridor, where it was seized and held open by Fisk, one of the conspirators, while Johnson and Caldwell assaulted the approaching keepers. Walters immediately stepped on to the stairs leading down into the corridor, and as he was descending them, to the floor of the jail, was struck on the head with an iron instrument by Johnson, which felled him to the floor. Caldwell also struck him with a wooden club or stick. Johnson and Caldwell then passed up the stairway, and through the door, into a narrow entryway, where they were met by the sheriff, who, after a severe and prolonged struggle, succeeded in driving them at the point of a pistol, back into their cells; and it was for the crime thus effected that Johnson was indicted and convicted.

No questions are raised involving the merits in the case, and but few argued that we deem it necessary to consider, and those are quite technical in character.

1. The defendant challenged the panel of jurors upon the ground that they were not drawn from the body of the county, as provided by section 358 of the Code of Criminal Procedure. That section requires a trial jury to be formed "as prescribed by the Code of Civil Procedure." The general provision of the Code of Civil Procedure requires juries to serve in courts of record in the several counties in the state, except Kings and New York, to

be drawn from the lists of persons prepared for that purpose by the county clerk from other lists of jurors returned to that officer by the various town officers in the several counties in the state charged with the duty of making such lists. Sections 1027-1062, Code Civil Proc. It is, however, further provided by subdivision 7, § 3347, that the above referred to provisions do not affect "any special provisions of law remaining unrepealed after May, 1877, whereby trial jurors are directed to be procured for a particular court of record from a particular locality, or whereby a county is divided into two or more jury districts." The county of Seneca was divided into two jury districts by section 3, c. 137, Laws 1822, and it was thereby enacted that the clerk of the county should keep the names of the jurors in such districts separate, and the jurors should be drawn for each court from the jury district in which the court is to be held. We cannot find that this law has been repealed, and are informed that from the time of its enactment it has been the uniform practice in the county of Seneca to make up jury-lists in the manner pursued in this case. The challenge to the jury was therefore properly overruled.

2. Upon the trial the defendant objected to the admission in evidence of the commitments upon which he was confined in the jail. The point of this objection arises out of the fact that some of the counts of the indictment charged the homicide to have been committed while the defendant was engaged in the commission of, or an attempt to commit, a felony, to-wit, to escape from jail where he was confined upon a charge of felony. This charge, if sustained by proof, would render the killing of a human being, under such circumstances, the crime of murder in the first degree, without regard to the degree of deliberation or premeditation exercised in its commission. Section 85 of the Penal Code provides that "a prisoner who, being confined in a prison, or being in lawful custody, by force or fraud escapes from such prison or custody, is guilty of felony if such custody or confinement is upon a charge, arrest, commitment, or conviction for a felony;" and section 686 enacts that a person who unsuccessfully attempts to commit a crime is indictable and punishable by imprisonment for not more than half the longest term prescribed, upon conviction for the commission of the offense attempted. A "felony" is defined as a crime which is or may be punishable by either death or imprisonment in a state's prison. Section 5, Pen. Code. We presume that the defendant, with the view of raising the question that he was not lawfully confined in jail, objected to the admission of the commitments in evidence upon the ground that they "did not comply with the Code of Criminal Procedure, and the justice had no right to issue them." It had then been proved that the justice making the commitments was an acting justice of the peace of the town of Seneca Falls, in the county of Seneca, and therefore the objection could not successfully be raised that he had not authority to issue such commitments. The principal point urged to the form of the commitments is that the statement that Charles Johnson was held to answer upon a "charge of burglary in the third degree," and in the other commitment that he was held upon, "a charge of grand larceny in the first degree," were not a compliance with section 214 of the Code of Criminal Procedure, requiring the nature of the crime to be briefly stated therein. We think the statements made were a sufficient compliance with the requirements of the statute. There is nothing, in the office which a commitment is designed to perform, requiring a detailed statement of the circumstances attending the commission of the crime. It is intended merely as a protection to the officer executing it, and as showing the authority upon which he restrains the accused person of his liberty. A reference to the statutory definitions of crimes shows with sufficient clearness and precision, for the purposes in view, the nature of the crime charged in the commitment. The fact that it states the name of a crime does not demonstrate that it does not also define the nature of the crime, and especially within the meaning of a provision requiring such crime to be briefly stated.

In every other respect the commitment seems to be in exact conformity with the requirements of the statute.

We think it was not incumbent upon the people, in order to make out a *prima facie* case that the defendant was lawfully restrained of his liberty upon a charge of felony, to put in evidence the proceedings taken upon the examination of the defendant. It was shown that he was arrested upon a valid warrant issued by competent authority, and was examined before a magistrate authorized to perform that duty, upon the charge therein contained, and held to answer the same, and the commitments were then made and delivered to the sheriff. The evidence tended to establish all of the jurisdictional facts necessary to give the magistrate authority to make the commitments. There was no affirmative evidence given that the magistrate had omitted any act, which he was required by law to perform, in the course of the examination; and we think, so far as any such requirement was discretionary merely, that he is entitled to the presumption that he performed his duty. The jurisdiction of the magistrate over the subject-matter of the examination and the person of the defendant having been established, he had authority to make the commitments in question, and the recitals therein contained are presumptive evidence of the facts stated therein. *Scott v. Ely*, 4 Wend. 555. Aside from the proof of jurisdictional facts, the orders and precepts of courts of inferior and limited jurisdiction have the same force and effect, and are entitled to the same presumptions, as apply to those of courts of more extensive authority. *Wright v. Nostrand*, 94 N. Y. 31. The evidence tended to establish the fact that the death of Walters occurred while Johnson was attempting to commit a felony, and, if it was caused by the act of the defendant, legally tended to establish his guilt of the crime of murder in the first degree.

But a single exception was taken to the charge of the court, and that is so manifestly unfounded that it is unnecessary to notice it more particularly. Subsequent to the trial a motion upon affidavits was made by the defendant to set aside the verdict of the jury upon the allegation of irregularities in the conduct of the jury occurring during the course of the trial. The alleged irregularities consisted (1) in allowing the jury to view the scene of the crime without first administering the oath to the officers in attendance upon them prescribed by section 412 of the Code of Criminal Procedure; (2) that members of the jury, while engaged in making such view, received information from the officers attending them as to the location of the cells occupied by the several prisoners attempting to effect an escape, and the location of the body of the deceased on the floor of the jail after his death. It may be said that these facts were known to the prisoner's counsel at the time they transpired, and were neither brought to the attention of the court nor objected to by them. The prisoner's counsel assented to the proposition that the jury should view the scene of the crime, and the court had undoubted authority to permit them to do so. Code Crim. Proc. § 411. The location of the prisoners' cells, as well as the position of Walter's body after death, was the subject of much oral testimony on the trial from eye-witnesses, as well as illustrations by a diagram of the premises, and they were neither of them the subject of controversy or dispute on the trial. It is impossible to see how the information, alleged to have been given to the jury was of the slightest materiality upon any issue of the trial. The answering affidavits on the part of the people controverted the allegations that any communication took place between the jury and the officers on the subjects referred to, and the trial court might well have found that the defendant's allegations were not true. We are, however, of the opinion that the motion in question was addressed to the sound discretion of the trial court, and that we have no right to review the exercise of such discretion, unless it appears that it has been abused to the prejudice of the defendant. The causes for which the trial court may grant a new trial to a defendant in a criminal case are specifically pointed out in section 465 of the

Code of Criminal Procedure, and, among others, embrace the following: (1) "When the trial has been had in his absence, when the indictment be for a felony;" (2) when the jury has received any evidence out of court other than that resulting from a view, as provided in section 411; (3) when they "have been guilty of any misconduct by which a fair and due consideration of the case has been prevented." In such cases the trial court is authorized to grant a new trial, provided they can see that the "substantial rights" of the defendant have been prejudiced, and not otherwise. There is no evidence that any part of the trial was had in the absence of the defendant, or that he has been deprived of any right which the statute gives in order to secure to him a fair and impartial trial. The omission of the trial court to cause the officers in charge of the jury, while taking a view, to take the oath prescribed by section 412, was an irregularity merely, which could be waived by the defendant, and was, we think, waived by the consent of his counsel that such view should be taken, and by his omission to object or call the attention of the court to the want of such oath. However that may be, it was, upon the facts in this case, a question for the court to determine whether any substantial right of the defendant had been prejudiced by the conduct complained of, and we do not think there is any sufficient reason for us to interfere in the conclusions reached by it in respect thereto. *People v. Draper*, 1 N. Y. Crim. Rep. 139. The judgment of the general term should therefore be affirmed.

All concur.

(110 N. Y. 101)

*WILSON v. DORAN et al.*¹

(Court of Appeals of New York. June 19, 1888.)

1. **TENDER—AFTER SUIT BROUGHT—PAYMENT INTO COURT—ADMISSION OF PLAINTIFF'S RIGHT TO SUE.**

Where, owing to a previous general assignment for the benefit of creditors, the plaintiff took no right of action by an assignment of the debtor's interest in a stock transaction, a tender, and payment into court of the amount tendered, admits the contract or duty sued upon, and the plaintiff's right to the amount tendered, but does not prevent the defendants showing, to defeat further recovery, that plaintiff acquired no title to the original cause of action.

2. **SAME—PRACTICE—NONSUIT.**

Though the plaintiff had no right of action except such as arose from a tender and payment into court by the defendant, a nonsuit cannot be granted where it is not shown that there was a sufficient tender before suit brought, and defendant gave no notice of the payment into court, as required by Code Civil Proc. N. Y. § 782 in order to make a valid tender after suit brought.

3. **SAME—SUFFICIENCY OF TENDER—PROVINCE OF JURY.**

Where a tender, before suit brought, was admitted, but claimed to be insufficient because made to one who had assigned the claim, and not to the assignee, the court cannot withdraw the question from the jury, and grant a nonsuit, on the ground that there had been a sufficient tender.

4. **SAME—FAILURE TO GIVE NOTICE—WAIVER OF OBJECTION.**

The failure to give the notice required by Code Civil Proc. N. Y. § 782, to make valid a tender after suit brought, is not waived, though the plaintiff do not raise the objection before trial.

Appeal from: general term, supreme court, Fifth department.

Action by Augusta A. Wilson against S. Gregor Doran and another. From an order of the general term affirming the judgment of the special term ordering a nonsuit, plaintiff appeals.

Jas. S. Carlock, for appellant. *John N. Beckley*, for respondents.

ANDREWS, J. It was held by the general term that the title of the plaintiff to the demand in suit was put in issue by the pleadings, and we concur in that opinion. *Bennett v. Manufacturing Co.*, ante, 669, (decided June 19, 1888.) There was no substantial conflict in the evidence upon the point

¹ Reversing 89 Hun, 83.

that the original assignor, before his assignment to Davis & Co., had, by virtue of a general assignment for the benefit of his creditors, transferred all his interest in the stock transaction, out of which the claim in controversy arose, to his general assignee. If there was nothing else in the case, the nonsuit was properly directed on the question of title, because the fact of this prior transfer left nothing to be transferred by George W. Wilson, the plaintiff's husband, to Davis & Co., his immediate assignees, and Davis & Co. had nothing which they could transfer to the plaintiff. The judgment should therefore be affirmed, unless the fact that the defendants in their answer pleaded a tender, before suit brought, to George W. Wilson and to Davis & Co. of the sum of \$189.30, on the cause of action sued upon, and concurrently therewith paid the money tendered into court, entitled her to litigate the question of the amount of the defendants' liability beyond the sum tendered, independently of the question of the plaintiff's title, or unless it entitled her at least to judgment in her favor for the amount tendered. The defendants in their answer, after alleging the tender of the sum stated, and that they have ever since remained and still are ready to pay the sum tendered, aver that "they now bring the said sum into court, ready to be paid to the plaintiff if she will accept the same." It is insisted, on the part of the plaintiff, that the defendants, by the plea of tender, and the payment of the money tendered into court, admitted, not only the existence of the cause of action set out in the complaint, and the right of the plaintiff to the amount tendered thereon, but also her title to the entire cause of action, and her right to recover damages beyond the amount tendered, although in fact she has no title, if the proof would justify a recovery of a greater amount if the action had been brought by the true owner. The authorities upon this question have been elaborately considered by the general term in the prevailing opinion. It is admitted that the tender, and payment of the sum tendered into court, admits the contract or duty sued upon, and the right of the plaintiff, under the contract and assignment, to the sum tendered. But we understand the authorities to hold that the admission, in such a case, goes no further, and that it is open to a defendant to defend against any claim by the plaintiff beyond the sum tendered, upon any ground consistent with an admission of the original contract or cause of action. The defendant may, notwithstanding, insist upon the statute of limitations, payment beyond the amount tendered, or other defense. *Cox v. Parry*, 1 Term R. 464; *Reid v. Dickons*, 5 Barn. & Adol. 499; *Meager v. Smith*, 4 Barn. & Adol. 678; *Spalding v. Vandercook*, 2 Wend. 431. It having been shown, therefore, that the plaintiff had not acquired title to the original cause of action, her right to recover thereon beyond the sum admitted by the tender was, upon the same principle, defeated.

The remaining question relates to the nonsuit granted by the trial court, notwithstanding the plea of tender. This cast upon the plaintiff the costs of the action. The rule is well settled that a tender before suit brought, to be available, must not only be pleaded, but the defendant, before or with his plea, must pay the money into court, so that it may be subject to the plaintiff's order; and it was also necessary, under the former practice, that the plea should be accompanied by a notice to the plaintiff's attorney that the money had been paid into court. *Brown v. Ferguson*, 2 Denio, 196; *Sheriden v. Smith*, 2 Hill, 538; *Dixon v. Clark*, 5 C. B. 366. This having been done, if the tender was admitted or proved, and the plaintiff did not establish a right to recover a greater sum than the amount tendered, the defendant was entitled to a verdict or nonsuit. The conclusion was founded upon the reason that the money paid into court belonged, in any event, to the plaintiff; and the claim, as to that amount, was deemed to be stricken from the complaint; and, if the plaintiff was not entitled to any more, he failed in the action. See *Becker v. Boon*, 61 N. Y. 317; *Platner v. Lehman*, 26 Hun, 374; *Murray v. Bethune*, 1 Wend. 191. If, therefore, in this case, the tender,

before suit brought, alleged in the answer, had been conclusively proven, the nonsuit was properly directed, unless the failure of the defendant to prove notice given to the plaintiff of the payment of the money into court entitled the plaintiff to judgment for the amount tendered. The answer, as has been seen, made *profert in curia* of the sum tendered. The plaintiff made no objection to the sufficiency of the plea, and went to trial upon the issues in the case, including that of tender. The duty of giving notice of the payment into court of the sum tendered, on a plea of tender before suit, was a matter of practice not prescribed by statute. In this case the money was in fact paid into court, and, under the authorities, the plaintiff, by proceeding under circumstances such as are disclosed by the record, waived the irregularity. *Sheriden v. Smith, supra; Platner v. Lehman, supra*. But the fact of tender was in issue, and was litigated on the trial. It was conceded that the defendants tendered the sum mentioned in the answer, before suit, to some one; but it was claimed by the plaintiff that the tender was insufficient because made to George W. Wilson, and not to Davis & Co., to whom the former had assigned the stock. The evidence raised a question of fact whether the tender was made to the proper person. The court could not, therefore, properly take this question from the jury, and it follows that the judgment cannot be supported on the ground that there had been a sufficient tender before suit brought, made effectual by the subsequent payment of the sum tendered into court. The defendants are therefore, we think, compelled, in order to support the nonsuit, to establish that there was a legal tender after suit brought, under the provisions of the Code of Civil Procedure, (sections 731-734,) based upon sections of the Revised Statutes, (2 Rev. St. 553, §§ 20, 23.) But it seems to us to be a conclusive answer to the claim to resort to these provisions to uphold the nonsuit, that section 732 of the Code, one of the sections regulating the subject of tender after suit brought, expressly enacts that a tender does not avail the defendant "unless the money is paid into court, and notice thereof given to plaintiff's attorney before the trial, and within ten days after the payment," and in this case it does not appear that there was notice, and the tender was objected to on the trial upon this ground. The giving of notice, in case of tender after suit brought, is no longer mere matter of practice under the regulation of the court, but a part of the prescribed statutory procedure. It is undoubtedly competent for a plaintiff to waive the service of the statutory notice, but we do not think that the former decisions in respect to notice, to which we have referred, justify the conclusion that the failure of the plaintiff to return the answer, which contained several defenses, and, among them, the defense of tender before suit, or to otherwise raise the question before trial, is a waiver of the right to insist, on the trial, that the money paid into court was not a good tender after suit brought, by reason of the fact that the statutory notice was not given. *Becker v. Boon, supra*. It would be unjust to the plaintiff, who, so far as appears, never had notice of the actual payment of the money into court. We are of opinion that a new trial should be granted on the ground that the question of tender before suit brought should have been submitted to the jury. The judgment should be reversed.

All concur.

(110 N. Y. 636)

THOMPSON v. NEW YORK CENT. & H. R. R. CO.¹

(Court of Appeals of New York. June 26, 1883.)

1. RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action against a railway company for killing plaintiff's horses, the driver testified that, as he approached defendant's tracks at a distance of 100 feet, he

¹Reversing 33 Hun, 16.

looked both ways, and saw no danger, and at 60 feet looked a second time, with the same result. Approaching nearer, he looked a third time in one direction, but was momentarily diverted from looking in the other by the reckless advance of a boy towards him, when, his horses' heads being in three or four feet of the tracks, hearing the whistle, looked and saw the train within 300 or 400 feet. His horses were in motion, but going slowly, and it was so near that he could not get them out of the way when they were struck by the engine, and killed. *Held*, that the question of plaintiff's negligence should have been submitted to the jury, and that a nonsuit, at the direction of the court, was improper.

2. SAME—NEGLIGENCE—RATE OF SPEED.

A railway company may be guilty of negligence in running its train at an improper and dangerous rate of speed, at a crossing made by a public street in a populous neighborhood, although all the statutory signals be given; that being a question for the determination of the jury.

Appeal from general term, supreme court, First department.

Jane Thompson brought an action against the New York Central & Hudson River Railroad Company for damages occasioned by the negligent killing of her horses. After the evidence for plaintiff was in, the court ordered a nonsuit, from which plaintiff appealed.

Nelson J. Waterbury, for appellant. *Frank Loomis*, for respondent.

PECKHAM, J. The nonsuit in this case should be set aside, and a new trial granted. Upon the facts as developed in the evidence on the part of the plaintiff, there was a question of fact which should have been submitted to the jury. The evidence of the driver of the horses is that he looked up and down the track when he came within a hundred feet of it, and saw nothing to prevent his crossing in safety. When within 60 feet he looked again, both ways, to the north and to the south, and still saw nothing. Approaching somewhat nearer the track, he for a third time looked to the south, and saw nothing, and was in the act, for the third time, of looking to the north, when his attention was for a moment diverted towards a boy in front of his horses; and, as he says in one portion of his evidence, the boy was on the track on the east, as he was approaching or on the west track, and when he first saw him the boy was perhaps 20 feet off, but moving recklessly towards him. His attention was thus momentarily diverted from looking to the north for the third time, and his horses' heads were but four feet from the west track, when he heard the whistle of the engine, and looked and saw a train coming from the north, 300 or 400 feet distant. His horses were in motion, and so near the track that he could not stop them, although going very slowly, scarcely off a walk, until they got onto the down track; and before he could get them off the engine struck them, and they were instantly killed. In all this we do not see that the plaintiff's driver was, as matter of law, guilty of negligence. One who approaches a railroad crossing must exercise due care and caution. He must, before crossing, look, when looking will do any good, both ways, and must cross only when he perceives that it can be done without danger in coming in collision with a train then in sight or within hearing. There is no special distance at which this looking must be done, but each case must necessarily depend largely upon its own facts. Here the plaintiff's driver looked twice up and down the track before attempting the crossing, once at a distance of a hundred and once at sixty feet from the tracks, and had looked a third time to the south, and was about looking a third time to the north, when his attention was taken up for a moment by the sight of the boy. It cannot be that a failure, for a second or two, to look a third time up the track, made him guilty of negligence, as a legal proposition, and rendered it proper to take that question from the jury. It is said the defendants were not guilty of any negligence, as there was no proof of a failure to ring a bell or blow a whistle within the statutory distance. The accident happened near the Tremont station, in Westchester county; but it is apparent, from the whole evidence, that it was at a crossing made by a public street, and that it was in a tolerably thickly populated part of the coun-

try, and it might well be a question for the jury whether the defendants were or were not, upon all the facts, guilty of negligence in running their train at the very great speed claimed on the part of the plaintiff, through such a portion of the country. The giving of the signals required by law does not, under all circumstances, render the defendants free from negligence, if they ran their train at an undue and what might be found to be an improper and highly dangerous rate of speed, through a village or city more or less densely populated. Both questions—as to the negligence of plaintiff's driver and as to that of the servants of defendants—should have been submitted to the jury; and for the error in refusing such submission the judgment should be reversed, and a new trial granted, costs to abide the event.

All concur.

(110 N. Y. 638)

BLAISER v. NEW YORK, L. E. & W. R. Co.

(Court of Appeals of New York. June 26, 1888.)

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Plaintiff, 65 years old, was struck by defendant's engine while crossing their tracks at night. The accident occurred at the intersection of two streets, one of which was entirely occupied by the tracks. Getting partly over, plaintiff was stopped by a switch train, and, while waiting, was struck by the engine, which approached without any warning or head-light; omitting all the statutory requirements in such cases. There was no flag-man there. Plaintiff could see 100 feet in the direction of the approaching train, and in day-time could have seen 500 feet. He looked for trains both ways, before stepping on the tracks, but none were in sight. He had been familiar with the crossing for 14 years. *Held*, that the case should have been submitted to a jury, and that a direction for a nonsuit was improper, as it could not be said, as a matter of law, that plaintiff was guilty of contributory negligence.

Appeal from general term, superior court, city of Buffalo.

Action for personal injuries sustained by plaintiff, caused by being struck by defendant's engine while crossing defendant's tracks on Smith street, at the intersection of Exchange street, in the city of Buffalo. The streets intersect each other at right angles, and are crossed diagonally by seven tracks of defendant's road, covering over a hundred feet, and occupying the whole of Exchange street. Immediately to the west of Smith street are the car and freight yards of defendant, and at Smith street the tracks make a sharp curve across Exchange street. On the 24th of November, 1882, at 7 o'clock in the evening, the plaintiff, who is a German, 65 years of age, returning home from work, started to cross the defendant's tracks on Smith street, at the crossing of Exchange street, approaching from the north. A switch train backed across the highway on the southerly track. He looked both ways before stepping on the crossing, and there was no other train in sight. There was no flag-man at the crossing. It was dark. He had crossed three or four tracks of the defendant, or more than 50 feet, before his progress was arrested by the switch train. He stood there a moment waiting for the switch train to move, and was struck by an engine coming from the west, which gave no warning of its approach, and which had no head-light. All the statutory requirements as to the running of trains when approaching crossings were omitted. On the night in question, at the time of the accident, the plaintiff could see 100 feet in the direction from which the engine came, and in the day-time he could have seen 500 feet. His left thigh was broken by the accident. His left leg is one-half inch shorter than his right, and he will never be able to walk as before. Plaintiff had been in the habit of crossing for 14 years at this crossing, and was familiar with it; knowing that trains were likely to come at any time. On these facts the learned judge who tried the case directed a nonsuit, and the plaintiff's counsel duly excepted. The exceptions were directed to be heard in the first instance at general term. On the argument at

general term only two judges sat,—one favored the affirmance of the nonsuit, the other a reversal. The court being divided, the nonsuit was by operation of law affirmed, and judgment ordered for the defendant, (Code Civil Proc. § 281,) and from that judgment this appeal is brought.

Arthur W. Hickman, for appellant. *E. C. Sprague*, for respondent.

PER CURIAM. We are of opinion that contributory negligence could not, as matter of law, be asserted of the plaintiff's conduct upon the facts disclosed by the evidence. The nonsuit was therefore improper, and the case should have been submitted to the jury. The judgment should be reversed, and a new trial granted, costs to abide the event.

All concur.

(123 Ill. 496)

ALKIRE *et al.* v. KAHLA.

(*Supreme Court of Illinois.* January 20, 1888.)

1. DEED—DATE OF EXECUTION—EVIDENCE.

In a suit in equity to set aside an execution sale of land on the ground that the judgment debtor had conveyed away his interest before recovery of the judgment, evidence that the same figures, in two places, in the deed relied on, which were written by different persons, had been erased, and others substituted, so as to make the conveyance earlier; that a lease of the land and other transactions, which took place between the two dates, were inconsistent with a conveyance at the earlier date; together with the fact that the erasures were in no way accounted for, and the testimony of the grantor, that he only knew when the deed was made by the date appearing on it,—is sufficient to prove that the correct date was erased, and an earlier one substituted.

2. PARTNERSHIP—FIRM PROPERTY—WHAT CONSTITUTES.

A tract of farming land purchased and cultivated by a partnership firm transacting a general merchandise business at a town some distance from such lands, the purchase deed describing the purchasers as copartners, but there being no evidence that the land was purchased with partnership funds or for partnership purposes, is not such partnership property as to give one of the partners who had paid debts of the firm, after its dissolution, an equitable lien thereon, as against creditors of the other partner.

Appeal from circuit court, Madison county; A. WATTS, Judge.

Happy & Travous, for appellant. *Metcalf & Metcalf* and *Wise & Davis*, for appellee.

SHELDON, C. J. This was a bill in equity, brought by Christian Kahla against Alkire & Co. and Charles N. Travous, to set aside a sheriff's sale and certificate of purchase of a certain tract of land made to Travous on an execution upon a judgment in favor of Alkire & Co. against one Henry Robinson. The original bill set forth that on August 26, 1884, Cato Abbott and Henry Robinson were each seized in fee-simple of an undivided one-half of the land; that on that day Robinson conveyed his one-half to Abbott, the deed whereof was recorded May 6, 1886; that, upon the execution of the deed from Robinson, Abbott entered into and continued in the possession of the premises until the sale thereof to complainant; that on April 24, 1886, complainant purchased the same from Abbott for the consideration of \$1,800, and received a warranty deed therefor; that at the October term of court, 1884, Alkire & Co. recovered a judgment against said Robinson, under which, on execution, the sheriff's sale in question of Robinson's interest in the land was made to Travous on August 24, 1885. At a late stage of the cause, after answers, replication, and a reference to the master to take testimony, the bill was amended by alleging, further, that the land in question was partnership property of the firm of Abbott & Robinson; that there had been a dissolution of the firm; that it was insolvent, and unable to pay its debts; and that Abbott had advanced, for the firm, moneys, by paying debts of the firm of a greater amount than the value of the land, claiming a superior equitable lien

upon the premises on that account; and that, since filing the original bill, a sheriff's deed had been made to Travous, and asking that it should be set aside. The court below, upon hearing on proofs taken, decreed in favor of the complainant, and the defendants appealed.

The ground of the complainant's claim for relief by the original bill is that Robinson had no interest in the land at the time the judgment against him was obtained, and the sale under execution thereon made; that he had previously conveyed away his interest to Abbott; and, under the amended bill, that, if Robinson had any interest in the land at the time of the judgment, it was subject to a valid lien in equity which Abbott had upon it as partnership property for what was due to him as partner in the firm of Abbott & Robinson. The judgment against Robinson was at the October term, 1884. To show that, at that time, Robinson had interest in the land, complainant introduced in evidence a quitclaim deed from Robinson to Abbott of Robinson's interest in the land, purporting to bear date February 26, 1884; and Robinson and Abbott testified, generally, that the deed was executed at the time it bears date; and the officer who took the acknowledgment testified that it was taken before him at the time it bears date, which was February 26, 1884. In opposition to this, the defendants introduced four witnesses,—three of them being entirely disinterested,—who testified that, in the date of the year appearing in the body of the deed, and in the certificate of acknowledgment, "1884," there had been an erasure of the last figure in the number of the year, and the figure "4" written over it, making it read "1884;" that in the certificate of acknowledgment the erasure was complete,—there being no trace of the figure erased left; but that in the body of the deed the erasure had been so imperfectly made that, by an examination under a glass, the figure "6" was plainly to be seen under the figure "4." There was no rebuttal whatever of this testimony, but it stood entirely uncontradicted, with no attempt at explanation of the erasure and alteration of date. All that appeared as in any way opposed thereto was the general statement, before referred to, made by witnesses, on introduction of the deed by the complainant, that the deed was executed at the time it bears date. But Robinson, one of the witnesses who had so testified in chief, on cross-examination said: "All I can tell about the execution and delivery is from the date of the deed. Have no recollection aside from that. When I testified this deed was executed on the 26th of February, 1884, it was because the deed bears date that day." The same may have been the case with the two other witnesses who testified the deed was executed at the time it bears date. It appears that the writing in the body of the deed, and in the certificate of acknowledgment, was made by different persons,—Robinson and the officer taking the acknowledgment. It would be extraordinary that they both should make the same identical mistake in the date of the year. There is corroborative evidence of the alteration of the date of the deed. Abbott & Robinson executed a written lease of the land, dated August 23, 1883, for one year from March 1, 1884. The tenant occupied the land for three years from March 1, 1884; he testifying that he knew of no change in the ownership of Abbott & Robinson. The rent for the first two years he paid to Abbott; the latter signing all the rent receipts in the name of Abbott & Robinson. On April 3, 1885, Abbott procured an abstract of title of the land to be made for the purpose of borrowing money on his interest. The abstractor testifies that at that time Abbott objected to the abstract showing the judgment against Robinson, as it had nothing to do with his half, and that Abbott then told him Robinson had promised at one time to deed him his half because he had paid some debts for him, but that Robinson had never done so. Abbott says he does not remember so telling the abstractor. The banker to whom Abbott applied for the loan in the spring of 1885 testifies that he was satisfied with the security on Abbott's half interest in the land; but, as the abstract presented showed the title to be in Abbott & Robinson, he was apprehensive there

might be a partition suit, to which he did not wish to be a party, and for that reason he refused to make the loan to Abbott. He says that Abbott did not then claim to own more than one-half of the land. The person who accompanied Abbott at the time, to assist him in obtaining the loan, testifies to the same effect. Mr. Happy, to whom this money, expected to be borrowed, was to be paid, to satisfy a judgment against Abbott, testifies that Abbott told him of the refusal of the loan; that he said he only had an undivided interest in the land he had offered as security; and that the banker had refused to loan him the money on an undivided interest, and he would have to make other arrangements. This witness was interested as a purchaser from Travous of one-half of his interest in the land. The defendant Travous testifies that, some two or three days before the sale under the execution, in a conversation he had with Abbott, the latter told him that Robinson had promised to deed his half of the land to him, (Abbott,) but never had done so, and now it was going to be sold away from them. To all which Abbott says he does not recollect the occurrences. We are satisfied from the evidence that the deed from Robinson to Abbott was not made on the 26th day of February, 1884, as it so purports, but that it was made subsequent to the recovery of the judgment of Alkire & Co. against Robinson, and so subject to the lien of that judgment, unless the claim, under the amended bill, of a paramount equitable lien of Abbott upon the land as partnership property, can be sustained.

Respecting such claim, it appears that the firm of Abbott & Robinson, consisting of Cato Abbott and Henry Robinson, was formed, in 1857, to do a general merchandise business at Venice, in Madison county, Ill.; the partnership continuing until December 5, 1881, when it was dissolved by Cato Abbott selling out to two other individuals his interest in the stock of merchandise then in the store. The partnership name of the new firm was Henry Robinson & Co. A warranty deed of the land in question was made September 24, 1872, conveying the same to "Cato Abbott and Henry Robinson, composing the firm of Abbott & Robinson, of the county of Madison and state of Illinois." We recognize it as a principle of the law of partnership that the separate estate or interest of a copartner in any of the copartnership property is only his share of that part of the copartnership effects which remains after the debts of the firm, and the demands of his copartners, as such, are satisfied, and, if one of the copartners has paid more than his share of the partnership debts, he has a claim upon the partnership property, which claim, in equity, is paramount to the claims of the separate creditors of his copartners; and that real estate of a copartnership is, in equity, to be treated as part of the effects of the firm. The fact of the conveyance being to the members of the partnership did not make the land copartnership property; nor did the mention in the deed of the grantees as "composing the firm of Abbott & Robinson" do so. *Sigourney v. Munn*, 7 Conn. 334. That was but *descriptio personarum* of the individual grantees in the deed. Such a description of the grantees, as said in the case last cited, affords no indication that the land was purchased with partnership funds, or appropriated to partnership purposes. To have made this land partnership property, it must have been purchased with partnership funds for partnership purposes; or, at least, there must have been one of such elements present. Pars. Partn. 364, 365; 1 Colly. Partn. § 135, and cases cited in note; *Howie v. Carr*, 1 Sum. 183; *Buchan v. Sumner*, 2 Barb. Ch. 165; *Wheatley's Heirs v. Calhoun*, 12 Leigh, 264; *Alexander v. Kimbro*, 49 Miss. 529. The business of this copartnership was that of merchandising in a small village. The land in question was farm land, situated several miles distant, and does not appear to have had any connection in any way with the business of the partnership. The evidence shows the land was sometimes rented, and a part of the time Abbott & Robinson farmed it themselves, sowing it generally in wheat. There is in the record no evidence whatever that the land was purchased for partnership purposes, or that it was appropriated to any pur-

pose of the partnership; and, as we think, there is an equal absence of evidence that the land was purchased with partnership funds. All there appears in this respect, aside from the description in the deed above adverted to, is that Abbott & Robinson, in giving their testimony herein, some five years after the dissolution of the partnership, in enumerating the assets of their merchandising business, class this land among the assets of the firm. There is not an intimation in their testimony that the land was bought with partnership funds, or for partnership purposes, or that it was ever put to partnership use; and no other witness speaks upon this subject. Such calling of land assets of a partnership as above mentioned, does not make it such, and we do not regard it as evidence which should impress the land with the character of partnership property. In order for that, there should be some evidence of the elements which go to constitute the land partnership property,—some evidence of facts going to show it to be partnership property. We find from the evidence that the land in question was real estate held by the two copartners, Abbott and Robinson, as tenants in common, and not as a part of the partnership property, and consequently that there is no foundation for the equitable claim which is set up of Abbott upon the land as partnership property.

The decree will be reversed, and the cause remanded, with direction to dismiss the bill. Decree reversed.

(123 Ill. 554)

KNOBLOCH v. MUELER.

(*Supreme Court of Illinois*. January 20, 1883.)

EQUITY—DECREE—BILL TO SET ASIDE—BONA FIDE PURCHASERS.

The supposed will of a testator was set aside, and the estate treated as intestate, and several years after his death a decree of partition was entered by consent in favor of one of the heirs, awarding her a one-fourth interest, and setting off a certain lot as her share, and she sold her interest to a purchaser for full value, and without notice of any defect in her title, after the entry of such decree. Afterwards the true will of the testator was found, and admitted to probate, by which all the testator's land was devised to his two sons, one of whom had since died, devising all his real estate to the other, who was the principal defendant in the partition suit. *Held*, that such son could not maintain a bill to set aside the deed to the purchaser of the interest awarded by the decree in partition, as a cloud upon his legal title, and for an injunction restraining all proceedings under that decree, which still remained in full force; such bill not being in the nature of a bill of review, and the defendant being entitled to defend as a *bona fide* purchaser.

Appeal from circuit court, St. Clair county; A. WATTS, Judge.

George Christian Mueller died March 27, 1870. By his will, dated March 14, 1870, his real estate was devised to his sons, George and Solomon Mueller. The will was admitted to probate, but afterwards, at the January term, 1871, in the circuit court of St. Clair county, this instrument was, on bill filed for that purpose, set aside, and declared not to be the will of said deceased. This decree was affirmed by this court. *Mueller v. Rebhan*, 94 Ill. 142. On the 27th day of March, 1879, Catharine Rebhan, one of the heirs at law of said George C. Mueller, deceased, filed in the circuit court of St. Clair county her bill for partition of the W. $\frac{1}{4}$ N. W., and the N. E. N. W. $\frac{1}{4}$ of section 28, town 1 N., range 7 W.,—alleging the death of said George C. Mueller intestate; that at his death he left him surviving George Mueller and Solomon Mueller, Margarite Rhinehardt, and complainant, Catharine Rebhan, his children and only heirs at law, to whom descended in equal parts the said lands; that on the death of said ancestor, George and Solomon had taken possession of the land jointly, and received the rents thereof until February 29, 1875, when George died, leaving all his property to Solomon by his will duly probated, etc., since when said Solomon has received the rents and profits of said land. The bill alleged that Solomon was the owner in fee of the undivided one-half of said lands, and the complainant and Mrs. Rhinehardt were each the owner in fee of the undivided one-fourth part thereof, as tenants in

common, and prayed for partition of the land, and that Solomon be required to account for the rents and profits, etc. At the February term, 1880, of said court, said bill was taken as confessed as to Mrs. Rhinehardt, and Solomon Mueller and his wife, who was also made a party, filed their answer, admitting the material allegations of the bill, and consenting to partition of said premises according to the prayer thereof. Subsequently an amended answer and cross-bill was filed, setting up that said Solomon had made lasting and valuable improvements on the land, etc. On hearing, said defendant Solomon admitted in open court the allegations of the bill in respect of the interest of the parties as tenants in common, the death and intestacy of the ancestor, and consented to a decree of partition; and a decree declaring the several interests of the parties as set up in the bill as heirs at law of said George C. Mueller, deceased, in and to said land, was entered by the court by consent, and commissioners were appointed to make partition accordingly. At the May term, 1880, of said court, on proof that defendant Solomon had purchased the interest of his co-defendant, Margarite Rhinehardt, the decree was, on his motion, so changed as to require the commissioners theretofore appointed to set off to the said Solomon three-fourths, and to the complainant one-fourth, of said land. The issue as to rents and profits and improvements was referred to the master for proofs. At the same term the commissioners filed their report, setting off to the complainant, Mrs. Rebhau, as and for her one-fourth interest in said land, lot 10, as shown in their report, containing 48 acres of the land; and set off the residue of said tracts of land to the said Solomon. Exceptions to the report were filed, which were, at the May term, 1881, overruled by the court, and the report approved by decree duly entered. No writ of error was prosecuted or appeal taken from the decree of partition. At the February term, 1883, of said court, on hearing of the issues as to rents and profits, a decree was rendered in favor of complainant Rebhau for \$1638.97, from which an appeal was prosecuted to the appellate court. On the 8th day of March, 1881, in consideration of \$5,050, Mrs. Rebhau, and Emil, her husband, by their warranty deed, conveyed the undivided one-fourth part of the premises of which her father died seized, and all their right, title, and interest in the whole of said land, to appellant, Thomas Knobloch; reserving, however, her rights to rents and profits theretofore accrued. This deed was filed for record March 10, 1881. At the February term, 1882, appellant brought an action of trespass against said Solomon for alleged trespasses upon said 48 acres of land set off to Mrs. Rebhau, and afterwards brought ejectment to recover the same. In March or April, 1883, appellee found a paper dated March 9, 1855, purporting to be the last will and testament of George Christian Mueller, deceased, in and by which the testator devised all his land to his two sons, George and Solomon, subject to the payment of \$1,500 to Catharine Rebhau. This will was duly admitted to probate. On July 6, 1883, Solomon Mueller, appellee here, filed in the St. Clair circuit court the present bill against appellant, Catharine Rebhau, Emil Rebhau, Margarite Rhinehardt, and Edward Abend, who, prior to the probate of the last will, had been appointed administrator of the estate of said George C. Mueller, deceased, substantially setting up the foregoing facts, and praying that said will (1855) stand as the last will and testament of the said George Christian Mueller; that the deed from Catharine and Emil Rebhau to said Knobloch be set aside as being a cloud upon complainant's title; that all proceedings in partition regarding said land, and the stating of an account of rents and profits now pending in the appellate court, and all actions commenced by said Edward Abend as aforesaid, and by said Knobloch, be no further prosecuted; and that the defendants, their attorneys, agents, etc., be perpetually enjoined from taking any further steps in regard to said action. An injunction was granted as prayed in the bill of August 25, 1883. Appellant answered, setting up that he had purchased in good faith and paid \$5,050 for the interest of Mrs. Rebhau in said

land, without any notice of any adverse claim or title, and also setting up that complainant, Solomon, is estopped, by the decree of partition rendered by his consent in open court, from disputing complainant's title. At the September term, 1885, of said circuit court, a decree was entered perpetually enjoining the prosecution of said suits, and setting aside the deed from Mrs. Rebhau and her husband to appellant as a cloud on complainant's title. From this decree appellant, Knobloch, alone appealed.

W. C. Kueffner and James M. Dill, for appellant. A. R. Halbert, for appellee.

SHOPE, J., (*after stating the facts as above.*) The bill in this case seeks to remove, as a cloud upon the title of appellee, Solomon Mueler, derived under the will of 1855, the deed of Catharine and Emil Rebhau to appellant; and restrain by injunction the prosecution of an action of ejectment brought by appellant to recover the land partitioned to Catharine Rebhau in the proceedings instituted by her for partition of the lands of which her father died seized, and to enjoin a certain trespass suit brought for alleged trespasses upon said land by appellee, and to restrain Mrs. Rebhau from collecting \$1,638.97, decreed as rents and profits in said partition proceeding. Mrs. Rebhau not having appealed from the decree against her, the latter branch of the case made by the bill is not before us. When the instrument dated March 14, 1870, purporting to be the last will and testament of George C. Mueler, who died March 20, 1870, was set aside upon bill filed for that purpose, it was supposed by all the parties in interest that his estate had descended to his heirs at law as intestate estate, and letters of administration were granted accordingly. All the parties acquiesced in this condition of affairs, and rested in the belief that the property had so descended until the discovery, in March or April, 1883, 13 years after the death of the ancestor, of the will of the 9th of March, 1855, by which the estate in question was devised to George and Solomon Mueler. The good faith of the parties is not questioned, no fraud or misconduct is alleged, or laches imputed or imputable to any one, on account of the delay in the production of this will, or in any of the proceedings had in respect to the real or personal estate prior to its discovery. When Catharine Rebhau, daughter and one of the heirs at law of said George C. Mueler, deceased, on the 22d day of March, 1879, filed her bill for partition of the real estate of which said George C. had died seized; and when Solomon Mueler filed his answer, admitting the intestacy of his father and consenting to the partition to Mrs. Rebhau and Mrs. Rhinehardt, his sisters, each a one-fourth part or interest in the land of which their common ancestor died seized, and consented to the decree therefor, the several parties in good faith believed the facts alleged in her bill to be true, and that the land had descended to the four children of George C. Mueler, deceased, in equal parts in fee. It is also equally clear that when appellant, Thomas Knobloch, purchased the interest of Catharine Rebhau in said land, and paid her therefor \$5,050, that he did so in good faith, relying upon the title of said Catharine as found and declared by the circuit court of St. Clair county in said partition proceeding by the consent of appellee. Upon the production and probate of the will of 1855, in April, 1883, it became manifest that the title to said land had not in fact so descended to the heirs at law of said George Christian Mueler; but by virtue of that will the legal title thereto, at the death of the testator, vested in the devisees, George and Solomon Mueler, and that by the last will of said George Mueler, who died February 29, 1875, the legal title to the whole of said land became vested in appellee, Solomon Mueler. It is apparent that all parties, while acting in good faith, were mistaken, and that the decree of the circuit court, finding one-fourth interest of said land in fee in Catharine Rebhau, would not have been entered had the court or parties been aware of the true condition of the title to the land.

It is said by counsel for appellee that this bill may be maintained, if upon no other ground than as a bill in the nature of a bill of review. This is manifestly a misapprehension. In neither the frame of the bill, or in the prayer, has the pleader attempted a review of the decree rendered in the partition proceeding of *Rebhau v. Mueller et al.* The bill sets out the filing of that bill, the decree of partition, and for rents and profits; but it nowhere seeks to reopen that decree, or reverse, impeach, or alter it, or to procure a rehearing of that cause upon the alleged newly-discovered matter. The prayer is to remove appellant's title, derived thereunder, as a cloud upon appellee's title, and to restrain proceedings under that decree without reopening it or setting it aside. The whole scope of the bill is to procure the relief sought upon the equitable ground of mistake of fact, as to the title at the time of the entry of that decree, without in any way interfering with it by seeking to enjoin proceedings under it. The two grounds upon which a bill of review, or bill in the nature of a bill of review, will lie, are: Errors of law, appearing on the face of the decree, without further examination of facts; and new fact or facts, discovered since the decree, which are material, and which it was impossible for the party to produce at the time the decree passed. 2 Daniell, Ch. Pr. 1576; 2 Smith, Ch. Pr. 50. Bills containing newly-discovered matter are in the nature of original bills, in so far as such new matter presents an issuable fact, and therefore admits an answer and the formation of an issue; but only so far as it relates to the truth and sufficiency of the alleged new matter, and its admissibility for the purpose of affecting and opening the original decree. Authorities *supra*; *Buffington v. Harvey*, 95 U. S. 99. The purpose of a bill of the character named is to procure a reversal, alteration, or explanation of the former decree. The bill should state the former bill, the proceedings thereon, and the decree rendered by the court, the grievance under the decree of the party presenting the bill, and the error of law or new matter discovered upon which it is sought to reverse, reopen, or impeach it. In bills of review, if the former decree has not been carried into execution, the prayer may simply be that the same may be reversed and set aside; if the former decree has been executed, that the decree be reversed, and the complainant be restored to his former condition or *status*, as if it had not been rendered. In bills in the nature of bills of review, instead of praying the reversal of the former decree, the prayer should be that the cause be reheard in respect to and considering the new matter at the same time it is reheard upon the original bill, etc. 2 Daniell, Ch. Pr. 1581, 1582.

The decree of partition rendered at the February term, 1880, and the subsequent decree approving the report of the commissioners rendered at the May term, 1881, of said court, remain unreversed and in full force and effect. The court had jurisdiction of the subject-matter and of the parties, and rendered its decree determining the several interests of the complainant Catharine Rebhau and appellee, by the consent of appellee, as appears by his answer filed in said cause, and by the recitals in said decree of partition. Decrees of courts of chancery, in respect of matters within their jurisdiction, are as binding and conclusive upon the parties and their privies as are judgments at law; and a decree by consent in an amicable suit has been held to have an additional claim to be considered final. *Allason v. Stark*, 9 Adol. & E. 255. Decree so entered by consent cannot be reversed, set aside, or impeached by bill of review or bill in the nature of a bill of review, except for fraud, unless it be shown that the consent was not in fact given, or something was inserted, as by consent, that was not consented to. 2 Daniell, Ch. Pr. 1576; *Webb v. Webb*, 3 Swanst. 658; *Thompson v. Maxwell*, 95 U. S. 391; *Armstrong v. Cooper*, 11 Ill. 540; *Cronk v. Trumble*, 66 Ill. 432; *Haas v. Society*, 80 Ill. 248; *Atkinson v. Manks*, 1 Cow. 693; *Winchester v. Winchester*, 121 Mass. 127; *Allason v. Stark*, 9 Adol. & E. 255; *Earl of Hopetoun v. Ramsay*, 5 Bell, App. Cas. 69. See, also, note to *Duchess of Kingston's Case*, 2 Smith,

Lead. Cas. *826 *et seq.* It is the general doctrine that such a decree is not reversible upon appeal or writ of error, or by bill of review for error. *Armstrong v. Cooper*, 11 Ill. 540. No exceptions were taken to the decree of partition, or attempt made in the cause in which it is rendered to vacate or modify it. It is undoubtedly true that, as between the parties and those chargeable with notice, courts of equity will entertain jurisdiction and grant relief, on proper bill filed, from the injurious effects of admissions and confessions of material facts, made in course of judicial proceedings, in ignorance of the rights of the party making them, where he has been guilty of no negligence, either in the discovery of the fact, or in applying to the proper forum for relief; but such relief can only be granted upon such grounds and for such reasons as would authorize the court to set aside agreements or contracts entered into by the parties. *Attorney General v. T'omline*, 7 Ch. Div. 388; *Millsbaugh v. McBride*, 7 Paige, 509; *Furnival v. Bogle*, 4 Russ. 142; *The Hiram*, 1 Wheat. 440. But it is apparent that the decree in the partition proceedings can only be attacked, reversed, annulled, or set aside by direct proceedings in that case, or upon bill of review, or bill in the nature of a bill of review.

If this were not so, however, there is another ground upon which the decree must be reversed. It is the well-settled doctrine of this court that no relief will be granted in equity, in cases of this sort, injuriously affecting intervening rights acquired in good faith, after the rendition of a judgment or decree, and in reliance thereon. So it has been held that amendments may be made in judicial proceedings, but not so as to affect the intervening rights of third persons accruing prior to such amendment. *Shirley v. Phillips*, 17 Ill. 473; *Coughran v. Gutcheus*, 18 Ill. 390; *Sickmon v. Wood*, 69 Ill. 829; 1 Story, Eq. Jur. 165. Relief will not be granted to the prejudice of appellant, if he has an equal equity with appellee, and is equally entitled to the protection of the court. 1 Story, Eq. Jur. 165. As already seen, all the parties to the partition proceedings supposed in good faith that Mrs. Rebhau was the owner in fee of the undivided one-fourth of the lands of which her father died seized, and that on the 8th day of March, 1881, appellant purchased her interest in such lands for a full and adequate consideration, without notice, actual or constructive, of any defect in her title, and in good faith. All the elements to constitute him a *bona fide* purchaser are present; that is, a valuable consideration paid, absence of notice, and presence of good faith. 2 Pom. Eq. Jur. § 745. His grantor had, by a court of competent jurisdiction, in a proceeding instituted to find and declare her interests in these lands, been adjudged, by the consent and admission of appellee, to be the owner in fee of the undivided one-fourth part thereof, and there was nothing in the record or elsewhere apparent to disclose that she, who was thus clothed with apparent legal title, was not the owner in fact of that interest in the land. Nor is it shown or claimed that further inquiry would then have disclosed anything to cast suspicion upon her title. The defense of a *bona fide* purchaser had its rise in equity, upon the doctrine that a court of equity acts upon the conscience of him against whom relief is sought; and if he has done no wrong, or it would be unconscientious or inequitable to grant the relief, the court will refuse to exercise its jurisdiction. If, in equity and good conscience, the complainant should not obtain what he seeks, or the defendant ought not to suffer what is demanded, then the court will withhold its power. In theory, it is said, the defense of a *bona fide* purchaser presupposes some defect in purchaser's title; but the court refuses to investigate the validity of the title of either party, upon the ground that good conscience does not dictate that he who has dealt honestly, in good faith, and without notice, should be deprived of the legal right he has thereby gained. *Id.* § 739. There was formerly much apparent conflict in the adjudged cases as to when the defense of a *bona fide* purchaser would be availing. In *Phillips v. Phillips*, 4 De Gex, F. & J. 208, Lord WESTBURY grouped the cases in which a *bona fide* purchaser will be pro-

ected into three general classes, and reduced the doctrine to a formula, which it is said by Pomeroy, (2 Eq. Jur. § 742,) has been accepted, by subsequent judges almost without exception. The doctrine thus formulated, so far as applicable here, is: "*Thirdly*, when there are circumstances which give rise to an equity, as distinguished from an equitable estate,—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake,—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the court will not interfere."

Without extended discussion, it is apparent that the bill here filed seeks relief ancillary to the legal estate of appellee. The purpose of the bill is to remove the deed to appellant as a cloud upon appellee's legal title, and to enjoin the assertion of rights by appellant thereunder. The right to the relief sought exists, if at all, upon the equity arising out of the alleged mistake as to the title to said land in the grantor of appellant. This brings the case directly within the rule above given, which is sustained by the weight of modern authority; and, if appellant has made out his defense as *bona fide* purchaser, he should have prevailed in the court below. The decree of partition, as seen, was rendered by a court of competent jurisdiction, having jurisdiction of the person and of the subject-matter, and by appellee's consent. Appellant without notice, for full value, and in perfect good faith, acquired the title, sought to be removed as a cloud upon appellee's title, from the party found and declared by that decree to be the owner, and we can perceive no principle upon which a court of conscience can hold that appellant shall lose in consequence of the mutual mistake, rather than appellee. It cannot be said that the equities of appellee are superior to those of appellant in respect of the title thus acquired, and, the equities being equal, the court will give no assistance to the legal title, (2 Pom. Eq. Jur. § 742, and cases cited,) but will remit the complainant to his remedy at law.

It is said, however, that, at the time appellant purchased, the report of the commissioners had not been confirmed by the court, and that he purchased subject to having the interest of his grantor, as found by the commissioners, set aside. It is true that exceptions to the report of the commissioners were then pending, but none of the exceptions questioned the right or title of Catharine Rebhau to the undivided one-fourth part of the real estate of which her father died seized. Such exception related simply to the manner of partition, and the conduct of the commissioners in making the same. There was nothing therein to put appellant upon notice or inquiry as to the title of Mrs. Rebhau. He bought subject, as a matter of course, to having the amount set off to Mrs. Rebhau changed or diminished by subsequent action of the commissioners, or to have their report set aside by the court; but his purchase was of her interest in the land, which was conceded by appellant and declared by the court to be a one-fourth interest therein.

It is also said by counsel for appellee that appellant may rely upon the covenants of warranty in his deed from the Rebhaus, and therefore the equities are with appellee. It is not shown whether Mrs. Rebhau, and her husband, who joined in the execution of said deed, are solvent or insolvent, and we perceive no principle, nor is any suggested by counsel, upon which appellant should be driven to resort to his legal remedy against his grantor for indemnity from loss, especially in view of the fact that it is not shown that such remedy would be availing. It will not be proper for us to here discuss or determine the right of appellee to the money paid by appellant for the land in question, or as to whether he has any remedy in respect of the same.

We are of opinion that the defense of a *bona fide* purchaser has been maintained, and, upon both of the grounds indicated, the right of appellee to the relief sought should have been denied, as against appellant, Knobloch, and the bill dismissed as to him. For the error of the court in this regard, the decree, in so far as it affects the appellant, Knobloch, will be reversed, and the

cause remanded to the circuit court of St. Clair county, with instructions to enter a decree in conformity with this opinion, dismissing the bill as to said appellant.

(123 Ill. 310)

SMYTH v. NEFF.

(Supreme Court of Illinois. January 20, 1888.)

1. **TAXATION—TAX TITLES—NOTICE OF REDEMPTION—FAILURE TO SERVE ON MORTGAGEE.**
Under Rev. St. Ill. 1874, (section 216 of the revenue act,) as amended by act 1870, (Sess. Laws, p. 256,) passed in pursuance of the constitutional provision that "the general assembly shall provide by law for reasonable notice to be given to the owners or parties interested * * * of the * * * sale of property for taxes, and when the time of redemption will expire," and providing that every purchaser of land at a tax sale shall serve notice of such purchase on "the owners of or parties interested in said land," a tax deed is not rendered invalid by failure to serve the statutory notice upon a mortgagee, although his mortgage appears on record unsatisfied at the time specified for giving notice, the phrase, "parties interested," not being sufficiently definite to designate any particular class of persons.
2. **APPEAL—REVIEW—OBJECTIONS NOT RAISED ON FORMER APPEAL.**
In ejectment, where plaintiff claims under a tax deed, evidence of an error in the service of notice on defendant, of the time of redemption goes to the validity of the deed, and cannot be considered on a second appeal where the former decision was that the deed "should have been held good," although it does not appear that objection to the proof of service of such notice was raised on such first appeal.
3. **SAME.**
On a second appeal, the former decision is conclusive as to all questions there considered upon which the evidence is the same.
MULKEY, J., dissenting.

Appeal from circuit court, Alexander county; D. J. BAKER, Judge.

Ejectment brought by Peter Neff against Robert Smyth to recover certain city lots which plaintiff claimed under a tax deed dated June 18, 1881, founded upon a tax sale made June 17, 1879, under a tax judgment rendered May 28, 1879, for taxes for the year 1878 and prior years. Judgment for defendant, and plaintiff appealed, when the judgment was reversed, and the cause remanded. On the second trial, plaintiff obtained judgment, and defendant now appeals. For opinion on former appeal, see *Neff v. Smyth*, 111 Ill. 100. *Lansden & Leek*, for appellant. *Green & Gilbert*, for appellee.

SCOTT, J. This case was before this court at a former term, and is reported as *Neff v. Smyth*, 111 Ill. 100. A sufficient statement of the facts appears in the opinion of the court then delivered, and no restatement is now necessary. It appears from the bill of exceptions in this case the evidence in the present record is precisely the same as in the former record except in two particulars: (1) There is now some parol testimony concerning the service of the notice as to the expiration of the time of redemption of the lots from the tax sale not contained in the former record; and (2) there was introduced on the trial a mortgage made by defendant, Smyth, to Michael Hoar on one of the lots involved, that was not contained in the record when the case was before this court on the former hearing. Upon all other questions in the case the evidence is exactly the same, and as to them the former decision is conclusive. Concerning the points considered by the court in its former opinion, the discussion must now be regarded as forever closed; and the decision, adverse to defendant, must stand. All those matters are now *res judicata*, and this court has neither rightful authority nor any inclination to reconsider them. The rule on this subject is so well settled that it is not necessary to do more than to cite a few of the cases in this court where it is declared: *Rising v. Carr*, 70 Ill. 596; *Newberry v. Blatchford*, 106 Ill. 584.

The additional parol testimony found in the present record, as to the service of the notice on defendant as to the time of redemption, is a matter of no consequence. It does not change the case in the slightest degree in that re-

spect from what it was in the former record. Precisely the same error, if any, existed in the affidavit itself, and in the proof of service of notice in the former record, as now insisted upon. It does not appear from the opinion of the court that any objection was then taken either to the sufficiency of the affidavit made to procure the deed, or to the proof of service of notice. The objection now urged goes to the validity of the deed; and, if the same points were raised by the former argument of the case, they must have been decided adversely to defendant, for the court was of opinion the "objections made against the tax deed were not sufficient to invalidate it, and that it should have been held good." So, in either event, whether objections were taken to the sufficiency of the affidavit made to procure the deed, or as to the proof of service of notice of redemption, such objections cannot now be entertained. To permit that to be done would simply be to reconsider the case upon exactly the same record. This is not allowable under any practice that has ever attained in this state. Should the errors now alleged to exist be held to be well assigned, it would place this court in the absurd position of holding the tax deed good at one term of court, and at a succeeding term holding it bad, upon the same identical record. This court will not even enter upon the consideration of a case where such results might follow. In all such cases the rule *stare decisis* should be observed. It is not necessary to look elsewhere than to decisions of this court for authorities declaring this doctrine. In *Newberry v. Blatchford*, 106 Ill. 584, it was ruled that the decision of a court of last resort, having jurisdiction of the parties and the subject-matter of the litigation, definitive in its character, comprehending the whole merits of the controversy, under the known rule of law, is obligatory upon and conclusive as to the same parties everywhere,—in this court as well as in all other courts. This case follows closely other cases in this court, so that the doctrine is now as well settled as is any branch of the law. *Hollowbush v. McConnel*, 12 Ill. 203; *Reed v. West*, 70 Ill. 479; *Smith v. Brittenham*, 94 Ill. 624; *Rising v. Carr*, 70 Ill. 596. The case of *Ogden v. Larrabee*, 70 Ill. 510, is an authority exactly in point. On the second appeal in that case, the alleged error complained of was admitted to have existed in the first record brought up; but the attention of this court was not called to it, and it was contended it might be considered on the second appeal because the court had expressed no opinion in regard to it. But the position taken was not sustained, and it was said to consider the suggestion of error on the second appeal would introduce a pernicious practice not heretofore adopted in this state. The rule has its foundation in reason and the policy of the law that there must be an end of litigation somewhere, and there would be none if parties were at liberty, after a case had received a final determination of a court of last resort, to litigate the same matter anew, and bring it again and again before the court for decision. Another rule, equally well settled, is that a second appeal, where the first decision covers the merits of the controversy in all its bearings, brings up only the subsequent proceedings had after the mandate of the court of last resort was sent down. This doctrine is fully declared in the cases *ut supra*. It is seen, the former decision in this case covered the whole merits of the controversy; for it declared the tax deed should "have been held good;" and that, of course, would be conclusive as to the rights of the litigants as the case was then presented.

The only thing that occurred after the mandate from this court was sent down at all affecting the merits of the controversy was the introduction of the mortgage made by defendant to Michael Hoar, which embraced one of the lots involved; and the effect of that evidence alone remains to be considered. The mortgage was made on the 27th day of June, 1874, to secure a note for \$750, due in 12 months, with interest at the rate of 10 per cent. per annum. It was entered satisfied on the record by the mortgagee on the 23d day of April, 1881. That was after the service of the notices as to the expiration of the

time for redemption, but before the time for redemption did in fact expire. The question made, is that notice as to the expiration of the time of redemption should have been given to the mortgagee, as well as to the owner. There is no pretense that the mortgagee was served with notice by the purchaser at the tax sale, either by himself or by his agent, and it is said the omission to give such notice is fatal to the validity of the tax deed. It will be seen at once the question made is important, and one of much seeming difficulty. Section 5, art 9, Const. 1870, declares: "The right of redemption from all sales of real estate for the non-payment of taxes * * * shall exist in favor of the owners and persons interested in such real estate for a period of not less than two years from such sales thereof." It is obvious the owners, and whoever may be included within the phrase, "persons interested in such real estate," all come within this clause of the constitution, and shall have the right, at any time within two years, to redeem any real estate from a sale for taxes or special assessment,—a right of which such owners and parties interested cannot be deprived by any action or non-action on the part of the legislature. It is not, however, germane to the present inquiry who may be meant by "persons interested in such real estate," as those terms are used in the constitution, for the reason no one is here seeking to redeem the real estate involved in this litigation from the sale for taxes. It is further provided, in the same section of the same article of the constitution, the "general assembly shall provide by law for reasonable notice to be given to the owners or parties interested, by publication or otherwise, of the fact of sale of the property for such taxes or special assessments, and when the time of redemption will expire: provided, occupants shall in all cases be served with personal notice before the time of redemption expires." Accordingly, the general assembly has provided by law for what is deemed reasonable notice to owners of real estate sold for taxes or special assessments. Section 216 of the act of 1872, entitled "Revenue," (Rev. St. 1874,) as amended by the act of 1879, (Sess. Laws 1879, p. 256,) provides, every purchaser, or assignee of such purchaser, of any land, or town or city lot, for taxes or special assessments, shall serve, or cause to be served, a written or printed, or partly written or partly printed, notice of such purchase on every person in actual possession or occupancy of such land or lot; also the person in whose name the same was taxed or specially assessed, if, upon diligent inquiry, he or she can be found in the county; also the owners of or parties interested in said land or lot, if they can, upon diligent inquiry, be found in the county,—at least three months before the time of redemption expires. The affidavit filed to procure the tax deed in this case shows notices were served upon defendant, Robert Smyth, who was alleged to be the owner and in possession of the lots for which a deed was asked, and the party in whose name the property was assessed, and upon other persons alleged to be in possession, in the manner and within the time prescribed by this section of the statute, which notices contained everything the law requires shall be stated as to the purchase of such property for taxes, and as to the expiration of the time of redemption. It will be noticed the affidavit makes no mention whatever of Michael Hoar as a party interested in such real estate, as mortgagee or otherwise. Conceding, as must be done, as the case now comes before this court, the affidavit in all other respects is sufficient, the question is squarely made whether the omission to give the statutory notice to the mortgagee, whose mortgage appeared on the record unsatisfied or discharged at the date notices should be served, or to show, by the affidavit for a deed, such facts as would excuse the giving of such personal notice, would render the tax deed invalid. The solution of the question involves a construction of the statute on this subject. The expression, "or parties interested in said land or lots," as used in the statute, is both obscure and indefinite. Exactly what it means, is not understood; and who are intended to be included within its meaning is a matter of the merest conjecture.

If it were the legislative intention, by its use, that persons that might be interested in the property sold, other than the owner when he should be served with the notice required by the statute, should also have a like notice, it is to be regretted that intention was not more clearly manifested, and more apt words used to designate such persons. Who may be said to be "interested" in real estate sold for taxes or special assessments? Most directly, it would be the owner, or the holder of a certificate of purchase at a judicial sale, or any incumbrancer, such as a mortgagee, judgment or attachment creditor; or, more indirectly, mechanics or material-men having liens under the statute; or, still more remotely, in case of infants or insane or feeble-minded persons, guardians or conservators. It would hardly be contended it was within the legislative intention, by the use of the words in the statute, that every person interested in real estate sold for taxes, directly or remotely, should have personal or constructive notice of the matters contained in this section. But who shall determine who is interested in the real estate sold, in the sense the term is used in the constitution, and who is not so interested? That is evidently the duty of the general assembly, under the injunction laid upon it by the constitution to provide by law for "reasonable notice to be given to owners or parties interested." The present statute on that subject must have a reasonable construction, otherwise it would be incapable of observance. Let us inquire, then, whether a reasonable and fair construction of this expression in the statute makes it imperative, when the owner is himself served with the statutory notice, that other persons interested with him in the same property shall also have the same notice. It will be noted, the words "or parties interested" are taken literally from the constitution. As used in that instrument, they are appropriate and well selected. It has been seen, the right of redemption from sales of real estate for taxes or special assessments was secured absolutely to "owners and persons interested in such real estate," for a period of two years. Then follows that provision which enjoins upon the general assembly the duty to provide by law for reasonable notice to "owners or parties interested," as should be deemed best to advise the citizen that his interests in the property sold were about to be cut off. It was a direction to the legislature to provide for reasonable notice to the owner, or to any other person who might appear to be interested in such real estate as the general assembly might designate by law. Giving that meaning to the expression, "or persons interested," as used in the constitution, the words are appropriately employed, and no other words could have been better selected to point out the duty of the legislature in that respect. The difficulty is, the general assembly has provided by law for reasonable notice to the owner of property sold for taxes, but has gone no further. No other persons, as a class or as individuals, are designated who shall have the same statutory notice as the owner. As has been seen, the phrase, "or parties interested," might include persons directly or remotely interested, and the number might be very large, and often it would be difficult, even if at all practicable, to ascertain every one that might be interested in the property sold. No doubt, what the framers of the constitution meant, was the general assembly should provide by law that reasonable notice should be given to the owner, or to any other person that had a specific or other interest in the property, as should be deemed proper in legislative discretion. That is its clear meaning, and nothing more. The general assembly has provided by law for reasonable notice to the owner, but has designated no other persons who might be directly or remotely interested in the property upon whom notice should be served. It is therefore apparent, when the purchaser at tax sale has given the proper notice to the owner, he has complied with the statutory requirements in that respect; for no other "parties interested" are designated by law, either as a class or as individuals, upon whom he could serve notice. Had mortgagees or judgment creditors or other persons having a lien on such property of record been designated by

name or as a class, such persons could have been readily ascertained by an examination of the public records. But, as the statute now is, the purchaser cannot know, from any direction given, to whom he is expected to give such notice as the statute requires other than to the owner. In that respect, the statute must be regarded as meaning precisely the same as it would mean if the words, "or parties interested," had been omitted. In this case, the owner was served with the statutory notice within apt time, and that is deemed a sufficient compliance with the law in this respect. The judgment of the circuit court must be affirmed.

MULKEY, J., (*dissenting*.) I do not concur in this opinion, or the conclusion reached by the majority of the court. I think, when Smyth took a new trial under the statute, the effect of it was to completely annul the judgment and proceedings in the case, and place the defendant in the same position as if no trial had ever occurred or judgment rendered, and that his rights in this respect are not at all affected by the fact that the former judgment was affirmed by this court.

(125 Ill. 307)

LESTER *et al.* v. BERKOWITZ.

(*Supreme Court of Illinois. June 16, 1888.*)

WRIT OF ERROR—WHEN LIES—INTERLOCUTORY ORDER.

An order for the production of books and papers for inspection by opposing party and counsel is not a final order, from which a writ of error will lie.

Error to circuit court, Cook county; R. S. TUTHILL, Judge.

Assumpsit by Samuel Berkowitz against John T. Lester, Roswell A. Peters, and Edward W. Bangs, trading as John T. Lester & Co., to recover profits on purchase and sale of certain stocks through defendants as brokers. From an order requiring defendants to produce in court and place in possession of the clerk certain books and papers for the inspection of plaintiff and his counsel, defendants bring error.

John S. Cook and John N. Jewett, for plaintiffs in error. *Thomas J. Sutherland*, for defendant in error.

SCOTT, J. The motion made by defendant to dismiss the writ of error in this case must be allowed to prevail. The order of the circuit court upon which error is assigned is not final in the sense that an appeal may be taken from it, or writ of error may be sued out to review it. It is simply an interlocutory order, made by the court in the progress of a suit at law, and is in no sense definitive, as that term is used in the law. It is an order made, under power thought to be conferred by the statute, upon defendants to place certain books, in which the business transactions of defendants with plaintiff and other persons are recorded, in the possession of the clerk of the court, that they may be inspected by plaintiff and his attorney, in order that they might prepare for the trial of the cause. It was the privilege of defendants either to obey the order or stand in defiance of the power of the court. Had the court attempted to enforce obedience to its order by the imposition of a fine in a sum of money with an order for an execution, or by a definitive term of imprisonment, as for contempt of court, the judgment of the court imposing such fine or imprisonment would be final, and from which an appeal might be taken, or to which a writ of error would lie. That would conform exactly with the rule stated by this court in *Blake's Case*, 80 Ill. 523. On the reviewing of such a judgment of the court, that might deprive defendants either of their property or their liberty, the propriety of the preliminary or interlocutory order could be considered; otherwise not. The writ of error will be dismissed.

(125 Ill. 519)

CHRISTIN v. ERWIN.

*(Supreme Court of Illinois. June 16, 1888.)***1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.**

In an action for personal injuries caused by negligent driving by defendant's servant, where the court instructed the jury that if they find, from the evidence, that neither plaintiff nor the person who was driving the buggy in which he sat was guilty of any negligence which contributed to the injury, they should find defendant guilty, defendant cannot complain that the question whether plaintiff exercised ordinary care to avoid the accident was not submitted to the jury.

2. SAME.

In an action for personal injuries caused by defendant's negligence, an instruction that, although plaintiff had been guilty of negligence, if it was slight as compared with that of defendant, it would not prevent his recovery, is not error.

3. DAMAGES—PERSONAL INJURY.

In an action for personal injuries, where the court, on the part of plaintiff, instructed the jury that, if they found that the injury was caused by the negligence of defendant's servant, they should find defendant guilty, and assess plaintiff's damages; and further instructed them, of its own motion, that they should carefully consider all the evidence, and award only such damages as they believed plaintiff fairly and justly ought to receive,—defendant cannot complain that the jury were improperly instructed as to damages.

Appeal from appellate court, First district.

Action by James Erwin against Arthur Christin for personal injuries alleged to have been caused by negligent driving by defendant's servant. The third instruction asked by plaintiff, and given by the court, was: "If the jury believe from the evidence that the plaintiff was injured, as charged in the declaration, and further find from the evidence that neither he nor the person who was driving the buggy in which he sat was guilty of any negligence which contributed to said injury, and further find from the evidence that the defendant, by his servant, was guilty of negligence, as charged in the declaration, and that such negligence, if any, on the defendant's part, caused said injury to said plaintiff, then the jury should find the defendant guilty, and assess the plaintiff's damages." To this the court added, of its own motion: "The jury are further instructed that if, after carefully considering all the evidence and the instructions of the court, they find that the defendant is liable, yet, in determining the amount of damages they ought to award, they are not bound to believe or accept as true all the testimony of the plaintiff as to the extent of the injury he has sustained, or in any other particular, but the jury should carefully consider all the evidence in the case, including the testimony of the physicians who were examined on behalf of the plaintiff, and they should award only such damages, should they find the defendant guilty, as, from all the evidence, they believe the plaintiff fairly and justly ought to receive, and the defendant ought to pay, on account of the injury." The fourth instruction on the part of plaintiff was: "If the jury believe from the evidence that the plaintiff was injured as charged in the declaration, and that he or the person who was driving the buggy in which he sat was guilty of some negligence which contributed to said injury, but that said negligence of the plaintiff, or of said person driving said buggy, if any, was slight, and that the defendant, by his servant, was guilty of negligence, as charged in the declaration, and that said negligence, if any, of said defendant, caused said injury to the plaintiff, and that said negligence, if any, of the defendant was gross, and the negligence of the said plaintiff, or the person driving said buggy, was slight when compared therewith, then the jury are instructed that such slight negligence on the part of the plaintiff, or the person driving said buggy, if you find from the evidence it was slight, will not prevent the plaintiff from recovering in this case." Judgment for plaintiff, and defendant appeals.

Grant, Brady & Northrup, for appellant. *Brandt & Hoffman*, for appellee.

SCOTT, J. This suit was brought in the circuit court of Cook county by James Erwin against Arthur Christin, and was to recover for personal injuries alleged to have been caused by the negligence of defendant's servant. It seems plaintiff was in a buggy with another man; and as they were riding south on Desplaines street, at the intersection of and crossing of Van Buren street, they were run into by the horse and wagon of defendant, then being driven by his servant, by which plaintiff sustained severe injuries. To the declaration, alleging, with the usual fullness and formality, the facts upon which plaintiff based his right of action, defendant pleaded the general issue. On the trial the jury found the issues for plaintiff, and assessed his damages at \$2,500. The motion to set aside the verdict and for a new trial was overruled, and the court pronounced judgment on the verdict. The judgment on the appeal of defendant was affirmed in the appellate court of the First district, and defendant brings the case to this court on his further appeal. As the case comes before this court, there are and can be but few questions in the case that admit of any discussion. Of course, the finding of all controverted facts by the trial and appellate courts is conclusive on this court, under the statute. There is evidence tending to show, and the jury must have found, that plaintiff was injured by the gross misconduct of defendant's servant while he was engaged in the service of his principal, and that plaintiffs, at the time he sustained the injuries, was observing due care for his personal safety. These facts are not open to review in this court, and they are conclusive as to plaintiff's right to recover.

It is said the damages awarded by the jury are excessive. That is also a question of fact that cannot be reconsidered by this court. The amount of damages a party may have sustained is a question of fact, but the rule for ascertaining the damages is, of course, a question of law. On looking into the instructions given by the court, it is not seen the jury were misdirected as to the rule that should guide them in ascertaining the damages plaintiff had sustained. The third instruction of the series given for plaintiff, which is said to be erroneous as to the damages recoverable, seems to have been supplemented by one given by the court, and does not appear to contain anything objectionable when both are considered together, as no doubt they were.

The sixth error assigned on the record in the appellate court is: "The court erred in giving to the jury the first, second, third, and fourth instructions on behalf of plaintiff." The only error assigned on the record of the appellate court in this court is: "The appellate court erred in that it affirmed the judgment of the circuit court." One phase of the third instruction of the series has already been remarked upon, but it may be necessary to refer to it further on. No particular infirmities are suggested as to the first and second instructions. It is said, however, that, on reading the instructions given on behalf of plaintiff, it will be seen that in none of them was the question whether or not plaintiff exercised ordinary care to avoid the accident submitted to the jury. There could be no occasion for stating the doctrine insisted upon either in the first or second instruction; but in the third of the series the principle contended for is distinctly stated, where it is said: "If the jury find from the evidence that neither he [plaintiff] nor the person who was driving the buggy in which he sat was guilty of any negligence which contributed to said injury," in connection with other facts as to which there was evidence, then they should find defendant guilty. This is certainly a sufficiently strong statement of the doctrine which defendant wished to have applied to the facts, and the series of instructions are not open to the criticism made upon them. In the fourth instruction the court undertook to give expression to the doctrine of comparative negligence as heretofore held by this court, and it is not perceived that it contains anything hurtful to the defense. The judgment of the appellate court will be affirmed.

(125 Ill. 286)

BERDEL v. EGAN *et al.*

(Supreme Court of Illinois. June 16, 1883.)

DOWER—ACTION TO RECOVER—PROOF OF RELINQUISHMENT.

A widow brought an action for dower, denying that she ever joined with her husband in acknowledging the deed of trust under which defendant held. Defendant, after showing that diligent search had been made for the original deed, and that it could not be found, the record having been burned, introduced an abstract of title, showing that the deed, as recorded, had her name to it; also testimony that the form of deed used was one which had the statutory acknowledgment for both husband and wife. The trustee testified that he would not have made the sale unless the deed had been acknowledged in the usual mode, and it was shown that he was familiar with such business. *Held* that, 28 years having elapsed, such evidence was sufficient to overcome the denial of defendant that she ever acknowledged the deed.

Appeal from superior court of Cook county; H. M. SHEPARD, Judge.

Petition by Catherine Berdel against Peter Egan, Margretta Meyer, John B. Lanzon, James Farrell, Andrew Crawford, Adam and Mathias Raven, for dower in lands sold by her husband. Judgment for defendants, and demandant appeals.

Blum & Blum, for appellant. *Chas. S. Thornton*, for appellees.

SCOTT, J. It is alleged in the petition filed herein that demandant, on the 8th day of July, 1855, was married to Nicholas Berdel; that during such marriage he was the owner in fee-simple of the lands described in the petition; and that now, since his death, which occurred on the 23d day of March, 1883, she is entitled to dower in such lands. It is not denied that decedent was the owner of the lands during his marriage with petitioner, and the only question it is deemed important to consider is whether demandant released her dower in such lands by joining with decedent in the execution of a trust deed to Henry Greenebaum. A case having some questions analogous with those involved in this one, between petitioner and other parties, was passed upon at a former term of this court, and is *Reich v. Berdel*, 120 Ill. 499, 11 N. E. Rep. 912. In that case petitioner was allowed dower in certain land of which decedent was seized during coverture. It was held her dower was not barred or cut off by the deed to Greenebaum, for the reason it did not appear, from any satisfactory evidence in that record, she had joined with decedent in the execution of the trust deed. In the case now before this court, the trial court, upon the evidence submitted, held that demandant did join with decedent in the execution of the trust deed to Henry Greenebaum, and that her dower in the lands in this suit was released by that deed, substantially in conformity with the statute. There is much new and material evidence in the present record not found in the record in *Reich v. Berdel*. Evidence was offered in that case to prove the execution of a trust deed of the property involved, by Nicholas Berdel and petitioner to Henry Greenebaum, trustee for Elias Greenebaum, a sale thereunder, and subsequent conveyances of the title to defendants in that suit. Neither the original nor a copy of this deed was produced. The evidence offered was held inadmissible, because the proper foundation was not laid for the introduction of secondary evidence of the contents of that deed. It was said by the court the deed was last in the possession of Elias Greenebaum, and for aught that appeared in evidence it might be there yet, as it was not shown he made any search for it. The difficulty found to exist in the former case has all been removed by the additional evidence contained in the present record. It is now proved the deed, when last seen, was most probably in the possession of Henry Greenebaum. Since the trial in the former case, he has made most diligent search for it in every place where there was the slightest probability it would be if it was still in existence, but without success. The witness states facts that show, past all reasonable doubt,

the trust deed must have been destroyed by the destructive fire which occurred in Chicago in 1871, and which destroyed all record of prior deeds. Thus it is seen a sufficient foundation was laid in this case for the introduction of secondary evidence as to the contents of the trust deed to Greenebaum. In this particular the cases are wholly unlike. It was also said in the opinion of this court in the former case, but even if the evidence were admissible, it could not be said there was error in not holding it to be sufficient to prove petitioner had released her dower pursuant to the statute then in force. Petitioner had testified in that case, as she has done in this case, that she had never executed or acknowledged the trust deed, and the evidence found in that record was not thought to be sufficient to overcome her express denial. Here again the cases are unlike. The secondary evidence of the contents and of the execution and acknowledgment of the trust deed shows with sufficient certainty that petitioner joined with her then husband in its execution, and acknowledged the same substantially in compliance with the statute then in force. The abstract of title in the office of Handy & Co., which was introduced in evidence, shows the trust deed as recorded had her name to it; that is, that it purported to have been executed by Nicholas Berdel and his wife. It is also shown the form of the trust deed was one of the blanks used by Greenebaum in his business. These forms contained a release of dower in the body of the deed, and had attached the usual statutory form of acknowledgment for both the husband and wife. Henry Greenebaum, since his recollection has been refreshed by much reflection on the matter, is quite positive the trust deed had an acknowledgment both of the husband and wife, certified by an officer authorized to take acknowledgments of such instruments. He says he would not have made the sale under the trust deed had it not been executed and acknowledged in the usual mode. He was familiar with such business, and now states he has no doubt he examined the deed, and that it was acknowledged before a proper officer, as the statute required. It is true he cannot now remember the name of the officer, nor the capacity in which he acted. It is now nearly 30 years since he made the sale under the trust deed, and it could not be expected any one could remember every detail of that transaction; but the witness is positive the trust deed was acknowledged by both the husband and wife, and had the certificate of a proper officer to that effect. Other testimony strengthens the testimony of Henry Greenebaum as to the contents of the trust deed, and as to the fact it was acknowledged by both grantors before some proper officer. On the whole evidence, when closely considered, it cannot be said it was error in the trial court in this case to hold it overcame the denial of petitioner that she signed and acknowledged the trust deed under which the title passed from decedent, and that her dower in the lands in controversy was released by it to her then husband's grantee. Conceding, as it is thought must be done under the evidence, that the trust deed had attached to it a certificate of acknowledgment by an officer authorized by law to take acknowledgments of such instruments, that fact of itself, after the lapse of 28 years, ought to overcome the denial of demandant that she never released her dower by the deed to Greenebaum or otherwise. It was held by this court in *Warrick v. Hull*, 102 Ill. 280, the certificate of the officer alone was sufficient to overcome the testimony of one witness introduced to impeach the certificate of acknowledgment to a mortgage. It was there said: "In taking acknowledgments of deeds, mortgages, and other instruments, an officer acts under the sanction of his official oath, and his certificate of official acts, required by law to be made, ought to be regarded as of as high a grade of evidence as testimony given under oath." In that case the officer that took the acknowledgment died before the controversy arose, and it was said: "Although deprived of the testimony of the officer on the witness stand, there remains the presumption that will always be indulged as to the certainty of an officer's acts done in the capacity in which he was serving. After his death, his certificates of his official acts

must be heard to speak for him; otherwise there would be no security for titles acquired under instruments required by law to be acknowledged before such officers." The principle of that case finds application to the facts of the case being considered. Here the name of the officer who took the acknowledgment is unknown, so that his testimony cannot be had. It is not known whether he is living or not. But there is satisfactory proof there was a certificate of acknowledgment by a proper officer attached to the trust deed, and that ought to be regarded as evidence of as high a grade as that of demandant, who alone offers her testimony, after very many years, and after all the original deeds and every record of them had been destroyed by fire, to impeach the deed under which the title passed from her then husband. On a careful consideration of the evidence in the present record, it is not thought there was any error in the trial court in holding it overcame the denial of demandant that she had never executed or acknowledged the trust deed under which defendants claim the property as relieved from the burden of her dower. The decree of the superior court will be affirmed.

(125 Ill. 352)

STEELE *et al.* v. LOVEJOY.

(Supreme Court of Illinois. June 16, 1888.)

LIMITATION OF ACTIONS—RUNNING OF THE STATUTE—APPEAL-BOND.

An action on an appeal-bond, brought within the period of limitation prescribed for actions upon bonds, is not barred by the running of the statute against the judgment appealed from.

Appeal from appellate court, First district.

R. P. Blanchard, (Thomas Dent, of counsel,) for appellants.

"It is a familiar principle that a statute of limitations shall not be applied to cases not clearly within its provisions." *Hazell v. Shelby*, 11 Ill. 9. If action on the judgment were barred, action on the bond would not be barred: for it is an independent promise under seal, based on a valuable consideration, as well as a security. *Smith v. Whitaker*, Id. 417; *Belknap v. Gleason*, 11 Conn. *160; 3 Pars. Cont. 355. *Harris v. Mills*, 28 Ill. 44, shows, in the reasoning of the court as to a debt not under seal, and a promise in a mortgage securing such debt, that the justice's judgment and the appeal-bond might be considered distinctly and separately. But, if action on the judgment were barred, action on the appeal-bond would not necessarily be barred, even though the bond were a security only; for, in that view, it is an additional and higher security, and an action upon it would lie, because statutes of limitation act upon the remedy merely, not upon the debt. *Waltermire v. Westover*, 14 N. Y. 16; Ang. Lim. §§ 7, 78; 2 Pars. Notes & B. 631.

Lyman M. Paine, (C. C. & C. L. Bonney, of counsel,) for appellee.

A bar that would defeat a recovery on the debt may be interposed to defeat a recovery on the security for such debt. *Harris v. Mills*, 28 Ill. 44; *Pollock v. Maison*, 41 Ill. 516; *March v. Mayers*, 85 Ill. 177; *Emory v. Keighan*, 88 Ill. 482; *Locke v. Caldwell*, 91 Ill. 417. Since an appeal-bond is to be regarded as a mere security for the payment of the judgment, whatever discharges the judgment discharges also the liability of the obligors on the bond. *Andrew v. Scotton*, 2 Bland, 629; *Bank v. Rogers*, 13 Minn. 407, (Gil. 376;); *Cass v. Adams*, 3 Ohio, 223; *Ellis v. Fisher*, 10 La. Ann. 479; *Ohio v. Blake*, 2 Ohio St. 147; *State v. Conroy*, 18 Ohio, 234; *Walton v. U. S.*, 9 Wheat. 651; *Cook v. King*, 7 Bradw. 549.

SCOTT, J. It appears from an amended declaration, which is the only declaration found in the transcript filed in this court, that this suit is by Lida K.

Steele and Edward T. Steele, administrators of the estate of Leonard G. Klinck, deceased, for the use of William H. Sisson, against Hebern Clafin and George T. Lovejoy, and is in debt upon an appeal-bond made by defendants—the first named as principal, and the second as surety—in the case of Leonard G. Klinck, for the use of William H. Sisson, against defendant Clafin, on the 23d day of June, 1875. It is recited in the bond, the plaintiff in the action before the justice of the peace had recovered a judgment against defendant Clafin for the sum of \$174, and costs of suit, taxed at \$5.95. The obligatory condition in the bond is in the usual statutory form, as follows: "If the said Hebern Clafin shall prosecute his appeal with effect, and shall pay whatever judgment may be rendered against him by said court upon the trial of said appeal, or by consent, or, in case the appeal is dismissed, will pay the judgment rendered against him by said justice, and all costs occasioned by said appeal, then the above obligation to be void; otherwise to remain in full force and effect." Afterwards, on the 21st day of November, 1876, the appeal secured by the filing of the bond was dismissed by the circuit court, and the plaintiff in that suit recovered a judgment for his costs in the circuit court against Clafin, taxed at the sum of \$1.50. The breach assigned is, defendant Clafin has not paid the judgment mentioned in the writing obligatory, with the interest and costs, or any part thereof. It does not appear, from anything in the transcript of the record filed in this cause, whether defendant Clafin was served with process or not. There is no default as to him, and no disposition of the case appears to have been made as to him. Only Lovejoy, the surety on the bond, appeared, and filed pleas. Before the trial, which was before the court without a jury, all pleas except the fifth and sixth of the series were withdrawn, and as to them the court overruled the demurrer that had been filed thereto by plaintiffs. The decision of the court overruling the demurrer to defendant's pleas raises all the questions of law discussed. The judgment seems to have been rendered for the penal sum named in the bond, and for damages in the sum of \$1.51; and, as that is in conformity with the sixth plea, it will only be necessary to consider that plea in the discussion of the case. The substance of that plea is as follows: "*Actio non* as to plaintiffs' entire cause of action, except said debt, and \$1.51 damages, because the supposed justice's judgment became a cause of action more than five years before commencement of this suit, and a cause of action did not accrue thereon within five years next before commencement of this suit; and so action upon said supposed writing obligatory, at the time of the commencement of this suit, and long prior thereto, to-wit, since November 21, 1881, had been barred by force of the statute, except as to said debt, and \$1.51 damages." It will be observed in the outset that this case does not fall within the principles of any case in this court construing any statute of limitation to be found in the statutes of this state on that subject. The question presented for discussion is new, and is one of first impression. The declaration is upon a sealed instrument; that is, an appeal-bond taken in conformity with the statute. The object is not to recover the penalty for the judgment, for the penalty would, of course, be discharged on the payment of any damages that might be recovered. It is manifest the action is to recover from the surety the amount of the judgment, with interest and costs which plaintiffs recovered before the justice of the peace against the principal in the bond. This the plea alleges cannot be done, for the reason the supposed justice's judgment became a cause of action more than five years before the commencement of this suit, and a cause of action did not accrue thereon within five years next before the commencement of this suit. It would, no doubt, be conceded, if this bond, being an instrument under seal, was for the absolute and unconditional payment of a sum of money, an action could be maintained upon it at any time within 10 years. The only limitation to the bringing of such action is that contained in the sixteenth section of the act entitled "Limitations," Rev. St. 1874.

The contention on the part of the defense is that, inasmuch as this action upon the bond is simply to recover the amount of the judgment before the justice of the peace, and as an action on that judgment against the defendant therein, that is, Hebern Clafin, was barred by the statute of limitation of five years before this suit was commenced, it therefore follows no action on the bond can be maintained against the surety thereon to recover the amount of the judgment described in the bond. Without stopping to inquire whether an action on a judgment recovered before a justice of the peace is barred within five years, under that clause of section 15 of the limitation act which declares all civil actions not otherwise provided for "shall be commenced within five years next after the cause of action accrues," does it follow the action on the bond in this case is for that reason also barred by the same provision of the statute? It is thought a brief discussion will show it is not, but that whatever limitation there may be to such an action is found in section 16 of the limitation act.

The plea does not allege the judgment obtained before the justice of the peace against the principal in the bond has been paid, or any part of it. Of course, if the judgment had been paid, no action could be maintained on the bond for the same claim. That is upon the principle a party cannot have at law more than one satisfaction of his debt or demand. It therefore appears the judgment stills remains unpaid. On a careful study of the plea, it will be seen it presents an immaterial issue, and is, for that reason, bad. How does it affect defendant's obligation, created by his bond, that Clafin could not be sued on the judgment obtained against him before the justice of the peace? It might be for reason other than the statute of limitation of five years that no action could be maintained on the judgment before the justice of the peace against the debtor; as, for instance, after the judgment, the debtor might have been discharged in bankruptcy. Would it be insisted such discharge of the judgment debtor would discharge the surety on the appeal-bond? Certainly not. It is simply stating an obvious fact that this defendant, Lovejoy, could not at any time have been liable in an action on the judgment before the justice against Clafin. It is not claimed that he could, and it is wholly immaterial to him whether the action against Clafin would be barred by the statute of five years. Had Clafin been sued on that judgment, it could not be known he would plead any statute of limitation; and, if judgment had gone against him by default or otherwise, would it be insisted this defendant, Lovejoy, would not be liable on his bond for the original judgment until an action thereon would be barred by the sixteenth section of the limitation act? It is obvious that whatever obligation rests on defendant, Lovejoy, arises on the bond executed by him; and what is that obligation? His covenant is that in case the appeal was dismissed, which was done, that his principal would "pay the judgment rendered against" him in the justice's court, and "all costs occasioned by said appeal." As has been seen, the breach assigned is that defendants have not paid the judgment and costs, or any part thereof. That fact is not denied by any plea in the case. How, then, is this defendant, Lovejoy, relieved of his obligation, created by the bond, to pay the judgment and costs in case an appeal was dismissed, as was done? Confessedly, his undertaking, in that respect, has never been performed. His covenant in his bond is absolute that his principal will pay the judgment in the justice's court on the happening of a contingency, viz., the dismissal of the appeal. It is not in any sense a collateral undertaking. It is an original covenant or agreement. It is sought to run a parallel between the covenant in this bond and a mortgage to secure a debt, where the debt secured is regarded as the principal, and the mortgage as a mere incident; and, where the debt is paid or barred by any statute of limitation, the mortgage fails also. But this cannot be done. Here, in this bond, there is an absolute undertaking the makers will pay the judgment in the justice's court on the happening of a certain con-

tingency which did occur; but a mortgage to secure indebtedness seldom contains any covenant that the maker will pay the debt secured, and accordingly it is held, if the debt secured is barred, the mortgage itself fails, and cannot thereafter be foreclosed in any mode known to the law. But the rule is different if the mortgage itself contains a covenant for the payment of the money secured, as this court has held in *Harris v. Mills*, 28 Ill. 44. It was there said: "When such a covenant is found in the mortgage, it being under seal, and the debt to secure which it was given is not, a bar to a recovery of the debt, if of a shorter period than a bar to a sealed instrument, could not affect the remedy on the covenant in the mortgage. If the statutory period necessary to bar an unsealed instrument be of shorter duration than a sealed instrument, a mortgage containing such a covenant, given to secure the payment of a debt evidenced by an unsealed note, would be governed by the longer period required to bar a recovery on sealed instruments." The principle of that case finds appropriate application to the facts in the case being considered, and would seem to control. It might be conceded an action on the judgment in the justice's court would be barred in a shorter period; but that fact "could not affect the remedy on the covenant" in the bond in suit, which contains an absolute obligation that the principal shall pay the judgment, with the costs. It seems to follow, upon principle as well as from authority, that an action on the obligation of defendant, Lovejoy, to pay the judgment in the justice's court against his principal, created, as it was, by a sealed instrument, would not be barred by any period short of that stated in the sixteenth section of the limitation act, which is ten years, and hence the pleas of five years constitute no bar to the action.

The judgment of the superior and appellate courts will be reversed, and the cause remanded to the superior court.

(126 Ill. 417)

MORIARITY v. GALT.

(*Supreme Court of Illinois*. June 16, 1888.)

INJUNCTION—ACTION ON BOND—DAMAGES—ATTORNEY FEES.

Where the controversy is whether a judgment is a lien on homestead premises which exceed in value \$1,000, and an injunction staying execution is issued, contingent upon the decision of this question, the judgment creditor is not entitled, upon a final decision sustaining the lien of his judgment, to attorney fees paid in defending the suit upon its merits, as an element of damage occasioned by the injunction.

Appeal from appellate court, Second district.

J. & J. Dinsmoor, for appellant.

Our supreme court has, in not less than 10 cases, sustained assessments of attorney fees upon dissolution of injunctions. *Buck v. Beekly*, 45 Ill. 101; *Misner v. Bullard*, 43 Ill. 470; *Directors v. Trustees*, 66 Ill. 247; *Joslyn v. Dickerson*, 71 Ill. 25; *Mason v. Shawneetown*, 77 Ill. 533; *Cummings v. Burleson*, 78 Ill. 281; *Darst v. Gale*, 83 Ill. 136; *Trust Co. v. Parks*, 88 Ill. 170; *Cummings v. Mugge*, 94 Ill. 186; *Marsh v. Morton*, 75 Ill. 621.

Manahan & Ward, for appellee.

While our supreme court have, in some injunction cases, allowed counsel fees to the defendant, whenever and wherever the question has been raised, fees for defending the suit have invariably been refused. *Jenne v. Osgood*, 57 Ill. 346; *Elder v. Sabin*, 66 Ill. 131; *Weaver v. Fries*, 85 Ill. 356; *Blair v. Reading*, 99 Ill. 615. And this construction has been followed throughout the state, as settled doctrine, by the circuit and appellate courts. *Gerard v. Gateau*, 15 Bradw. 530. This distinction is also upheld by the following authorities: *Disbrow v. Garcia*, 52 N. Y. 654; *Wallace v. York*, 45 Iowa, 81; 2 High. Inj. §§ 973, 974; 2 Suth. Dam. 65, 68; *Allen v. Brown*, 5 Lans.

511; *Hotchkiss v. Platt*, 8 Hun, 46; *Childs v. Lyons*, 3 Rob. (N. Y.) 704; *Strong v. Deforest*, 15 Abb. Pr. 427; *Campbell v. Metcalf*, 1 Mont. 378; *Allport v. Kelley*, 2 Mont. 343; *Newton v. Russell*, 87 N. Y. 527; *Burgen v. Sharer*, 14 B. Mon. 399; where it is stated that the only damages which can be recovered are such as arise from the injunction itself, and not such as are occasioned by the suit independent of the injunction.

SCOTT, J. The original suit out of which the present litigation arises was a bill brought by Thomas A. Galt against Michael Moriarity, plaintiff in a certain execution, and Thomas S. Beach, sheriff, to prevent defendants from casting a cloud upon the title of certain real property which complainant claimed to own in fee-simple. It was alleged the property was exempt from sale under defendant's execution in the hands of the sheriff, because it was at the time of the recovery of the judgment the homestead of one Mooney and wife, who afterwards by deed conveyed it to complainant, with a release of homestead. A temporary injunction was asked for and allowed to restrain the sheriff from making the sale until the further order of the court in the premises. On the final hearing of the cause, the circuit court decided the property was not subject to sale on the execution, and entered an order making the injunction perpetual. That decree was affirmed in the appellate court of the Second district, but the judgment of the appellate court was afterwards reversed in this court, and the cause remanded to that court, with directions to reverse the decree of the circuit court, and remand the cause for further proceedings in conformity with the views expressed in the opinion of the supreme court. That was done, and when the cause was redocketed in the circuit court, it seems defendant Moriarity entered a motion to dissolve the injunction in accordance with the mandate of the appellate court. Thereupon a suggestion of damages alleged to have been occasioned by the injunction was made, and the court was asked to ascertain and assess the same under the statute. The sum demanded, as damages, amounted to the sum of \$465.69, most of which was for attorney fees in and about the defense of the suit, as appears from the bill of items found in the record. The injunction previously awarded was dissolved, and the suggestion of damages was referred to the master in chancery, and he was ordered to take evidence, and report as to the matter of damages. Upon the evidence taken by him, the master reported that he was of opinion defendant was entitled to damages in a sum equal to the fair value of all the services rendered by his solicitors in procuring the dissolution of the injunction, and fixed the value of such services, from a fair estimate of all the evidence, at \$400. To the master's report 12 exceptions were filed before the master, all of which he overruled. On the cause coming on to be heard, on the suggestion of damages, the court sustained all the exceptions taken to the master's report, and held and so decreed that defendant Moriarity, was not entitled, under the proof taken and reported by the master, to any damages by reason of the injunction; and thereupon dismissed the bill, at complainant's cost. That decree was affirmed in the appellate court, and defendant, Moriarity, brings the case to this court on appeal.

The entering of a motion, as was done, after the cause was sent down from the appellate court to dissolve the injunction, was the doing of a useless thing. The mandate directed the circuit court to proceed in conformity with the views expressed in the opinion of the supreme court, and that was equivalent to a direction to dismiss the bill. When that should be done, the injunction would cease to control, without any specific order of dissolution. Even if this were a case for the allowance of solicitor's fees as damages, the amount fixed (\$400) by the master was so unreasonable, in view of the character of the case, that, had it been allowed, it would not be permitted to stand for a moment. The judgment which the litigation concerned was only about \$600, and had the sum claimed been allowed it would have been oppressive in the

extreme upon complainant in the original suit. But the case is not one where solicitor's fees should be allowed as damages recoverable, as on the dissolution of an injunction. The question presented by the bill and subsequent pleadings in the case, for decision, was whether the premises, or any part thereof, were subject to levy and sale on the execution issued on the judgment in favor of defendant, Moriarity, after they had been sold by the judgment debtor; or, in other words, whether a judgment becomes a lien upon any portion of property occupied by a debtor and his family as a homestead, when it exceeds in value \$1,000. That was a question of some difficulty, and one about which the courts disagreed. Both of the courts below through which the case came to this court held the judgment was not a lien upon the property, or any portion of it. This court, however, held as to \$1,000 of the lot the judgment created no lien, and could not be enforced, but as to the excess in value the property was liable to be levied upon and sold at any time during the existence of the lien of such judgment. The injunction granted was simply an incident to the principal relief sought by the bill, and operated to stay the action of the sheriff until the question litigated by the parties could be judicially determined. That was a question in which both parties were interested, and common prudence would dictate that no sale of the property should be made while the point in controversy was being litigated through the several courts; and it would seem defendant as well as complainant would have been willing to a stay of proceedings without the restraining order of the court to that effect. There was in fact no controversy as to the propriety of the injunction. It necessarily followed the fate of the bill. If it should be held the judgment created no lien on the premises, then it would be continued; but if it should be determined it was a lien on the premises, or some portion, then it would fail, as a matter of course, with the dismissal of the bill, which would follow that conclusion. In *Wilson v. Haecker*, 85 Ill. 349, it was said: "It is not perceived what damage appellees would suffer from being restrained from selling or incumbering the land while the title was in litigation." In *Blair v. Reading*, 99 Ill. 600, the case of *Wilson v. Haecker* is cited with approval, and it was said: "The propriety of suing out the injunction was never called up or considered by the court until the case was finally considered on its merits." What was said in both of these cases may well be applied to the facts of the case in hand. It is not perceived what damage defendant, Moriarity, would suffer from the sheriff being restrained from making the sale while the question whether the judgment was a lien upon the premises was being litigated, nor was the propriety of the suing out of the injunction called up or considered until the merits of the case had been passed upon by this court. It is apparent the expenses incurred on account of solicitor's fees would have been substantially the same if no injunction had been sued out. Had the preliminary injunction been refused, the bill might have been and doubtless would have been retained to ascertain whether complainant was entitled to relief, and the same litigation would have been had. The circuit court and the appellate court decided wisely and justly in disallowing the claim of solicitor's fees as damages arising out of the issuing of the injunction, and the judgment of the appellate court will be affirmed.

KIRCHOFF v. UNION MUT. LIFE INS. CO.

(Supreme Court of Illinois. June 16, 1888.)

APPEAL—APPELLATE JURISDICTION—ACTION INVOLVING A FREEHOLD.

Section 8 of the appellate court act (1 Starr & C. St. Ill. 702, par. 23,) and section 88 of the practice act, (2 Starr & C. St. 1842, par. 89,) excepting from the jurisdiction of the appellate court cases involving a freehold, and providing that appeals and writs of error in such cases shall be taken to the supreme court, are inapplicable to a bill to have a deed declared a mortgage, and for permission to redeem; and an appeal, in such case, to the supreme court, will be dismissed.

Appeal from circuit court, Cook county; M. F. TULEY, Judge.

Bill by Elizabeth Kirchoff against the Union Mutual Life Insurance Company to have a deed absolute on its face declared a mortgage, and for permission to redeem. The bill was dismissed, and complainant appealed. By section 8 of the appellate court act, referred to in the opinion, (1 Starr & C. St. 702, par. 28,) the appellate courts "shall exercise appellate jurisdiction only, and have jurisdiction of all matters of appeal or writs of error from the final judgments, orders, or decrees of any of the circuit courts, or in the superior court of Cook county, or from the city courts, in any suit or proceeding at law or in chancery, other than criminal cases, and cases involving a franchise or freehold or the validity of a statute. Appeals and writs of error shall lie from the final orders, judgments, or decrees of the circuit and city courts, and from the superior court of Cook county, directly to the supreme court, in all criminal cases, and in cases involving a franchise or freehold, or the validity of a statute." Section 88 of the practice act (2 Starr & C. St. 1842, par. 89) provides that "appeals from and writs of error to circuit courts, the superior court of Cook county, the criminal court of Cook county, county courts, and city courts, in all criminal cases below the grade of felony, shall be taken directly to the appellate courts; and in all criminal cases above the grade of misdemeanors, and cases in which a franchise or freehold, or the validity of a statute, or construction of the constitution, is involved, and in all cases relating to revenue, or in which the state is interested as a party or otherwise, shall be taken directly to the supreme court."

W. S. Harbert and George R. Daley, for appellant. *Leonard Swett and P. S. Groscup*, for appellee.

SCHOLFIELD, J. This appeal must be dismissed. It should have been taken to the appellate court of the First district, and it is therefore improperly here. The bill seeks a decree declaring a certain deed absolute on its face to be but a mortgage, and that appellant be allowed to redeem from it as such. The material allegations of the bill, so far as they are necessary to show the character of the question involved, are as follows: "That on or about the 8th day of May, 1871, complainant, together with her husband, Julius Kirchoff, and her mother, Angela Diversey, borrowed of the Union Mutual Life Insurance Company the sum of \$60,000; and, to secure the payment thereof, executed their promissory note for said sum, payable to said company, and also a trust deed, to Levi D. Boone, as trustee, on a large amount of property, including lots 2 and 4, in block 21, of the Canal Trustees' subdivision of the south fractional quarter of section 8, township 89 north, range 14 east of the third principal meridian, being situated in the city of Chicago; that, some time during the year 1878, default having been made in the payment of said indebtedness, the said company instituted proceedings for the foreclosure of said trust deed; that thereupon complainant, through her said husband as her agent, offered said company to release and quitclaim to said company all her lands in said trust deed described, provided said company would allow her to redeem said two lots hereinbefore described (one of which said lots was occupied by her as a homestead) upon payment of whatever sum the said lots, with the improvements thereon, should be valued at by an appraiser to be agreed upon by said company and complainant, and upon such terms of payment as said company were, at or about that time, offering to purchasers of its real estate, to-wit, in ten equal annual payments or installments, with interest until paid at the rate of 6 per cent. per annum, and to secure the payment of such installments by a mortgage or trust deed upon said lots, and provided, also, that said company would take the lands in said trust deed described, belonging to appellant, in full satisfaction of the indebtedness held by it against herself and husband; that said company accepted said offer, and agreed to allow such redemption by complainant upon the terms

and for the consideration aforesaid." There is an allegation that complainant has performed her part of the agreement, and the prayer of the bill is that she may be allowed to redeem, and that appellee then reconvey to her.

Our ruling is that "a freehold is involved," as that language is used in section 8 of the appellate court act, and in section 88 of the practice act, (Laws 1877, pp. 70, 153,) only where it is the immediate subject of litigation, and the one party directly gains, and the other party directly loses, by the judgment or decree then entered, a freehold; and that it is not sufficient that, by the effect of the judgment or decree then entered, a freehold will ultimately result to the one party, and be lost to the other. *Railroad Co. v. Watson*, 105 Ill. 220; *Galbraith v. Plasters*, 101 Ill. 444. And, upon this principle, we held in *Land Co. v. Peck*, 112 Ill. 432, where the litigation involved the enforcement of liens on real estate, by mortgage and otherwise, the establishment of such liens, the release of and redemption from them, and the resistance of such redemption, that no freehold was involved. And so, upon like principle, we have held, in *Kingsbury v. Sperry*, 119 Ill. 279, 10 N. E. Rep. 8, that a decree authorizing a guardian to execute a mortgage does not involve a freehold; in *Pinneo v. Knox*, 100 Ill. 471, that a bill to foreclose a mortgage does not involve a freehold; in *Hollingsworth v. Koon*, 113 Ill. 443, that a bill to redeem from a mortgage does not involve a freehold, and in *McIntyre v. Yates*, 100 Ill. 475, that a bill to reform a mortgage, and make it include real estate omitted by mistake, to determine the priority between several mortgages, and to foreclose, does not involve a freehold. Kindred ruling will also be found in *Clement v. Reitz*, 103 Ill. 815, and *Carbine v. Fox*, 98 Ill. 146. The appeal is dismissed, with leave to appellant to withdraw record, abstracts, and briefs.

(125 Ill. 230)

HANSEN et al. v. SCHLESINGER et al.

(*Supreme Court of Illinois*. June 16, 1888.)

1. JUDGMENT—BY CONFESSION—AMENDMENT OF RECORD.

After a judgment is entered on a warrant of attorney, it is not error for the court to refuse to amend the record, on defendant's motion, supported by affidavit, so as to show that the judgment was entered at an earlier hour than the court opened, as the record imports verity, and cannot be contradicted by parol.

2. SAME—SETTING ASIDE.

Where a judgment was entered upon a warrant of attorney for the correct amount honestly due, the fact that the attorney waived defendant's right to appeal, which he was not authorized by the warrant to do, is no ground for setting aside the judgment, no equitable ground for setting it aside being shown.

Error to appellate court, First district.

Grant & Brady and *Frank P. Leffingwell*, (*N. W. Bliss*, of counsel,) for plaintiffs in error. *Kraus, Mayer & Stein*, for defendants in error.

SCOTT, J. It appears from the record in this court that the June term, 1886, of the superior court of Cook county, convened on the 7th day of June, 1886, the Hon. ELLIOTT ANTHONY, one of the judges of that court, presiding; that afterwards, on the 17th of the same month, in the same year, there was filed in the office of the clerk of that court a certain declaration, note, and warrant of attorney, affidavit, and *cognovit*, all of which appear in full in the transcript filed in this court; and afterwards, on the 17th day of June, 1886, the same being one of the days of the June term of said court, a judgment by confession was entered in favor of Leopold Schlesinger and David Mayer against Peter Hansen, Joseph A. Hansen, and Daniel B. Hansen for the sum of \$5,375.04. On the 26th day of June, 1886, being one of the days of the said June term of court, defendants appeared and entered their motions to have the record amended, and to have the judgment rendered against them set aside and to quash the execution that had been issued on such judgment. These several motions were overruled by the court, and its decisions in that respect

were subsequently affirmed by the judgment of the appellate court of the First district. Although the questions raised on this record have been elaborately argued, the views entertained by this court may be briefly stated. Most of the principles of law applicable have been definitely settled by the previous decision of this court in *Roche v. Beldam*, 119 Ill. 320, 10 N. E. Rep. 191, and need no further discussion. The amendment which the defendants asked should be made was that the record should be corrected so as to show "that the branch of the court which is presided over by the Honorable ELLIOTT ANTHONY, one of the judges thereof, did not open on the 17th day of June, 1886, and the judge did not take his seat on the bench till 10 o'clock in the forenoon of that day; that the direction to enter such judgment, and pursuant to which it was entered, was indorsed by the judge upon the declaration filed in the cause, to which was then attached the *cognovit*, note, and warrant of attorney filed therewith; that such indorsement was made before the hour of 10 o'clock in the forenoon of said 17th day of June, and outside of the court-room which was, at that date, occupied and used by said judge for the holding of his branch of said court." There is nothing in this record that shows it was error or even irregular, if the direction given to enter the judgment was in fact made before the hour of 10 o'clock on the day it was rendered. It does not appear from anything in this record that the court was not then in open session. All that appears is that the court convened for that term on the 7th day of June, 1886, and continued in session until this judgment was rendered. Of course the presumption will be indulged the court took the usual recess from one day to the next, and over Sundays; but at what hour it announced it would resume its sessions on the succeeding day nowhere appears in the record. It might have been at 9 o'clock in the forenoon, for anything that appears in this record. Nor is there anything to show the direction given by the judge to enter the judgment was made "outside of the court-room" which at that date was used by him for holding a branch of the superior court. The record in this respect is absolutely silent. It is plain, therefore, there was no error in the court in refusing to amend its record. Indeed, it does not appear there was anything to amend by. It seems idle to present affidavits of the clerk of the court to advise the judge presiding at the same term whether he had directed a judgment to be entered while the court was in session for business, or at an hour when he was not transacting the business of the court. The theory of the law is that at the same term, all proceedings rest in the breast of the judge of the court, and he can amend his record according to the facts within his own knowledge. The record shows the judgment in this case was rendered in term-time, and, although it was rendered upon a *cognovit*, the same presumptions in its favor will be indulged as in case of ordinary judgments of courts of general jurisdiction. *Bush v. Hanson*, 70 Ill. 480. But, aside from this view, it was expressly ruled by this court in *Roche v. Beldam*, *supra*, it could not be shown by parol the judgment was in fact rendered at an hour earlier than the time appointed for the convening of the court, simply by an order of the judge "at chambers," in opposition to the record to the contrary. It was for the reason the record imports verity, and cannot be contradicted by parol.

In respect to the other branch of the motion, unless some equitable ground was shown, the judgment could not be set aside and the execution quashed. *Rising v. Brainard*, 36 Ill. 79; *Farwell v. Meyer*, Id. 510. None has been shown in this case. There is no pretense the judgment was not confessed for the exact amount honestly due to plaintiffs from defendants. If the attorney waived more than he was authorized to do by the warrant of attorney in respect to defendants' right to an appeal or writ of error, it is obvious it did them no harm, for they have now had their day in court, notwithstanding the action of their attorney of which complaint is made. The judgment of the appellate court will be affirmed.

(125 Ill. 410)

FAIRBANK CANNING CO. v. INNES.*(Supreme Court of Illinois. June 16, 1888.)***1. APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.**

In Illinois, in an action for damages resulting from the death of plaintiff's intestate, the finding of the appellate court as to the question of defendant's negligence is conclusive on the supreme court.

2. TRIAL—INSTRUCTION—REFUSAL OF SPECIFIC INSTRUCTIONS.

It is not error to refuse specific instructions where the general charge and the instructions given fully state the law applicable to the facts of the case.

Appeal from appellate court, First district.

Action on the case by Elizabeth C. Innes, administratrix, against the Fairbank Canning Company, to recover damages resulting from the death of George Innes, alleged to have occurred through the careless, negligent, and defective construction of an elevator of which he was in charge as defendant's employe. The appellate court affirmed the judgment of the superior court of Cook county in favor of plaintiff. Defendant appeals.

John C. Richberg, for appellant. *John B. Skinner*, for appellee.

SCOTT, J. The questions raised on the record in this case consist mostly of controverted questions of fact which admit of no discussion in this court. The suit was brought by the administratrix to recover damages resulting to the next of kin of George Innes, whose death it is alleged was caused by the negligent conduct of the Fairbank Canning Company. Decedent, at the time he received the injuries that caused his death, was in the employ of defendant, and was in charge of the freight elevator used in its packing-house. The ground of recovery, as alleged, is that the elevator upon which decedent was engaged was so improperly, negligently, and carelessly constructed that it became displaced and broken, and by reason thereof, while decedent was operating it with due care, it fell to the basement with such force and violence as to cause his death. The evidence bearing on the question of negligence on the part of defendant, in respect to the defective construction of the elevator, has been subjected to examination, and it is seen there is evidence tending to sustain the averments of the declaration in that regard, and that precludes all discussion in this court. Whether defendant had been guilty of negligence in the manner of the construction of the elevator was a controverted question of fact, and in all such cases the findings of the appellate court as to such questions are conclusive upon this court.

Some evidence was permitted to go to the jury over the objections of defendant, but, on examination, it is seen that the errors in this respect, if any exist, are so slight as to be of no serious consequence,—certainly there was nothing in the rulings of the court as to the admission of evidence that would warrant a reversal of the judgment.

It is said it was error in the trial court to refuse certain instructions asked by defendant. No instructions were given for plaintiff. Quite a number, however, were given on behalf of defendant, and this court fully concurs with the appellate court in its conclusion. The law applicable to the facts was stated with sufficient fullness in the instructions given. No others were needed to an understanding of the true issues involved. It is also seen that the substance of the refused instructions were in a large measure, at least, embodied in the charges given, and the court was under no duty to give the same thing a second time. The judgment of the appellate court will be affirmed.

(110 N. Y. 170)

TARBELL v. ROYAL EXCH. SHIPPING Co., Limited.¹*(Court of Appeals of New York. June 30, 1888.)***1. CARRIERS—COMMON CARRIER OF GOODS—TERMINATION OF CARRIAGE.**

In an action against a common carrier for the loss of goods shipped on defendant's steamer, it appeared that notice of the arrival of the steamer on November 25, 1882, was given the owners the same day; that the goods were discharged on the 27th; and that the owners had three full days in which to remove it before December 1st, when it was discovered that part of the goods had been lost since the 29th. *Held*, that defendant's liability as a carrier had ceased, as the owners had had sufficient time by the exercise of due diligence to remove them.

2. SAME—LIABILITY AS WAREHOUSEMEN—NEGLIGENCE.

It appeared that the goods were discharged from defendant's steamer upon its private wharf, to which only defendant, and those permitted by it, had access; that the owner had constructive possession of them, but delayed removing them, and left them in charge of defendant, during which time they were lost. It was defendant's rule that no goods should be taken from the wharf without a receipt, but no receipt was taken for the missing goods. *Held*, that defendant was negligent in not taking a receipt, as the property could not have been removed without its consent, tacit or otherwise.

3. SAME—BILL OF LADING—LIMITATION ON LIABILITY.

A common carrier is not relieved from liability for goods lost by its negligence, by a contract of affreightment exempting it from liability for loss by theft, when its liability as carrier had ceased when the loss occurred.²

4. APPEAL—REVIEW—WAIVER OF OBJECTION.

Where an action for the loss of goods is tried without objection on two theories, one on the contract of affreightment, and the other for not taking proper care of the property after its delivery on defendant's wharf, defendant cannot, on appeal, raise the point that the complaint only states the first cause of action.

This action was brought by Charles W. Tarbell against the Royal Exchange Shipping Company, Limited, to recover damages for the non-delivery in New York of 68 slabs of tin, part of a shipment of 1,702 slabs, made at Singapore, India, September 7, 1882, under a bill of lading stipulating that the tin should be transported from Singapore to London per the steamer Thibet, and thence, by a steamer of the Monarch line, to New York. The York City, having the consignment of tin on board, arrived at her wharf in Jersey City on Saturday, November 25, 1882. On the same day, notice was given by the agents of the defendants to Mayer Bros. & Co., the assignees of the bill of lading, of the arrival of the vessel, and on that day Mayer Bros. & Co. entered the tin at the custom-house, and, there being no duty on tin, obtained a free permit for its discharge. On Monday, the 27th, the consignees paid the freight to the ship's agents, who thereupon gave to Mayer Bros. & Co. a delivery order, addressed to the delivery clerk of the Monarch line at Pavonia ferry, Jersey City, for the delivery of the tin. Mayer Bros. & Co., presented to and left with the delivery clerk, on the same day, the custom-house permit and the delivery order, with an indorsement on the latter, "Deliver to our order only." Before the arrival of the vessel, Mayer Bros. & Co. had sold to one Peter Hayden generally 25 tons of tin to arrive, and he had made a similar sale to Lucius Hart & Co. On the afternoon of November 27th, Mayer Bros. & Co. sent a weigher to the defendant's wharf to weigh the tin, instructing him to separate it into lots of five tons each, and to mark the lots consecutively "1," "2," "3," "4," "5," etc. The weigher, on reaching the wharf, found that the tin had not been discharged from the vessel, but was told by the delivery clerk that it would be discharged right off. He did not wait, but returned to the wharf on the morning of Tuesday, the 28th, about 8 o'clock, and then found about 30 tons discharged, and lying on the wharf. He weighed, and divided

¹ Reversing 53 Super. Ct. 190.² Respecting the right of common carriers to limit their liability by contract, see *Railroad Co. v. Riordan*, (Pa.) 13 Atl. Rep. 324, and note; *Express Co. v. Darnell*, (Tex.) 6 S. W. Rep. 765, and note.

it into five-ton lots, numbered it as instructed, and completed the weighing about 11 o'clock, and about noon of that day sent returns of the weights to Mayer Bros. & Co. About 1 o'clock of the same day, Mayer Bros. & Co., in fulfillment of the contract of sale to Peter Hayden, sent to him an order in writing on the delivery clerk of the vessel for the delivery to him of lots 1, 2, 3, 4, 5, of the tin; and with the order sent the weigher's return of the said five lots. Peter Hayden at once indorsed the order to Lucius Hart & Co., his vendees, and between 1 and 3 o'clock delivered it, with the weigher's return, to that firm. Lucius Hart & Co. made no effort to take the tin that day. On the morning of November 29th, they sent two trucks, one double and one single horse truck, to the wharf to take tin. The drivers were accompanied by one James Coughran, an employe of Lucius Hart & Co., who handed to and left with the delivery clerk the order for lots 1, 2, 3, 4, 5. The two-horse truck, before noon, drew two loads of the tin to the store of Lucius Hart & Co., in New York, in all about four tons, and the one-horse truck one load, consisting of about one ton, and no more was drawn on that day. The next day, the 30th, was Thanksgiving day. Lucius Hart & Co. did not send to the wharf at all on that day, though the wharf was open for business, and other merchants sent for and took away goods on that day. On the morning of December 1st, it was found that the piles of tin included in the order to Lucius Hart & Co. had been disturbed, and that 63 slabs of tin were missing; but when the 63 slabs were taken away, or by whom, or under what circumstances, is not disclosed. The trial judge found explicitly that they were not stolen, although there is an apparent inconsistency between this finding and an expression in a finding proposed by the defendants, adopted by the judge, in which, after stating that on the morning of December 1st investigation showed that 63 slabs were missing, the finding concludes: "No clue to the stolen tin was ever obtained." The trial court found, on the request of the defendants, as follows: "The part of the wharf where the tin lay was the private wharf of the defendants. It was covered with a substantial building, the doors of which were locked at night. Two watchmen were employed by the defendant to watch the wharf by day, and four by night; and due care had been taken in their selection. There was also a competent person in the employ of the defendant to keep a tally of the cargo taken away by merchants, and to take receipts for it." It was shown that the delivery of cargo landed on defendants' wharf, to consignees, was under the direction and supervision of the delivery clerk and his subordinates. But the delivery clerk had been instructed by the defendants not to deliver goods to cartmen without taking a receipt, and it was his duty to take receipts for goods before he permitted them to be taken from the wharf. The practice was for the gateman to count the load, and take the cartman's receipt in a book provided for that purpose, after the goods were loaded, and before the cartman left the pier. Madigan, the delivery clerk, testified that, when he knew the cartmen, he sometimes permitted them to take goods without receipting for them. There were no receipts taken for the 63 slabs in question. The three loads taken on the 29th were receipted for according to the rule, as were also the loads subsequently taken by Lucius Hart & Co., constituting the remainder of the 25 tons purchased by them, less the 63 slabs; the receipts being in form, "Received in good order, from on board the SS. York City, the following packages for Mayer Bros. & Co.," with a statement of the number of slabs, the date, the number of the cart, and signed by the cartman. After the discovery of the loss of the 63 slabs, the defendants, by their agents, made diligent inquiry to ascertain what had become of them, but were wholly unable to trace them. Each slab weighed more than 100 pounds. The trial judge found that the defendants were negligent in not warehousing the tin, and also that the delivery clerk was negligent in permitting goods to be removed from the dock without taking receipts from the cartmen in every instance,

and that his negligence was the negligence of the defendants. Due demand for the tin was made of the defendants before suit brought. The trial judge directed judgment for the plaintiff for the value of the missing tin, on two grounds: *First*, that it was liable as carrier; and, *second*, if this relation had terminated, it was liable as a warehouseman for negligence. The general term reversed the judgment on the ground that the defendants' responsibility as carrier had terminated by a delivery of the tin to Mayer Bros. & Co. before the loss in question, taking no notice of the other ground of liability, on which the judgment also proceeded. Other facts are referred to in the opinion.

Charles Blandy, for appellant. *Wm. Allen Butler*, for respondent.

ANDREWS, J., (*after stating the facts as above.*) The bill of lading contained special clauses defining the obligation of the carrier in respect to the delivery of the goods, and also the duty of the consignees as to receiving them. By the first of the clauses referred to, the goods were "to be delivered from the ship's deck (where the ship-owner's responsibility shall cease) at the port of New York;" and by the second it was declared that the goods were "to be received by the consignees immediately the vessel is ready to discharge, or otherwise they will be landed and stored at the sole expense and risk of the consignee, in the warehouses provided for that purpose, or in the public store, as the collector of the port of New York shall direct." Among the exceptions in the bill of lading is one against loss by "pirates, robbers, thieves, etc., whether such perils or things arise from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, agents, or other persons in the service of the ship-owner, and occur before, during the voyage, or at the port of discharge." It is conceded that the 63 slabs of tin, the value of which the plaintiff seeks to recover in his action, have been lost, and have never come to the actual possession of Mayer Bros. & Co., or their assignees. The necessary conclusion from the evidence is that they were removed from the wharf of the defendants, after they had been discharged from the ship, by some one, without authority of the true owner. The finding that they were not taken by theft leads to the alternative conclusion that they were taken by some person other than the true owner by mistake, but with the passive acquiescence, at least, of the persons in charge of the wharf. If the original taking was not felonious, it is difficult to resist the conclusion that there was a subsequent felonious appropriation, in view of the fact that the property has never been returned, and that all efforts to trace it have proved unavailing. But, whether taken by felony or mistake, there can be no reasonable doubt that the tin in question passed from the wharf of the defendants through the usual gate through which goods were taken, and under the observation of the persons in charge. The weight of each slab exceeded 100 pounds. The ship lay against the wharf. The wharf was inclosed on all sides. On the water side there was a gate for the discharge of cargo onto the pier. There were two other gates, one for the entrance of trucks, and one through which the loaded trucks passed on leaving the wharf. It is a reasonable inference that, whether the tin was taken by felony or mistake, the loss would have been prevented if the defendants' agents in charge of the wharf had required from the person taking the tin an exhibition of his authority, and had followed the rule prescribed by the defendants, requiring the gateman to inspect goods passing the gate, and to take receipts from cartmen before permitting goods to leave the wharf. It is not claimed that any authority was exhibited to the defendants' agents other than the original order of Mayer Bros. & Co., indorsed to Lucius Hart & Co. on the 28th, to deliver the 25 tons of tin embraced in the order, nor that any receipt was taken by the gateman for the 63 missing slabs. The trial judge found, in substance, that the defendants never delivered the tin pursuant to

their contract of carriage, but held it, at the time of the loss, in their capacity of carriers, subject to the rigorous liability imposed upon carriers by the common law, except as modified by the bill of lading, and that the tin was not lost by any of the perils excepted in the bill of lading. But the trial judge placed the right of the plaintiff to recover on an additional ground, viz., actual negligence on the part of the defendants' agents and servants in the care of the goods while on the wharf, by reason of which they were lost; and held that, assuming they were not liable as carriers under the contract of affreightment, they were liable for a breach of duty to use ordinary care in the protection and preservation of the goods.

We concur in the conclusion of the general term that the judgment of the trial court cannot be supported on the liability of the defendants as carriers under the bill of lading. The general principle that the duty and obligation of a common carrier by water does not *ipso facto* cease on the unloading of goods from the ship, and their deposit upon a wharf, and especially where the place of discharge is also the terminus of the particular voyage, is the settled doctrine of this court, and the generally accepted doctrine of the maritime law. The obligation of the ship-owner is not only to carry the goods to the port of destination, but to deliver them there to the consignee. But a delivery which will discharge the carrier may be constructive, and not actual. To constitute a constructive delivery, the carrier must, if practicable, give notice to the consignee of the arrival; and when this has been done, and the goods are discharged in the usual and proper place, and reasonable opportunity afforded to the consignee to remove them, the liability of the carrier, as such, terminates. The duty of the consignee to receive and take the goods is as imperative as the duty of the carrier to deliver. Both obligations are to be reasonably construed, having reference to the circumstances. The stringent liability of the carrier cannot be continued at the option, or to suit the convenience, of the consignee. The consignee is bound to act promptly in taking the goods; and, if he fails to do so, whatever other duty may rest upon the carrier in respect to the goods, his liability as insurer is by such failure terminated. *Redmond v. Steam-Boat Co.*, 46 N. Y. 578; *Hedges v. Railroad Co.*, 49 N. Y. 223. In the present case, prompt notice of the arrival of the goods was given by the defendant to Mayer Bros. & Co. They were discharged from the ship on Monday, November 27th, and deposited on the proper wharf. The consignees had three full days thereafter in which they could have removed the tin before the 1st of December, the day when the loss was discovered. They were not prevented from removing it from the wharf during those days by any act of the defendants, or by any *vis major*, and it is very clear that its removal during that time was practicable in the exercise of due diligence by the consignees. See *Richardson v. Goddard*, 23 How. 28. Under these circumstances, the defendant, under the authorities, must be held to have made delivery of the tin under their contract as carriers, and to have discharged themselves from its custody as such; and as the loss, upon the evidence and findings, must be held to have occurred after notice to the consignees of arrival, and the lapse of a reasonable time for the removal of the tin from the wharf, the general term properly overruled the first ground of liability asserted by the plaintiff. The general duty of a carrier to deliver, and of a consignee to receive, as defined in the authorities to which we have referred, is not, we think, essentially changed by the clause in the bill of lading that the goods are to be delivered "from the ship's deck, when the ship-owners' responsibility shall cease," or by the clause that the goods are to be received by the consignee "immediately the vessel is ready to discharge." See *Collins v. Burns*, 63 N. Y. 1; *Gleadell v. Thomson*, 56 N. Y. 194. The defendants, in our view, are not liable as carriers, for the reason that they had made delivery as such according to the general rule governing the liability of carriers by water.

But this conclusion does not meet the other ground of liability asserted, and found by the trial court, viz., that the defendants neglected to exercise due and proper care of the tin, and negligently permitted it to be taken from their wharf by strangers, which is the substance of the findings on this branch of the case. It is claimed by the learned counsel for the respondents that this cause of action was not alleged in the complaint, and that the action was brought exclusively upon the contract of affreightment, and the duty of the defendants to make delivery under the bill of lading. The case was tried upon both theories of liability; and no objection was made that a cause of action for negligence in not properly caring for the tin after the strict liability of the defendants as carriers had ceased, was not within the issues. It is now too late to take this objection. See *Wellington v. Morey*, 90 N. Y. 656; *Vann v. Rouse*, 94 N. Y. 407.

There can be no doubt, we suppose, that in many cases a carrier's whole duty in respect to goods carried by him is not discharged by a constructive delivery terminating his strict responsibility as carrier. Although a consignee may neglect to accept or receive the goods, the carrier is not thereby justified in abandoning them, or in negligently exposing them to injury. The law enables him to wholly exempt himself from responsibility in such a contingency by giving him the right to warehouse the goods. When this is done, he is no longer liable in any respect; and, if they are subsequently lost by the negligence of the warehouseman, the carrier is not liable. *Redmond v. Steamboat Co.*, 46 N. Y. 578, and cases cited. But so long as he has the custody of the goods, although there has been a constructive delivery which exempts him from liability as carrier, there supervenes, upon the original contract of carriage, by implication of law, a duty, as bailee or warehouseman, to take ordinary care of the property. This duty of ordinary care rested upon the defendants in this case. The tin, it is true, was placed, by the act of the defendants, under the dominion of the consignees, for the purposes of weighing and removal; but nevertheless, as between the defendants and the consignees and their assignees, the actual custody of the part not removed by the consignees or their assignees remained at all times in the defendants. It was deposited on their private wharf, to which alone they, their servants, and those permitted by them, had access. The tin could not have been removed against their consent. It was in fact removed by some one unknown, by their tacit acquiescence; doubtless without any fraud on their part, but nevertheless its removal by a stranger was made possible by reason of an omission on the part of the defendants' servants to take the precautions against misdelivery which the defendants had deemed it proper to prescribe to prevent such an occurrence. The trial court found that the omission to take these precautions was negligence. We do not perceive why this finding is not supported by evidence. If there was negligence on the part of the servants of the defendants which occasioned or contributed to the loss, the doctrine of *respondet superior* applies, and makes it in law the negligence of the defendants. The delay of the consignees in removing the tin had no legal connection with this breach of duty by the defendants, and cannot justly be considered as a concurring cause of the loss. The exceptions in the bill of lading of loss by thieves, etc., do not exempt the defendants from liability, for the reasons—*First*, that it was found by the trial court that the tin was not lost by theft; and, *second*, by the true construction of the contract, the perils excepted were those which should happen before or during the voyage, and while the goods were in the possession of the carriers as such under the bill of lading. Upon the whole case, we are of opinion that the original judgment is supported upon the ground of actual negligence of the defendants, after the contract of carriage had been performed, in omitting to exercise ordinary care in the custody of the tin. It was found by the trial judge, upon the request of the counsel for the defendants, that the plaintiff owned by assignment the

claim in suit; and no question can now be made as to the right of the plaintiff to maintain the action. For the reasons stated we think the general term erred in reversing the judgment, and the order of reversal should therefore be reversed, and the judgment of the trial court affirmed.

All concur, except EARL and GRAY, JJ., not voting.

(110 N. Y. 154)

WOOD *et al.* v. LUDLOW *et al.*¹

(Court of Appeals of New York. June 19, 1888.)

GUARANTY—EXTENT—LIMITATION IN PENAL BOND AS COLLATERAL.

Defendant's testatrix, in assigning certain bonds and mortgages, covenanted "that the mortgage security is sufficient to satisfy the obligation of said bonds at the maturity thereof," and agreed to make good any deficiency. Subsequently, and before said bonds became due, she and her husband made to plaintiff's testator a penal bond conditioned to pay a stated sum, and, further, to pay such deficiency as might arise on foreclosure of the assigned mortgages, "as stipulated in the deeds of assignment," etc., but limiting their liability thereunder to \$3,500. Before maturity of the bonds and mortgages, and after execution of the penal bond, defendant's testatrix and her husband extended the period of their liability on the covenants of guaranty. Held that, as nothing in the language of the penal bond limited the liability upon the covenants of guaranty, and as plaintiff's testator and the draughtsman of such bond testified that no such limitation was intended, but that the bond was executed as collateral security for the guaranty, the penal bond did not supersede the covenants of guaranty, or limit defendant's liability thereon to \$3,500, although defendant testified that the liability on the covenants of guaranty was intended to be limited to that amount by the penal bond.

Appeal from supreme court, general term, Second department.

Actions by Joseph Wood and others, executors, against William H. Ludlow, as executor, and others, on a bond and guaranty. From an order of the general term modifying the decree of the special term, defendants appeal.

Jasper W. Gilbert, for appellants. *A. A. Spear*, for respondents.

PER CURIAM. Defendants' testatrix, in assigning the bonds and mortgages now being foreclosed in these actions, covenanted as follows, viz.: "And I hereby guaranty that the mortgaged security is sufficient to satisfy the obligations of said bond at the maturity thereof, and do covenant and agree to pay the deficiency, if any, to the said party of the second part, or his assigns; hereby charging the same on my separate estate." The assignments were dated January 16, 1874, and June 20, 1874. On November 22, 1874, and before the assigned bonds became due, she and her husband, William H. Ludlow, made and delivered to plaintiffs' testator their bond in the penal sum of \$10,000, conditioned to pay the sum of \$1,500 in one year; and, further, to pay such deficiency as might arise on the foreclosure of the two mortgages in suit here, (and upon another mortgage not now in question,) "as stipulated" in the assignments of January 16th and June 20th. The following clause was contained in this bond: "But it is understood that the liability of said Frances L. Ludlow and William H. Ludlow, by virtue hereof, for such deficiency on any or all of said described mortgages, shall not exceed the sum of thirty-five hundred dollars." The bond was secured by a mortgage upon certain real estate. Before the maturity of the bonds and mortgages described in the complaints in these two actions, defendants' testatrix and her husband executed an instrument in writing by which their liability, under their covenants of guaranty, should be continued for one year from the maturity of said bonds, and by similar instruments their liability on the covenants was continued to November 29, 1883. Before that date these actions were commenced for the foreclosure of the mortgages. The \$1,500 secured by their bond was repaid, and the sum of \$3,500 was placed in the hands of the plaintiffs' attorney.

¹ Affirming 37 Hun, 642, *mem.*

who had commenced these foreclosure actions, and the bond and mortgage given to secure these sums were canceled and satisfied. The defendants' claim is that the bond of Mrs. Ludlow and her husband, given to secure the sum of \$5,000, on November 22, 1874, was substituted in the place of and superseded their covenants of guaranty contained in the assignments of the mortgages; that their liability upon those covenants was thereby limited to \$3,500. Plaintiffs' testator refused to accept the \$3,500 in discharge of that liability, and that sum still remains in the attorney's hands, to be applied according to the direction of the general term, modifying the decree at special term to that effect, to relieve defendant Ludlow *pro tanto* from any deficiencies arising upon sale of the mortgaged premises.

The sole question presented for review is whether the plaintiffs in foreclosure are entitled to a judgment against the defendant Ludlow for any deficiency arising upon sale, or whether that defendant's liability is limited, by virtue of the agreement in the bond of November 22, 1874, to the said sum of \$3,500. The learned justice at special term found that the said covenants were in full force and effect. In the careful opinion accompanying his decision, he held that the bond of November 22, 1874, was given as a collateral security to the extent of \$3,500, and that the covenants in the assignments were never restricted. The reading of the bond itself warrants that construction, and the oral testimony upon the trial sustains it. Nothing in the language of the bond limits the liability upon the covenants of guaranty, while it does distinctly provide that the obligors shall pay any deficiency "as stipulated in the deeds of assignments," etc. These words, in connection with the subsequent extensions of the guaranty from time to time, are significant of an intention to keep in force the covenants themselves, and negative the idea of a substitution of the bond for them. The words "by virtue hereof," in the clause in the bond relating to the measure of liability, could only mean that the liability on that bond of the obligors, after repayment of the sum of \$1,500, intended to be secured thereby, was fixed at the sum of \$3,500, which amount might be realized upon it, and applied, if need be, towards discharging the still existing liability of the obligors on their covenants of guaranty. Such a construction accords with the weight of the evidence. While the testimony of William H. Ludlow is to the effect that the liability upon the covenants of guaranty was intended to be restricted by the bond of November 22, 1874, it is contradicted by that of plaintiffs' testator and of Griffing, the attorney who drew the bond. According to Griffing's evidence, the bond was drawn by him "in exact accordance with the instructions received from both parties at the time," and all the limitation spoken of was as to the liability on the new mortgage given to secure the bond. Plaintiffs' testator was present at the interview which resulted in the execution of the new bond, and testified that it was proposed as a collateral security for the guaranty.

The appellants claim that the guaranty was discharged by the fact that the assignees of the mortgages, plaintiffs' testator, gave time to the mortgagor, without exacting a performance of the condition on which his assignor had consented to continue the liability on the covenants of guaranty. What is referred to as the condition was a proviso that the interest on the bonds, and the taxes on the property, should be paid as they became due. There is no force in this suggestion. This proviso relates to Wood's consent to extend the time of payment of the principal sum in the bonds and mortgages assigned to him. The agreement continuing the guaranty recites that extension as based on such a condition, and Wood's evidence so explains it. We think the judgments appealed from were right, and, under the stipulation of the parties, the judgments in actions Nos. 1 and 2 are affirmed, with costs of the appeals to the respondents.

All concur.

(110 N. Y. 145)

HERRINGTON v. VILLAGE OF LANSINGBURGH.¹

(Court of Appeals of New York. June 19, 1888.)

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE—BLASTING BY SEWER CONTRACTOR.

Plaintiff's team, while fastened to a post in a village street, became frightened at the noise of a blast fired by contractors, who were constructing sewers under authority of the municipality, and plaintiff was injured in attempting to control them. *Held*, that all the carelessness having been upon the part of the contractors, who had entire control of the work, the village was not liable for the injury. DANFORTH, J., dissenting.

Appeal from general term, supreme court, Third department.

Edgar L. Fursman, for appellant. *Henry A. Merritt*, for respondent.

EARL, J. The defendant is a municipal corporation, and by its charter is clothed with power to cause the construction of sewers. On the 23d day of October, 1878, it made and entered into a contract in writing with Broderick & Ellis for the construction of a sewer in and through one of its streets called "State Street." The specifications for the work provided that all damage arising from blasting to be done in the construction of the sewer should be paid for by the contractors. State street crossed Market street at right angles. On the 7th day of December, 1878, the plaintiff came into the village with a team, and tied his horses to a post in Market street about 15 feet from State street, in front of a grocery, and went into the grocery, and while there the contractors fired a blast in State street, which frightened the team. The plaintiff rushed from the grocery, and, while attempting to control the team, was severely injured. The place where the blast was fired was about 200 feet from Market street, and the team where it was fastened in Market street was not visible from the place of the blasting. The claim of the plaintiff is that the defendant is responsible to him for the injury he sustained in consequence of the frightening of the horses by the blast. At the place where the horses were fastened the street was in perfect condition, and the horses did not become restless or frightened from anything existing in the street, and the accident was in no way caused by any imperfect condition of the street, but simply by noise resulting from the blast. If there was any culpable carelessness which caused the injury to the plaintiff, it was that of the contractors. They had entire control of the work, and the manner of its performance. They could choose their own time for firing the blasts, and select their own agents and instrumentality. They could make the charges of powder large or small, and they could in some degree smother the blasts, so as to prevent falling rocks, and much of the noise of the explosion, or they could carelessly omit all precautions, and for the consequences of their negligence they alone would be responsible. If it was a prudent thing to notify persons in the vicinity of the blast before it was fired, then the contractors should have given the notice; but the duty to give it did not devolve upon the village. And for these conclusions the cases of *Pack v. Mayor, etc.*, 8 N. Y. 222; *Kelly v. Mayor, etc.*, 11 N. Y. 432; and *McCafferty v. Railroad Co.*, 61 N. Y. 178,—are ample authority. It is conceded by the learned counsel for the appellant that if the plaintiff had been hit by a fragment of rock thrown by the blast the defendant would not have been, and the contractors alone would have been, responsible. So, too, if a fragment of rock had struck one of the horses, or had fallen or passed near them, and thus had frightened them, causing the injury to the plaintiff, within the authorities cited the defendant would not have been responsible, and for precisely the same reason no responsibility rests upon it because the team was frightened by the noise of the explosion. A rule which would cast responsibility upon the defendant for injuries resulting from the noise of the explosion, and

¹ Affirming 86 Hun, 593.

exempt it from responsibility for injuries caused by fragments of rock thrown by the explosion, would rest upon no rational basis, and require distinctions too fine for the practical administration of justice. The judgment should be affirmed, with costs.

All concur, except RUGER, C. J., not voting, and DANFORTH, J., dissenting.

(110 N. Y. 639)

MARSH v. PIERCE.

(Court of Appeals of New York. June 26, 1888.)

APPEAL—TIME OF TAKING—WAIVER OF OBJECTION.

Under Code N. Y. § 1325, requiring an appeal to the court of appeals from a final judgment to be taken within one year after judgment is entered and the judgment roll filed, where notice of appeal is not served until 16 months after entry of judgment, and respondent's attorney returns it, with the statement indorsed thereon that it is too late, he does not waive the objection by failing to return papers subsequently served upon him.

Appeal from general term, supreme court, Fourth department.

Action by Loren W. Marsh against Sylvester P. Pierce. Judgment for defendant, and plaintiff appeals. Motion by defendant to dismiss appeal.

Wm. C. Anderson, for the motion. Cornelius E. Stephens, opposed.

EARL, J. Judgment of affirmance by the general term was entered in this action, February 5, 1885, and the plaintiff did not serve notice of appeal therefrom to this court until the 1st day of June, 1886, nearly 16 months thereafter. He has caused a return to be made to this court, has served notice of argument, and has placed the cause upon our new calendar. The defendant has made this motion to dismiss the appeal on the ground that it was not brought within the time prescribed by the Code, section 1325 of which requires an appeal to this court from a final judgment to be taken within one year after the judgment is entered and the judgment roll filed. That is an absolute limitation, and the time begins to run from the time the final judgment is entered and the roll filed, and no notice of the judgment or of its entry is necessary to set the time running. This is made clear by the subsequent provision in the same section as to appeals to this court from orders of the general term. It is provided that such appeals must be taken within 60 days after service "of a copy of the order appealed from, and a written notice of the entry thereof;" and a similar provision is contained in section 1351 as to appeals to the general term. It was doubtless supposed, in limiting the time for appeals to this court to one year, that the party desiring to appeal would have ample opportunity to obtain information of the entry of the judgment without any notice thereof from the other party.

The counsel for the appellant claims that this motion should be denied on account of the laches of the respondent. The return was filed in this court on the 22d day of July, 1886, and on the 10th day of August, 1886, the appellant served three printed copies of the return on the respondent's attorney, and they were not returned. But the respondent's attorney immediately returned the notice of appeal served on him, with a statement indorsed thereon that it was returned because the appeal was not brought within the time required by the Code. That was a distinct notice to the appellant's attorney that his appeal was too late, and that the respondent did not mean to recognize the same, and the appellant could not thereafter take any further steps upon the appeal with any expectation that the respondent would waive the objection he had made. Having taken his stand, and notified the appellant's attorney thereof, the respondent's attorney was not bound to continue to return all the papers which the appellant's attorney chose thereafter to serve upon him, and he did not waive the objection he had made to the appeal by retaining copies of the printed case, which no act of his had caused or induced the appellant to print. When the attorney subsequently noticed the cause for

argument the respondent's attorney immediately returned the notice, with a statement that it was returned because the notice of appeal was not served in time. We are therefore of opinion that the motion should be granted, and the appeal dismissed, with costs.

All concur.

(110 N. Y. 635)

WAITE *et al.* v. NEW YORK CENT. & H. R. R. Co.¹

(Court of Appeals of New York. June 26, 1888.)

1. CARRIERS—DELAY IN DELIVERY—NEGLIGENCE—PLEADING AND PROOF.

In an action against a railroad company for damages occasioned by delay in delivering a boiler, the complaint alleged that defendant was a common carrier, and "so negligently and carelessly conducted" and "so misbehaved in its calling" as to occasion the delay; and the answer denied such negligence. The proof was principally as to defendant's negligence as a carrier, and its counsel interposed no objection that that issue was not involved in the case. *Held*, that defendant cannot complain of surprise on account of the exclusion by the court of the liability upon contract from the consideration of the jury, and submission of the case wholly upon the question of negligence.

2. SAME—NEGLIGENCE—WHAT CONSTITUTES.

A boiler was to be shipped from Boston to Little Falls. It was placed in car No. 2,890 of the Boston & Albany road, and taken to Albany, where it was transferred to car No. 20,126 of the New York Central & Hudson River road, with some other machinery consigned to East St. Louis. The agent of the former road notified the latter of the transfer by a dispatch, thus: "2,890, B. & A., Boston, to E. St. Louis, 10, trans'd to 20,126, N. Y. C." The latter road took the car, with the boiler therein, to East St. Louis; thereby occasioning delay in its delivery. *Held* that, the latter road having sent the car to East St. Louis without examination, there was sufficient evidence of negligence to support a verdict against it.

3. SAME—EVIDENCE—LETTERS WRITTEN AFTER DELAY.

In an action against a railroad company for delay occasioned by a mistake in the shipment of merchandise, letters written to it by the agent of a connecting road, from which it received the consignment, in relation to the mistake, after it had occurred, are not admissible.

Appeal from general term, supreme court, Fourth department.

Action by Eben B. Waite & Co. against the New York Central & Hudson River Railroad Company for damages occasioned by delay in the shipment of a boiler. Judgment for plaintiffs, and defendant appeals.

C. D. Prescott, for appellant. *Hadley Jones*, for respondents.

FINCH, J. This action was brought to recover damages for delay in the delivery of a boiler shipped to the plaintiffs from Boston. Their recovery, which was sustained by the general term, is resisted here mainly upon two grounds.

It is claimed that the action was upon an express contract; that whether such contract did or did not exist was the point in controversy; that, at the close of the evidence, the court ruled that no contract had been established; and then for the first time put the case upon the ground of the defendant's duty as a carrier, and submitted to the jury the question of negligence in the performance of that duty. It is added that the defendant corporation was not prepared, and had no opportunity, to contest that new issue, and it was error to introduce it into the controversy. The history of the trial does not sustain this contention. The complaint explicitly alleged that the defendant was a common carrier, and "so negligently and carelessly conducted" and "so misbehaved in its calling as a common carrier" as to have occasioned the delay and injury which the plaintiffs suffered. The answer not only denies the negligence alleged, but avers that the delay was due to the careless and negligent conduct of the Boston & Albany Railroad Company, over whose line the property was transported from Boston, and by whom it was delivered to

¹Affirming 89 Hun, 655; *mem.*

the defendant, to be further carried over its road to Little Falls. Very early in the trial, and before the evidence had at all developed the facts, the defendant's counsel, in objecting to a question put, declared: "This is simply a question between these two roads as to who made the mistake." As the trial proceeded, the plaintiff's proofs were devoted almost entirely to the question of the defendant's negligence as a carrier; and, among the plentiful objections taken, no one was put upon the ground that no such issue was fairly involved in the case. When the inquiry as to damages was reached, the defendant's counsel interposed, and moved for a nonsuit on the general ground that no cause of action was proved, and renewed that motion at the close of the evidence upon the ground—*First*, that no contract had been established; and, *second*, "that in an action like this, for a delay merely in the delivery of freight, the ordinary rule in regard to being insurers as against everything but the act of God and the public enemy does not pertain, and any excuse which shows that they employed reasonable diligence is all that is necessary." And when, in answer to that motion, the court held in defendant's favor in respect to a contract, but submitted the question of negligence to the jury, the counsel for the railroad company excepted because no negligence had been proved, and upon the whole evidence could not be said to exist. Upon these facts it is entirely clear that the defendant was in no respect surprised or misled, and has no just reason to complain of the action of the court.

The next contention is that, upon the facts, the defendant was shown to have exercised reasonable care, and was not chargeable with negligence. I think that was quite certainly a question for the jury. The way-bill of the property reached the agent of the Boston & Albany road at its terminus in East Albany on the 11th of September, and on that day was sent by messenger to the agent of the defendant, who thereafter forwarded it to the freight agent at Little Falls, who received it the next day. That way-bill, dated September 10th, was "of merchandise from Boston to Little Falls," specified the car as "B. & A. 2,390," named the plaintiffs as consignees, described the property as machinery, and fixed the amount of freight chargeable by each road. The property arrived on September 13th, and was by the Boston & Albany agents unloaded from car 2,390, together with some other machinery consigned to East St. Louis, and transferred to defendant's car, numbered 20,126. That car was taken across the bridge, and to West Albany, and there taken out of the train, and held for want of a conductor's slip, or other evidence of its destination. On the 14th or 15th of September, Ingraham, who represented the Boston & Albany, sent to J. J. Jones, the dispatch agent of the defendant, a notice which is in this form: "2,390, B. & A., Boston, to E. St. Louis, 10, transfd to 20,126, N. Y. C." So that, before the machinery left West Albany, the defendant knew that it had been sent from Boston on car 2,390, had arrived at East Albany, had been transferred to car 20,126, and was waiting at West Albany for further direction; or, if the defendant did not know all these facts, its agents had full means of knowledge in their possession, or spread upon their records, and it was their business to know, and not carelessly and without examination send car 20,126 to East St. Louis loaded in part with the freight which should have stopped at Little Falls. It may be that the Boston & Albany road was partly in fault for the mistake, but it was fairly a question for the jury whether the defendant was not negligent in shutting its eyes to its own means of knowledge, which it was its duty and business to utilize and employ. If the system of transfers adopted admits of such mistakes, both roads should reorganize the system.

A further exception is argued, growing out of the refusal by the court to admit in evidence certain letters written by the agents of the Boston & Albany in answer to letters from the agents of the defendant. This correspondence is among the exhibits attached to the case. The first letter of Ingraham was dated October 17th, and the second October 27th. Both were written long

after the mistake had occurred,—the first on the day the property finally reached Little Falls, and the second 10 days later; and both were the unsworn statements narrative of a past occurrence of the agents of the Boston & Albany road, which last was not a party to the action. They were not admissible; but, if they had been, they would have been badly damaging to the defendant, for not only do they tend to fasten the charge of negligence upon the defendant, but do it so forcibly and with so much reason that, at the close of the correspondence, their offer to bear a part of the loss seems at least liberal and fair. Several objections were taken to the admission and rejection of evidence, and to the charge of the court, but do not seem to us well founded. The judgment should be affirmed, with costs.

All concur.

(110 N. Y. 650)

GARDINER *et al.* v. SCHWAB *et al.*¹

(Court of Appeals of New York. June 29, 1888.)

SALE—ACTION FOR PRICE—GOODS WRONGFULLY RETURNED—MEASURE OF RECOVERY.

Defendants having agreed to purchase from plaintiffs certain goods of a designated quality, the price to be paid on delivery, the goods were furnished as agreed; but a portion, proving inferior to the agreed quality, were returned. Defendants also, about a month after their receipt, returned another portion of the goods, falsely claiming them to be of an inferior quality, but plaintiffs did not consent to receive them. *Held*, that the measure of plaintiffs' recovery was not the difference between the market value of the goods and the contract price, but the contract price for all the goods delivered, less the amount not actually complying with the contract in quality.

Appeal from supreme court, general term. Third department.

Action by Leonard Y. Gardiner and another against Gabriel Schwab and others for the contract price of goods sold and delivered. Judgment on the report of a referee was rendered for \$613.86, which was, on appeal to the general term, affirmed, and defendants again appeal.

Theo. H. Swift, for appellants. *W. L. Van Denbergh*, for respondents.

GRAY, J. As the case presented here does not contain the evidence given upon the trial, the correctness of the conclusions of law made by the referee is alone the subject for review. If they are warranted by the findings, the judgment must be sustained. We are only concerned with the legal effect of the facts as found. Those findings of fact we must assume to be true, and we must also assume that the facts proved on the trial were sufficient to sustain those findings. Indeed, if necessary, we must assume that they were sufficient to sustain any additional findings required to sustain the conclusions of law, not in conflict with the affirmative facts found. *Kellogg v. Thompson*, 66 N. Y. 88; *Murray v. Marshall*, 94 N. Y. 617. A consideration of the record here reveals no error in the referee's conclusions. The action being to recover of the defendants for the purchase price of certain goods which they had agreed to take of the plaintiffs if of quality equal to a sample produced, and of colors to be designated by them, the referee found as the facts that all which had been furnished pursuant to defendants' orders conformed thereto, except as to 217 yards, which he found to have been unmerchantable and unsalable. He found the liability from the defendants to the plaintiffs, under their agreement, to be for the contract price for the quantity of goods furnished, less the number of yards of goods returned as unmerchantable and unsalable. The appellants claim that they returned to the plaintiffs some more of the goods furnished under the agreement, as being unsalable, and that the referee's finding to that effect is in hostility to the conclusion of law. They argue that, such being the fact, the only cause of action which plaintiffs can maintain is for a failure to accept the goods on delivery, the measure of dam-

¹ Affirming 88 Hun, 641, *mem.*

age for which is the difference between the contract price and the market price at the time of refusal. The referee's finding is that the particular goods referred to were returned by defendants, but he does not find that the plaintiffs consented to receive them back. He does find that they were returned about a month after they were furnished, but he makes no finding that they were in excess of quantity or inferior in quality. Under the terms of the agreement, the price for the goods was to be paid on their receipt by the defendants; and, as nothing in the record appears to the contrary, the act of defendants in returning the goods, after retaining them for a month, may have been an attempt to throw them back on the plaintiffs, which they were not warranted in doing, and to which the plaintiffs did not assent. The commencement of this action, within a few days after the return of that lot, to recover for the goods which had been furnished, is a fact negating the idea of any assent by the plaintiffs. To reverse the referee's conclusion of law it must appear that, from the facts found, that conclusion is erroneous. We think his findings of fact justified his conclusion of law, and for that reason the judgment of the general term, affirming the judgment entered upon the report of the referee, should be affirmed, with costs.

All concur.

(110 N. Y. 646)

DAVIS v. NEW YORK, L. E. & W. R. Co.

(Court of Appeals of New York. June 29, 1888.)

PLEADINGS—AMENDMENT—AFTER REMAND BY GENERAL TERM.

Under Code Civil Proc. N. Y. § 723, providing that at any time on or before trial, or before or after judgment in an action, the court may, in furtherance of justice, and upon just terms, amend a pleading by inserting an allegation material to the case, a complaint by an engineer against his employer, a railroad company, alleging injuries arising from negligence in failing to furnish suitable and safe appliances, and in not furnishing a safe locomotive, whereby plaintiff was injured, may be amended at the special term, after a reversal and an order remanding the case, and before a second trial, by inserting an allegation that the injury was caused by improper and unsafe coal furnished for use in the engine; such allegation not amounting to a new cause of action.

Appeal from general term, superior court, city of Buffalo.

Action by Nathan W. Davis against the New York, Lake Erie & Western Railroad Company for personal injuries. Plaintiff recovered a judgment, which was reversed by the general term, and, upon the case being remanded, was allowed to amend his complaint by the special term, which order was affirmed by the general term on appeal. From the judgment of affirmance, defendant appeals to this court. Code Civil Proc. N. Y. § 723, provides that at any time before or pending trial, or before or after judgment, the court may, in furtherance of justice and upon just terms, amend a pleading by inserting an allegation material to the case.

Norris Morey, for appellant. Charles A. Pooley, for respondent.

EARL, J. The amendment of the complaint which the court at special term gave the plaintiff leave to make, was authorized by section 723 of the Code. The amendment did not bring into the complaint a new cause of action. The cause of action alleged in the original complaint was to recover damages resulting from an injury caused to the plaintiff by the wrong of the defendant, and precisely the same cause of action is alleged in the amended complaint. It was alleged generally in the original complaint that the defendant so negligently, carelessly, and unskillfully conducted its business that it failed to supply the plaintiff with suitable and safe appliances in the conduct of its business, and failed to keep the same in repair, as was proper and necessary to do to secure the safety of the plaintiff; and it was specially alleged that the defendant was negligent and careless in not furnishing a safe and proper locomotive engine to the plaintiff with which to do his work, and that in conse-

quence thereof he was injured. It turned out upon the trial, by proof given on the part of defendant, that the plaintiff may have been mistaken in his particular allegation that the engine was defective and improper, and that his injury may have been caused by improper coal furnished for use in the engine; and therefore, to meet the case as it might be made upon the evidence, the plaintiff was permitted to insert in his amended complaint, in addition to the other allegations, averments that the fuel furnished for use in the engine was unfit, unsuitable, and dangerous. These allegations did not constitute a new cause of action. The plaintiff still based his right to recover upon the same injury, caused to him, at the same time and place, by the wrong of the defendant; and all that was added in the amended complaint was additional specifications of the same wrong. The plaintiff, when he framed his original complaint, may have been mistaken as to the cause of the effects from which he suffered the injury, but he was not mistaken as to his cause of action. It is a fair test to determine whether a new cause of action is alleged in the amended complaint, that a recovery had upon the original complaint would have been a bar to any recovery under the amended complaint. If the plaintiff had, however, been beaten or nonsuited upon a trial under the original complaint, because of the insufficiency of the allegations therein contained, the judgment entered would not have barred a recovery under the amended complaint, because the judgment in such case would not have passed against the plaintiff upon the merits. There is no doubt that the court may at special term allow an amendment of a complaint by introducing therein even a cause of action barred by the statute of limitations; but in such case the defendant must not be deprived of his defense of the statute. As the court had power, in the exercise of its discretion, to allow this amendment, we have no jurisdiction to review its discretion, and the appeal should therefore be dismissed, with costs.

All concur.

(110 N. Y. 644)

BESTE et al. v. BURGER et al.

(Court of Appeals of New York. June 29, 1888.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—PARTNERSHIP—POWERS OF SURVIVING PARTNERS.

The surviving members of a firm can make a valid general assignment for the benefit of creditors, giving preferences. Following *Williams v. Whedon*, 16 N. E. Rep. 865.¹

2. SAME—ACTION TO SET ASIDE—EVIDENCE—ADMISSIONS AFTER ASSIGNMENT.

In an action to set aside a general assignment of firm property for the benefit of creditors, containing preferences made by the surviving partners, plaintiffs offered evidence of admissions of the individual partners, made several weeks after the assignment, on examination before the witness as referee in supplementary proceedings under one of plaintiffs' judgments, as to certain drafts on the firm by certain members about the time of the assignment. *Held*, that the evidence was immaterial, and incompetent to affect the grant as against the assignee, though not as against the individual partners, and was properly excluded; the offer being as to all the defendants.

Appeal from general term, court of common pleas, city and county of New York.

Action by Henry Beste and others as judgment creditors of the firm of Burger, Hurlbut & Livingston, to set aside a general assignment made by the surviving members of that firm for the benefit of their creditors; the executor of the deceased partner joining in the assignment, and expressly assenting thereto. On the trial at the special term it was found "that the said assign-

¹As to the rights and liabilities of the surviving partner, where a partnership is dissolved by the death of one partner, see Appeal of Shipe, (Pa.) 6 Atl. Rep. 108, and note; Klotz v. Macready, (La.) 2 South. Rep. 203; Brown v. Watson, (Mich.) 28 N. W. Rep. 498; Clay v. Field, 84 Fed. Rep. 375; Dial v. Agnew, (S. C.) 6 S. E. Rep. 295.

ment was not made with intent to hinder, delay, or defraud the creditors of the said firm, and that the same was made honestly and in good faith for the benefit of the said creditors according to the tenor thereof," and the complaint was dismissed on the merits, and judgment entered accordingly. On appeal to the general term the judgment was affirmed. From the latter judgment plaintiffs appeal, and assign as grounds of error (1) the exclusion of certain testimony; and (2) that surviving partners cannot make a valid assignment for the benefit of creditors, whether with or without the assent of the personal representatives of the deceased partner.

Frederic R. Coudert and Paul Fuller, for appellants. *W. W. MacFarland*, for respondents. *W. W. Goodrich*, for assignee.

EARL, J. This action was brought by the plaintiffs as judgment creditors of the firm of Burger, Hurlburt & Livingston, to set aside a general assignment made by the surviving members of that firm for the benefit of their creditors. The assignors and assignee were made defendants. The action was brought to trial at a special term, and there the complaint was dismissed, and the judgment there entered was affirmed at the general term. At the trial no evidence whatever was given of any actual fraud affecting the assignment, and the sole contention of the plaintiffs, both at the special and general terms, appears to have been that the surviving members of the firm had no power to make the assignment. Since the decision of the general term, we have, in *Williams v. Whedon*, 109 N. Y. —, 16 N. E. Rep. 365, held that the surviving members of a firm are competent to make a general assignment for the benefit of creditors giving preferences; and it is now conceded on the part of the appellants that this judgment must be affirmed unless there was error at the trial in ruling upon evidence to which we will now call attention.

A witness was called by the plaintiffs, who testified that he was a lawyer, having some connection with plaintiffs' attorneys; that he had conversations with some of the defendants, constituting the firm of Burger, Hurlburt & Livingston; that he examined Hurlburt under oath in supplementary proceedings under one of the judgments mentioned in the complaint, and that Burger was present at the same time; that Hurlburt and Burger made statements to him, at that time, with reference to the amount of moneys drawn from the firm by one or more of the members thereof at or about the time of making the assignment. He was then asked this question by plaintiffs' counsel: "Please state what they said upon the subject of any drafts from the concern by any of the partners at or about the time of making the assignment. This question was objected to by defendants' counsel on the ground that it was "an attempt to introduce admissions of a grantor made after the execution of the deed;" counsel for the defendant Platt, the assignee, saying: "It is endeavoring to prove the admissions of the grantor after the grant has been made. That, of course, cannot be admitted under any circumstances. As I understand the law, any remarks or admissions of the grantor in the deed cannot be given after the execution of the conveyance." To this counsel for plaintiffs replied: "That is true; there is legal good faith and good faith in fact. I simply want to prove that fact, or we can admit it, and allow your honor to determine afterwards." The court then sustained the objection, and counsel for plaintiffs excepted to the ruling. We think there was no error in excluding this evidence. The question related to a time several weeks subsequent to the assignment, and when the property assigned was in the possession of the assignee. The statements offered were not part of any *res gestæ*, and they were not offered for the purpose of contradicting or discrediting any witness produced by the defendants. Even if the statements would have been competent evidence against the parties who made them, it is well settled that they were not competent against the assignee. The attention of the court was not called to the fact that they might be competent evidence against the

parties making them; and, when they were specially objected to on behalf of the assignee, the offer was still persisted in. Under such circumstances, the plaintiffs cannot complain that the evidence offered against all the defendants was excluded. But, still further, the evidence appeared to be entirely immaterial, and no offer, statement, or explanation was made by plaintiffs' counsel showing how it might become material. On the contrary, plaintiffs' counsel stated that he simply wanted to prove that fact; and, if that was all, its exclusion certainly did not harm the plaintiffs. What did plaintiffs' counsel mean when, in reply to the statement of defendants' counsel that "any admissions by the grant, or after the grant has been made," cannot be given in evidence, he said: "that is true; there is legal good faith and good faith in fact?" That language must have induced the court to suppose that he assented to the legal proposition made by the counsel for the defendants. The evidence which the plaintiffs sought to give was therefore, in any event, incompetent as against the assignee, and it was so offered and so treated that there was no error in its entire exclusion. There was no further attempt upon the trial to prove any fraud, and it is a just inference that the main, if not the exclusive, purpose of the plaintiffs was to assail the assignment upon the ground above stated. The judgment should be affirmed, with costs.

All concur.

(110 N. Y. 188)

PEOPLE v. KEARNEY.¹

(Court of Appeals of New York. June 29, 1888.)

1. SEDUCTION—CRIMINAL PROSECUTION—EVIDENCE—BIRTH OF CHILD BEYOND PERIOD OF GESTATION.

On trial of an indictment for seduction under promise of marriage alleged to have occurred on July 4, 1885, it is prejudicial error to admit, over defendant's objection, evidence of the birth of a full-grown child in August, 1886, 13 months thereafter, as it neither tends to prove the seduction alleged, nor that the prosecutrix had intercourse with defendant on July 4, 1885, nor that the subsequent intercourse, from which, as claimed, the pregnancy resulted, commenced, as testified by her, at that time.

2. SAME—PLEADING AND PROOF—CHARACTER OF PROSECUTRIX.

In a prosecution under Pen. Code N. Y. § 284, for seduction under promise of marriage, corroboration as to the fact that prosecutrix is "an unmarried female of previous chaste character" is unnecessary; this allegation being simply descriptive of the person whom it was the purpose of the statute to protect. Distinguishing *People v. Plath*, 100 N. Y. 590, 8 N. E. Rep. 790.

DANFORTH and FINCH, JJ., dissenting.

Appeal from general term, supreme court, Fourth department.

Indictment of Charles E. Kearney for seduction under promise of marriage, accomplished on the 4th day of July, 1885. Judgment of conviction. Defendant appeals.

W. P. Goodelle, for appellant. Lawrence T. Jones, Dist. Atty., for the People.

PECKHAM, J. Under the objection and exception of the counsel for defendant, the court permitted the prosecution to prove that in August, 1886, the prosecutrix was delivered of a child at the countyhouse. She had already testified that the promise of marriage had been made in July of the previous year, and the intercourse had taken place immediately thereafter, and upon the faith of such promise, and had continued frequently until the following December. The materiality of this evidence as to the birth of a child could only have been claimed upon the ground that it tended in some degree to support the evidence of the prosecutrix upon one of the two points upon which such support was necessary, viz., the promise of marriage, and the intercourse

¹Reversing 47 Hun, 129.

following upon and on the faith of it. Authority for the admission of this evidence is claimed to exist in the case of *Armstrong v. People*, decided by this court, and reported in 70 N. Y. 38. In that case the promise of marriage was alleged to have been made in May, and the intercourse took place, on the faith of such promise, in the following August. The trial occurred in March of the next year; and the prosecution proved, by the female seduced, that, at the time of such trial, she was in the family way. It was held that such evidence was competent to be laid before the jury, as it proved that the woman, being unmarried, had had illicit intercourse with some one, which, under the evidence, must have taken place somewhere about the time she fixed as the time she had the intercourse with the defendant; and hence it must have tended, in some degree, to support her evidence. That case went to the limit, as it seems to me, of the principle upon which alone evidence of such a fact is admissible. It did show that the woman, being unmarried, had had illicit intercourse with some man, and in that way it supported her evidence as to a portion of the fact necessary to be proved, viz., that she had had such intercourse, and that it was with the defendant, and not only that, but also (and herein consists its materiality) that the intercourse took place at about the time which she alleged she had had it with him. Upon the same principle, it would have been proper, if the trial had taken place after the birth, to have proved that fact, provided the birth had taken place within the usual period of gestation after the seduction. The fact alone of the birth would, of course, have no tendency to prove that the child was the result of the intercourse with the defendant; but, taken in connection with the other circumstances of the case, it might have at least some tendency to strengthen her evidence on the main point, that the intercourse was with him. It might be slight; but, in the language of FOLGER, J., in that case, it was a fact not incompetent to be laid before the jury. In this case, however, another and a most material step is taken. The birth of the child was in August, 1886, and the physician in attendance swore it was a full-grown nine-months child; thus showing conception to have taken place as late as November, 1885, while the prosecutrix swore the seduction occurred on the 4th of the previous July. What support is given to the evidence of the prosecutrix that she was seduced under promise of marriage on the 4th of July, 1885, by proving that she was delivered of a child 13 months thereafter, or in August, 1886? This fact simply proves that she had illicit intercourse with some one four months subsequent to the time when she swears that she was seduced under promise of marriage by the defendant. In the *Armstrong Case* the evidence showed that the female had had intercourse with some one at or about the very time she alleged she had it with the defendant. In this case it shows nothing of the kind. It neither shows, or tends to show, that she had any intercourse with the defendant at the time she swears she was seduced, nor does it show, or tend to show, that she had such intercourse with any one at or about that time. It is said that it is a most natural consequence of the seduction that the intercourse should have continued thereafter, as sworn to by the prosecutrix, and until it resulted in her pregnancy. That is very likely true; but it does not advance us a step in the way of proving that the intercourse did commence in July. If it did then commence, it may be admitted that it was very likely to have continued; but is it any, even the slightest, proof that it did then commence, by proving that she had illicit intercourse with some one four months thereafter, which resulted in the birth of a child after the usual period of gestation? In other words, is there any support given to the evidence of the prosecutrix as to the seduction by the defendant in July, 1885, by proof of this nature? I cannot see that an affirmative answer can be given to either interrogatory. How can it be said to support the evidence of the prosecutrix? In the *Armstrong Case* it did support her evidence, by showing that, at or about that very time when she swore she was seduced, she had illicit

intercourse with some one. Suppose she had not been pregnant? In such case there might have been no proof that she had ever had connection with any man, and her whole story might, in that event, have been entirely unsupported. Of course, we do not mean to intimate that no conviction can be had, under this statute, unless pregnancy follows the seduction. But it might be much more difficult to support the evidence of the female alleged to have been seduced if no such result followed. The evidence given did, however, support her story so far as to show that she had had intercourse with some man, and as to the time at which it took place; while other evidence in the case may have supported her story that she had the intercourse at that very time with the defendant. But in this case the evidence does not even tend to the support of her story that she had intercourse with the defendant on the 4th of July, 1885, under promise of marriage, because it does not tend to show that she had such intercourse at that time, or about that time, with any man. It is not a case where the prosecutrix may have been deceived or mistaken as to her dates, so that she ought not to be held to the very day, or even week, on or in which she placed the seduction. This is an affair of months, and there is no claim of any mistake as to date, occasion, or place. The crime was committed, if at all, on the 4th of July, 1885.

We think it was error to admit this evidence. In *Boyce v. People*, 55 N. Y. 644; it seems to have been assumed that if evidence of this nature had been objected to, and admitted under objection and exception, it would have been error. The error was saved because the evidence was not objected to, and the prosecution stated that no reliance was placed on it as being corroborative in any degree of the prosecutrix, and therefore the refusal to strike it out was not error, as there was no strict right to have it stricken out when it came in without objection. We fully realize the truth of the proposition that evidence in corroboration of the prosecutrix, in this class of cases, upon the points where corroboration is necessary, viz., the seduction and the promise of marriage, is not very easily obtainable. For that reason it has been held that only such corroboration as, in the natural and ordinary course of events, these facts are capable of, is to be required. But this rule cannot be construed to allow evidence of a fact which does not in the least tend to support the evidence of the prosecutrix upon the two points which require it. That the evidence in this case, of the nature herein commented on, was of a very dangerous and probably highly injurious character and tendency, we think admits of no controversy. The crime is a most atrocious one, and one which must naturally tend to enlist the sympathies of all men, and of course of jurors, in favor of the victim. In such cases, while administering the law with perfect fairness, courts must be extremely careful that no evidence of a tendency to excite or influence the resentment of jurors, and which does not tend to support the evidence of the prosecutrix, or to connect the defendant with the commission of the crime, should be permitted to go to the jury. Cases are cited by the counsel for the people where, under indictments for adultery, (where that act is made a crime, in some of the states,) evidence of intercourse between the parties, or even acts of familiarity between them, prior and subsequent to the time when the adulterous act is alleged to have been committed, is competent as tending to prove such act at the time laid. The cases are not at all analogous, and the same principle does not govern. If evidence had been given in this case tending to show or showing that the defendant had had intercourse with the prosecutrix subsequent to the time when she alleged she was seduced, it might have been admissible upon the principle decided in those cases. Such evidence was given in this case by the female herself, who swore to frequent intercourse up to December, 1885, with the defendant. But the fact that the prosecutrix had a child 13 months after her alleged seduction by defendant did not show, or tend to show, illicit intercourse with him subsequent to the alleged seduction, which would have to be the case to make

it parallel with the cases cited by the counsel for the people. Nor did it, as we have attempted to show, tend to prove that she was seduced in July, 1885, by the defendant.

As the case must go back for a new trial, we think it proper to state that, in our judgment, no new principle, as to the evidence required in support of an indictment in such a case as this, was promulgated by the decision in *People v. Plath*, 100 N. Y. 530, 3 N. E. Rep. 790, as seems to have been assumed by the counsel for the defendant herein. It was held in that case that the corroboration must be upon all the points which go to make up the crime, (in that case, abduction for the purpose of prostitution,) and that in that case corroboration was necessary as to the taking, as well as to the purpose for which the taking occurred. Here the defendant's counsel argues that this decision makes it necessary to corroborate the prosecutrix, not only upon the question of the promise and the seduction, but also upon those of the previous chaste character of the female seduced, and that she was unmarried. This court has held that the offense really consisted in the seduction under a promise of marriage, and that the character and condition of the female simply identified the kind of person whom the statute had in view, and whose purpose it was to protect. Supporting evidence never was, and is not now, required on those points. See *Kenyon v. People*, 26 N. Y. 208. The cases are perfectly consistent. But for the reasons already given this judgment must be reversed, and a new trial ordered.

ANDREWS, EARL, and GRAY, JJ., concur. DANFORTH and FINCH, JJ., dissent. RUGER, C. J., not voting.

(110 N. Y. 183)

WALTERMIRE v. WALTERMIRE.¹

(Court of Appeals of New York. June 20, 1888.)

DIVORCE—SEPARATION—ABANDONMENT—DEFENSE OF CRUELTY.

On complaint for a separation by the husband on the ground of abandonment, it appeared that the wife had lived with him nearly 50 years, and had always discharged faithfully her wifely duties; that in 1877 he threatened to knock her down, and struck at her twice; that he had been continuously abusive, calling her "all the bad names that belong to a bad woman," "a dirty bitch," "a liar," "a whore," and had accused her of adulterous intercourse with other men, naming them. Held, that such conduct was "cruel and inhuman treatment" under Code N. Y. § 1767, and her abandonment was justified, and though the husband be plaintiff, under Code N. Y. 1772, she is entitled to affirmative relief by a decree for separation and a reasonable support.

Appeal from general term, supreme court, Second department.

Action by Edwin N. Waltermire for a decree of separation, on the ground of abandonment, against his wife, Maria Waltermire. Decree for defendant. Plaintiff appeals.

Henry W. Gilbert, for appellant. W. Farrington, for respondent.

DANFORTH, J. The courts were not troubled, in this case, with contradictory statements, nor the evidence of casual observers, whose inferences might be inflamed or partial, as their sympathies went with one or the other party. They have had only the testimony of the defendant, and that not given voluntarily, or as a witness in her own behalf, but on compulsion of the plaintiff, and left by him undisputed. Yet from this testimony the courts below have reached different conclusions; the trial judge relieving the plaintiff by a decree in his favor, and the general term adjudging that the plaintiff was at fault, and not only to be defeated by his own misconduct, but that the defendant was entitled to recover upon her affirmative allegations. A

Affirming 88 Hun, 643, *mem.* and 41 Hun, 643, *mem.*

new trial was therefore ordered, but the plaintiff, by appealing, makes that impossible, and he consents to judgment absolute if the decision shall be affirmed. We think the evidence justified the conclusion of the general term. The parties were married in 1834; and from that time until September, 1882, nearly half a century, lived together as husband and wife, she rendering wifely service as a helpmate, in all that that term implies, until, as she alleges, compelled "by his faithless and hateful conduct as a husband, and his cruel and inhuman treatment, to leave his side." The evidence in the case was adopted by the court as the defendant's pleading. From that it appears that, in 1877, the plaintiff laid violent "hands upon her, led her to the door, threatened to knock her down, and struck at her twice." Upon another occasion, falling to the floor from sickness, "he said it was a pity she ever got up;" and, again, he said, "I will be glad when you draw your last breath." He called her "all the bad names that belong to a bad woman," "a dirty bitch," "a liar," "a whore." He accused her of being "with different men in the neighborhood, naming several, and having with them improper intercourse." These are the gravest circumstances that characterize his conduct as "cruel and inhuman." There are many others which made her life miserable, and rendered it unfit that she should live with him, and impossible for her to do so with any sense of self-respect, or with any comfort. They were continuous, and not occasional. Those mentioned bring the case within the statute which, for cruel and inhuman treatment, permits a separation, (Code, § 1762;) and that relief, by the terms of the same statute, (Id. § 1772,) may be had by the wife, although the husband is the plaintiff. The circumstances, which constitute his misconduct, not only defeat his action, but entitle the defendant to the protection of the court. The ill feeling of the plaintiff towards his wife was manifested repeatedly, not by mere "petulance or rudeness," but by a series of acts of personal violence, and a continual use of insulting language. He thus caused the abandonment of which he complains, and his conduct entitles the defendant to a separation, and a reasonable support at his hands. *Barrere v. Barrere*, 4 Johns. Ch. 187. The order appealed from should therefore be affirmed; and the defendant have judgment absolute, according to the prayer of the answer.

All concur

(110 N. Y. 159)

HAMILTON v. SMITH.

(Court of Appeals of New York. June 29, 1883.)

WILLS—CONSTRUCTION—CHARGES UPON REAL ESTATE.

A will provided that, "after all my * * * debts are paid and discharged, I give and bequeath unto my wife" one-third of the personalty, and the use of one-third of the realty for life. It then gave the residue of the "real and personal estate" to testator's son,—one-half absolutely, and one-half in trust for a daughter. Power to sell any of the property was given to the son as executor or trustee, to whom also was given the right to continue testator's milling business. *Held*, that there was no blending of the real and personal estate, and no conversion; and that, in view of the provisions of Code Civil Proc. N. Y. § 2749 *et seq.*, permitting creditors to resort to decedent's real estate, the will could not be construed to charge the realty with the payment of debts, though the personalty was insufficient for that purpose.

Appeal from general term, supreme court, Fifth department.

Prior to the year 1878, the city of Rochester constructed a system of water-works by which it used certain water privileges which were appurtenant to the lands of one Hiram Smith. In that year, he with other owners of premises similarly affected, commenced an action to restrain the city. He was unsuccessful until, by the judgment of this court, his right to maintain the action was established. 92 N. Y. 463. After the reversal by this court of the judgments below, an order of injunction was granted. Hiram Smith died May 14, 1883, leaving a will, dated April 10, 1883, by which he disposed of his real and personal estate as follows, viz.: "First. After all my lawful and

just debts are paid and discharged, I give and bequeath unto my wife, Emily C. Smith, one equal one-third of all the personal property of which I may die seized, and the use or income from one-third of my real estate, during the term of her natural life. *Second.* The residue or remainder of my real and personal estate, of every name or nature, I give, devise, and bequeath unto my son, George R. Smith, in manner following: One equal one-half of the same to him absolutely; the other equal one-half to him in trust for the benefit and maintenance of my daughter, Emma C. Smith." Testator empowered his son to manage Emma's share, and to pay over to her the income, and also such part of the principal as he might choose; and he might transfer to her the title to the property held by him as trustee, and, upon properly accounting, thus release himself from the trust. Power was given to him, as executor or trustee, to sell, etc., any of testator's property, and to invest the same according to his discretion; and the right was given also to continue the business in which testator was engaged at the time of his death, in testator's name or otherwise, for such time as he might choose. George qualified as executor. At the time of his death, testator was engaged in the milling business. In November following testator's death, for considerations expressed in the conveyance, the widow and daughter of deceased conveyed to George the flouring-mill premises, water privileges and rights now in question, the machinery, stock in trade, and indebtedness due the estate; he assuming payment of all incumbrances and indebtedness. In March, 1884, the city of Rochester instituted these proceedings to acquire, as against the owners of the mill property in question, and of other owners of mill privileges, the permanent and perpetual right to draw water, and to condemn the privileges injured thereby, and to ascertain by commissioners the amount of the compensation to be made to such owners. In June, 1885, the commissioners awarded to George and Emma Smith, as owners, the sum of \$21,000. George, being indebted to William Hamilton, appellant herein, had assigned to him, in March, 1884, all his interest in the award as security for what was owing then, and for what he might thereafter become indebted to him for. Hamilton's claim amounted, at the time of these proceedings, to some \$14,000. In December, 1884, George made a general assignment to said Hamilton for the benefit of his creditors. When the award of damages was made, the conflicting claims to the fund were referred for determination. They were made by Hamilton, by creditors of the decedent, Hiram Smith, and by George, as executor of his father's will. He filed his first account, as such executor, in September, 1886, which, at the time of these proceedings, had not been judicially settled, from which it appeared that there were presented debts against the estate, in addition to claims allowed and paid in full, amounting to about \$25,000, of which about \$23,000 remain unpaid and unsecured. The referee sustained the claim of Hamilton to the fund in virtue of the assignment to him individually and of the other assignment to him for the benefit of George's creditors; holding that the real estate was not devised charged with the payment of testator's debts. At special term, however, his report in that respect was modified, and payment ordered to be made to George, as executor, for distribution among the creditors of the estate. This disposition of the fund by the special term was sustained by the general term, and from the order of the general term Hamilton has appealed to this court.

Theo. Bacon, for appellant. *J. A. Stull*, for respondent.

GRAY, J., (*after stating the facts as above.*) Section 2749 of the Code of Civil Procedure provides that "real property of which a decedent died seized * * * may be disposed of, for the payment of his debts and funeral expenses, as prescribed in this title, except where it is devised expressly charged with the payment of debts and funeral expenses," etc. Section 2750 provides that such a disposition may be effected by a proceeding before the surrogate's

court, instituted, by unsecured creditors, "at any time within three years after letters were first duly granted, within the state, upon the estate of a decedent." By the force of these enactments the debts of a decedent, by the rights of creditors, will seek the real estate when the personalty is exhausted, and the only restriction upon their rights is the not unreasonable one of the period of time within which they shall be enforced. As the three years had more than elapsed in this case, the statutory remedy of the creditors of Hiram Smith against the real estate is no longer available. The question of the proper disposition of the fund in question is, therefore, of considerable moment to the parties interested in his estate. The water privileges which the city of Rochester, through its proceedings, condemned, were appurtenant to the real estate devised by the testator. They constituted an easement attaching to the land of the devisee, which would pass as an incident to it. This fund, therefore, partakes of the nature of realty, and for every purpose is to be treated as its representative here.

The general term, in their conclusions below, seemed influenced, in construing the terms of the will, by extrinsic circumstances; which, when called in aid of the discovery of the intention of the testator, led them to find an intention to charge his lands with the payment of his debts. They concede that the power of sale is not in terms significant in that direction; but they thought the words, "after all my just and lawful debts are paid and discharged," in the will, had such significance, in connection with the fact that the testator's personal estate, at the time of his death, (which was shortly after the making of his will,) was so inadequate for the purpose of discharging his debts, as to make the power of sale consistent with an intention that the debts should, so far as necessary, be a charge upon the realty. Whether a general direction for the payment of debts and legacies charges the real estate with their payment has been the subject of discussion in the courts from an early period. The question has more often been raised with respect to legacies. For obvious reasons, the question of whether debts are made a charge upon real estate devised, has not demanded much attention from our courts. The existence of the statutory provisions referred to, which give to creditors a right to have the real estate of a decedent disposed of, and which are usually availed of, removes the necessity for raising that question. We do not think that the course of administration should be changed in this case, or ever, without clear evidence of intention. In *Lupton v. Lupton*, 2 Johns. Ch. 614, the chancellor had before him the question of whether legacies were charged upon the real estate, and it is elaborately considered. But in the course of his opinion he made these remarks: "Thus where the testator devises the real estate after payment of debts and legacies, as in *Tompkins v. Tompkins*, Finch, Prec. 397, and in *Shallcross v. Finden*, 3 Ves. 738, or where he devised the real estate after a direction that debts and legacies be first paid, as in *Trott v. Vernon*, Finch, Prec. 430, and in *Williams v. Chitty*, 3 Ves. 545, the real estate has been held to be charged. It is not sufficient that debts or legacies are directed to be paid. That alone does not create the charge, but they must be directed to be first or previously paid, or the devise declared to be made after they are paid." Courts should be slow to construe an intention to charge the payment of debts upon a devise of real estate, from the use in a will of formal words, or the presence of commonly employed phrases. Of such a case this seems a fair illustration; for, beyond the opening words of the will, "after all my lawful and just debts are paid, I give," etc., "to my wife," etc., the instrument concededly is devoid of any expression or declaration by the testator of intention as to the mode of payment of his debts. These words have become a usual formula in wills, and to their presence in a will I think we should give no greater significance than was given by the chancellor in *Lupton v. Lupton*, *supra*, to the use of the words which give "the rest, residue, and remainder of real and personal estate not hereinbefore

already devised and bequeathed." He said: "If that residuary clause created such a charge, the charge would have existed in almost every case; for it is the usual clause, and a kind of formula in wills." If we except the formal words with which this will opens, the testator's language furnishes no inference or clue of intention. In *Kinnier v. Rogers*, 42 N. Y. 581, it was said: "There is no special designation of the fund or property from which the debts, and said annuities and legacies and provisions, are to be paid and satisfied. The personal estate is therefore the primary fund applicable thereto, and the devise of the residuary estate, being in general terms, without any declaration or statement that the real estate is given after or subject to the payment thereof, or of any part thereof, there is no ground for the inference that the testator intended to appropriate it to such purpose." The case of *Reynolds v. Reynolds*, 16 N. Y. 257, which has been cited, furnishes authority for the proposition that, to create a charge upon real estate, there must be either express directions to that effect, or the intention thus to charge it must be implied from the whole will taken together.

In this will the gift of the residuary real and personal estate refers to what remains after the bequests, in the prior clause, to the wife of one-third of the personalty, and of the income of one-third of the realty. No equitable conversion is worked of the real estate into personalty by the power of sale to George as the executor and trustee; for it was not obligatory upon him, and a merely discretionary power of selling produces no such result. It may not be amiss to note the distinction here, that the real estate was neither devised to the executor, nor was a fund given or created for the payment of the debts, beyond the personalty. Testator's son, George, was the devisee of an undivided interest, in common with others who had no part in the execution of the will. We recognize the rule insisted upon that the intention of the deviser is to be sought out by all possible investigation, and observed with strictness, however untechnically expressed. The rule is one of construction, adopted from a very early period, and it has uniformly been sustained in the courts. But we should be careful, in applying the rule, not to construct an intention from words which have acquired, from constant use, merely a formal or customary character, and for that reason have ceased to have great import as expressions of the will-maker.

It is argued, however, that by the terms of this instrument, read in the light of surrounding circumstances, the testator's words, as to payment of his debts, are given a force which, as general words, they might not otherwise have in the will. The general-term opinion concedes that they, or general words of like character, in the opening paragraph of a will, do not necessarily have the effect to make testator's debts a charge upon real estate. But the learned judge at general term considered there was a blending of the disposition of the real and personal estate, which, with the fact of the excess in the amount of his debts over his personal estate, seemingly made the entire devise and bequests subject to the payment of his debts. We cannot so view the terms of this will, or deduce such inferences from the surrounding circumstances. Inadequacy of the personalty is not suggestive of any such intention, in view of the existing provisions of the Code of Civil Procedure, permitting a resort to the real estate by the creditors of a decedent. There was no blending of the real and personal estate in the residuary clause of this will. They are kept distinct by the prior clause, and a different direction is given to each. The testator's wife was given one-third of the personalty, and the income from one-third of the realty, and the remainder is divided between the two children; the son taking his share absolutely, and holding his sister's share in trust. The authority given in the will to his son to continue the milling business is hardly consistent with the existence, at the time, of an idea that the real estate necessary to its conduct should be charged with testator's debts. The pending action against the city of Rochester is not a cir-

circumstance which can be taken as suggestive of any particular intention or expectation on testator's part. That action was brought for equitable relief, and success meant an injunction against further use of the water privileges, but no money recovery for the taking of property. The proceedings by the city of Rochester to acquire the right of a perpetual use of the water privileges appurtenant to the real estate of which Hiram Smith died seized, were instituted, after testator's death, and when George, his son, by force of the devise in the will, and of the conveyance from his mother and sister, was invested with the title to the whole of the real estate in question. Testator had a right of action for damages for the injury committed upon his property rights, which would have survived to his executor; but the object of the proceeding by the city was the acquisition, by condemnation proceedings, of the interest of George, as the owner, in the property.

Without further elaboration of the point, the conclusions at which we have arrived are (1) that, upon the death of Hiram Smith, his son, George, became vested with the absolute title to an undivided half of the real estate in question, (subject to the provision for the widow from the income,) free from any charge for the payment of the testator's debts; and, upon the conveyance to him by his mother and sister, his title to the whole became perfect, subject only to be disposed of through proceedings under the statute, when instituted by creditors of the estate, to compel a payment of their debts, for which the personality was shown to be insufficient; (2) that the fund arising out of the proceedings instituted by the city of Rochester to acquire in perpetuity the water privileges in question, vested in George R. Smith as the owner, by said devise and conveyance, of the property taken, freed from the claims of testator's creditors; (3) that, by the assignments from George R. Smith, William Hamilton, this appellant, became entitled to the whole of the fund created by the award, with which he may first repay to himself the amount owing to him, for which the first assignment was made as security, and then is to distribute the balance remaining in his hands to the creditors of his assignor, under the second assignment made for their benefit. The order of the general term, therefore, should be reversed, and the order of the special term modified, in accordance with the report of the referee, and as so modified affirmed, with costs to the appellant in both courts.

All concur, except DANFORTH, J., not voting.

(125 Ill. 584)

BELK *et al.* v. PEOPLE.

(*Supreme Court of Illinois. June 16, 1888.*)

1. NEGLIGENCE—CRIMINAL LIABILITY—CONTRIBUTORY NEGLIGENCE.

Where a team and wagon run into another wagon, and the horses hitched to the latter are frightened, and run away, throwing an occupant out, and causing injuries from which she dies, the collision is the proximate cause of the death; and it is no excuse of the criminal liability of those causing the collision that the runaway horses might have been checked by the driver, by the exercise of diligence and care.

2. SAME—HOMICIDE.

Upon an indictment for murder, where it appeared that deceased had come to her death in consequence of the collision of a vehicle, driven by defendants, with that in which deceased was riding, criminal liability of the defendants depends, not merely upon the question whether they were active in inducing their team to run, thereby causing the collision, but also whether they recklessly or wantonly permitted the collision.

3. SAME—INSTRUCTIONS.

In a trial for murder, occasioned by the collision of two vehicles, one of which defendants were driving, an instruction submitting to the jury the question whether defendants were active in causing the collision by urging their team on, no evidence of such fact having been introduced, and the only reference to it in the record being the statement of counsel explaining why it had not been proved, is improper.

Error to circuit court, Jo Daviess county; WILLIAM BROWN, Judge.

D. & T. J. Sheean & McHugh, for plaintiffs in error. *George Hunt*, Atty. Gen., and *W. W. Wagdin*, State's Atty., for defendant in error.

SHOPE, J. The plaintiffs in error, John Belk, John Hill, and George Williams, with George Belk, were jointly indicted in the Jo Daviess circuit court for the murder of Ann Reed; the indictment charging, in the various counts, in varying forms, that the murder was committed by the defendants, by willfully, recklessly, negligently, wrongfully, and feloniously driving a team of horses, hitched to a wagon, upon and against a wagon in which the deceased was riding,—thereby causing the horses attached to the wagon in which she was so riding to run away, thereby throwing said Ann Reed upon the ground, whereby she received wounds and injuries from which she died the following day. A trial resulted in an acquittal of said George Belk, and a verdict of guilty of manslaughter as to plaintiffs in error, and fixing their punishment at confinement in the penitentiary at one year each. Motions for new trial and in arrest were severally overruled, and sentence pronounced by the court upon the verdict. The facts immediately connected with the killing of Mrs. Reed, in reference to which there is little or no controversy, are as follows; On the 5th day of July, 1886, a celebration of the 4th of July was held in a grove about a half-mile from the village of Elizabeth, in Jo Daviess county. The grove was a quarter of a mile from the public highway, and was reached through a lane about one rod wide and fifty rods long, extending from the road into the fields in which the grove was situated. This lane, ordinarily closed by gates at each end, was on this day thrown open and used by the public. About six rods from the gate nearest the grove was a hollow or depression crossing the lane, the descent into which by the road was quite steep, and at this point, owing to the unevenness of the surface of the land, a team could not be driven aside to permit another to pass. About 6 P. M. the deceased, with others, started homeward, through this lane, in a spring wagon or "hack," drawn by two horses, driven by her son Richard. About the same time plaintiffs in error, in company with George Belk, also started from the grove in a like vehicle, also drawn by two horses, driven by the defendant John Belk. At the time the latter entered the narrow lane the former was some six rods in advance, and in plain view. About the time of so entering the lane, the horses driven by Belk began to run, and ran into and against the wagon in which the deceased was riding, breaking the end-gate and the back of the seat. The collision occurred just as the forward conveyance was descending the declivity into the hollow mentioned. The result was that the horses attached to the vehicle in which Mrs. Reed was riding became unmanageable, and ran away, whereby she was thrown violently to the ground, and was injured so that she died the next day. Some question is made whether the collision was the proximate cause of the team running away; and of the injury and death of Mrs. Reed; but it is sufficient to say the evidence was sufficient upon which to base the finding of the jury in that respect, the question was submitted under proper instructions, and there is no ground for disturbing the verdict for that reason. There was direct causal connection between the collision and the death of the deceased. Between the acts of omission or commission of the defendants, by which, it is alleged, the collision occurred, and the injury of the deceased, there was not an interposition of a human will acting independently of the defendants, or any extraordinary natural phenomena, to break the causal connection. It may be fairly said that what followed the colliding of the defendants' team with the wagon in which the deceased was riding was the natural and probable effect of the collision, and the collision was in consequence of the manner in which the team of the defendants was controlled. It can make no difference whether the driver of the team after which the deceased was riding was guilty of negligence in not controlling or failing to control his team after the collision. It may be that persons standing by, or the driver, might,

by the exercise of diligence and care, have checked the horses, and thereby prevented the final catastrophe; but because they did not do so, and were derelict in moral, or even legal, duty in that regard, will not release the defendants from the responsibility of their wrongful act or omission of their legal duty. If the driver, instead of being negligent, as is claimed, in controlling his team, had done some act contributing to the running away of his horses, or driven upon a bank, whereby the carriage had been overturned and the deceased thrown out, or the like, it might justly be said that it was the act of the driver, and not of the defendants, to which the death of the deceased was legally attributable. 1 Whart. Crim. Law, § 341 *et seq.*; Rosc. Crim. Ev. 700 *et seq.*

The case made by the evidence fairly presented the question for determination as to whether the collision was the result of the reckless and wanton failure of the plaintiffs in error, or some one or more of them, to control and manage the team of which they were in charge, or was the result of unavoidable mischance or accident. This record shows that, in approaching the gate and entering the lane, the horses of the defendant were being driven in a walk or slow trot, and apparently under perfect control; about the time they entered the lane the horses started to run, and continued to do so until the wagon in which the deceased was riding was struck, as before mentioned; that then, and from there on, said horses were again apparently under perfect control. The evidence fails to show that the horses were started or urged into a high rate of speed by any act or word of the defendants, or either of them. There is great conflict in the evidence as to whether or not said horses were unmanageable, and ran despite the efforts of the defendants John Belk and Hill to control them, or whether they were permitted to run and collide with the wagon of the deceased without any attempt on the part of defendants, or either of them, to control said horses. It is insisted by counsel for the defendants that as there is a failure to show that they were active in inducing their horses to run at the place indicated, that no criminal responsibility attaches to the defendants. This we think a misapprehension of the law. There can be but little distinction, except in degree of criminality, between a positive intent to do wrong and an indifference whether wrong is done or not. It is therefore said: "Carelessness is criminal, and, within limits, supplies the place of the direct criminal intent." 1 Bish. Crim. Law, § 313; *Com. v. Rodes*, 6 B. Mon. 171; Rosc. Crim. Ev. *supra*. Every person driving upon the public highway, or in other place frequented by others, is bound to exercise reasonable care and caution to prevent injury to others. The law casts upon him the legal duty of observing such care and caution as is exercised by reasonable and prudent men under like circumstances. As a rule, the care required is to be proportioned to the danger; hence driving rapidly in an open country highway may not be negligence, while the same character of driving in a thronged street or thoroughfare, or where there is known hazard to others, may be negligent in the highest degree. 1 Whart. Crim. Law, §§ 353, 355. We have seen that every person driving upon the public highway is under a legal duty to observe, in the control and management of his team, the exercise of reasonable care to prevent injury to others. Every person is criminally responsible for the neglect or willful failure to perform that duty. To create this responsibility, however, the law must cast upon the persons sought to be charged the legal obligation to do the act or perform the service the omission of which is alleged to be the direct cause of the injury. *Id.* § 229 *et seq.* If, therefore, the defendants, or such of them as had the control or management of the horses attached to the vehicle in which they were riding, knowing of the danger of the collision and the probable consequences flowing therefrom, recklessly and negligently, or wantonly and willfully, permitted the horses to run down and collide with the vehicle of the deceased, without using such means as was reasonably at their command to prevent the

same, they should be held penally responsible for the result of their negligence or willful omission of duty. Archb. Crim. Proc. 9; 1 Bish. Crim. Law, § 314. The case in this view should have been submitted to the jury by the trial court. It is strenuously contended, and there is much proof tending to show, that after the horses of defendants had entered the lane, they became frightened and unmanageable, and that the collision was without fault on the part of accused, or either of them; that they used every endeavor to prevent the same, but without avail. If the defendants were not guilty of negligence, and the collision was the result of inevitable accident, or resulted from their horses becoming unmanageable without fault of the defendants, and uncontrollable by the exercise of proper care by the defendants, there would be no criminal liability. It is not our purpose, however, to discuss the evidence pertaining to this branch of the case, for the reason that the plaintiffs in error may again be placed upon trial for the crime of manslaughter under this indictment. As we have seen, there is a total want of evidence in this case showing that anything was said or any act done by the defendants, or either of them, to induce their team to run away, or become unmanageable, or that might have produced that result; and all that can be claimed by the prosecution upon this record is that they failed to perform the legal duty of using reasonable care to check the team and prevent the collision.

The court by the sixth and eighth instructions given for the people told the jury that if they believed from the evidence that the defendants, etc., unlawfully, recklessly, and carelessly did drive and urge a certain span of horses to so rapid a pace that they could not control them, and in consequence of the careless, reckless, and unlawful driving the horses ran into another wagon, etc., whereby the death, etc., of Ann Reed occurred, the defendants would be guilty of the crime of manslaughter. It is to be remarked that the only place in this record in which any reference is made to the fact that defendants were urging or doing any act tending to urge their horses into a rapid gait, after reaching the lane, is to be found in these instructions, and in the remarks of counsel in argument to the jury. One of the counsel in argument said to the jury that the reason why the prosecution had failed to prove that the defendants were whipping their horses, just as they struck Reed's hack, was because of the absence of the witness Herman Praegar; that, if the witness Praegar had been present, the prosecution would have proved by him that, as the defendants were driving along and running into Reed's hack, they were whipping their horses. It is true, it does not appear that these remarks of counsel were objected to, or the attention of the court called to them by the defendants or their counsel. But followed immediately, as they were, by the instructions referred to, having for their sole foundation these remarks of counsel, or none at all, gave emphasis to them, and must have been prejudicial to the defendants. It is a doctrine so well established in this court that instructions must be based upon the evidence that no authorities are required to be cited in support of it. To instruct the jury that if they believed from the evidence that the defendants were carelessly and recklessly urging their horses, was for the court to say, in substance, to the jury, that, in the view of the court, there was some evidence upon which such finding might be predicated, whereas it is totally without foundation in this record. This was manifest error, and necessitates the reversal of the judgment of the circuit court. The judgment will accordingly be reversed, and the cause remanded to the circuit court of Jo Daviess county for further proceedings. Reversed and remanded.

(125 Ill. 348)

FIESTER v. PEOPLE.

(Supreme Court of Illinois. June 16, 1888.)

BURGLARY—EVIDENCE.

In a trial for burglary, the evidence showed that defendant had been in the saloon, which it was alleged he was attempting to enter, on Sunday morning, and obtained a drink. He went out, and, on returning the same morning, found the door closed, and was seen with his body leaning half over the top of a window, which had been left down, and, on being asked what he was doing, said he wanted whisky. Held not sufficient evidence to sustain a conviction.

Error to circuit court, Iroquois county; ALFRED SAMPLE, Judge.

Payson & Raymond, for plaintiff in error. *George Hunt*, Atty. Gen., and *R. W. Hilscher*, State's Atty., for defendants in error.

SCOTT, J. At the November term, 1887, of the circuit court of Iroquois county, an indictment was presented in open court against John Fiester charging him with an attempt to commit burglary. It is averred the accused attempted to break into the store-house of one George Laub with intent to steal the goods of the said Laub, kept in such building. On the trial, defendant was found guilty, and the punishment he should suffer was fixed, by the verdict of the jury, at one year in the penitentiary. A motion for a new trial was overruled, and the court pronounced judgment on the verdict. It is to reverse that judgment defendant brings the case to this court on error. Numerous errors are assigned on the record; but, in the view taken, it will only be necessary to consider the sixth of the series, viz., the verdict of the jury is against the law and the evidence. The store-house it is alleged defendant attempted to break and enter was occupied by the prosecuting witness, Laub, as a saloon, in which he kept for sale the usual stock of liquors. It is situated in the midst of the village or little city Watseka. That which was done by accused was done on Sunday morning, about 11 o'clock, on a day in the month of May, and at an hour when it might be supposed persons were passing and repassing. The witness, Williams, had been in the saloon that morning, and he, with another person, had been scrubbing the room, and after they got through, before leaving, as they did shortly after finishing their work, they "left the top window down, to air it out." That was a window in the rear of the building. There was also a door in the rear end of the room, through which the evidence tends to show persons who desired to visit the saloon on Sunday entered. Defendant says he had been at the saloon, and entered by that door on that morning, and obtained some whisky. When Williams left the saloon he went out at the front door, but on his return, shortly thereafter, he went down the alley to the rear of the saloon. It was there he saw defendant "leaning through top of the window. His body was about half way over. The screen was torn off. * * * I asked him what he was doing. He said he wanted whisky." This is the substance of all that is alleged by the prosecution against defendant. The accused was a witness in his own behalf, and the explanation he gives of his conduct is as follows: "Remember of being at the rear end of his saloon on the Sunday in question. Had been there before on that morning, and had been in the saloon. Albert Williams, Trammel, and two or three more were there. I got liquor there that morning. It was about an hour and a half after this that I went back the second time. Went back there for the purpose of getting a drink. I went back there, and looked through the key-hole. I thought they were in there, and that they were playing 'shenanagen' on me. I went to the window, and looked over. It was down at the top. When I was spoken to, I said, 'I want whisky.' I rapped on the door when I went there. I says, 'Are you in?' and nobody answered me. I thought they were in the room, and would not let me in. Had no other object or purpose there, only to see if some one was in there. I only wanted to see if somebody was there." While defendant's

conduct is not free from censure, the evidence is hardly sufficient to show¹ he attempted to commit a burglary. The time, place, and all the circumstances are inconsistent with that theory of the case. The accused had purchased whisky at the saloon that morning, and had drank it, and, no doubt, he was much under its influence. It had inflamed his desire for more, and he returned with a view to obtain it. That is a reasonable explanation of his conduct. It may be true, as he relates in his testimony, he thought there were persons in the saloon, and that they would not open it to him. Conceding that to be all he did, of course it falls short of proving him guilty of the attempt to commit burglary, and the judgment is warranted neither by the law nor the evidence. The judgment will be reversed, and the cause remanded.

(125 Ill. 256)

THOMPSON *et al.* v. PEOPLE.

(Supreme Court of Illinois. June 16, 1888.)

1. RECEIVING STOLEN GOODS—VERDICT—VALUE OF GOODS.

Under Rev. St. Ill. c. 38, § 239, providing that the punishment for receiving stolen goods shall be imprisonment in the penitentiary not less than one nor more than ten years, or, if the goods do not exceed the value of \$15, a fine not exceeding \$1,000, and confinement in the county jail not exceeding one year, the jury must find the value of the property, or a conviction cannot be sustained.

2. INDICTMENT—JOINDER OF PARTIES AND OFFENSES.

The joinder of two counts for burglary and larceny with a count for receiving stolen goods in an indictment against three, on which two defendants are found guilty of burglary, and one of receiving stolen goods, is not ground for arrest of judgment, where the bill of exceptions shows only the instructions given and refused, and the rulings thereon.

3. CRIMINAL LAW—APPEAL AND ERROR.

Instructions will not be reviewed where the evidence is not brought up with the record.

Error to criminal court, Cook county; R. S. WILLIAMSON, Judge.

Donahoe & David, for plaintiffs in error. *George Hunt*, Atty. Gen., for the People.

SCHOLFIELD, J. An indictment was returned by the grand jury of Cook county against John Thompson, E. M. Showles, and Harry Stillman. The indictment contained three counts. The first and third were for burglary and larceny, and the second was for receiving stolen goods. The defendants severally pleaded not guilty. On trial in the criminal court of Cook county, the jury returned the following verdict: "We, the jury, find the defendants John Thompson and Harry Stillman guilty of burglary in manner and form as charged in the indictment, and fix their punishment at imprisonment in the penitentiary for the term of eight years each. We, the jury, also find the defendant E. M. Showles guilty of receiving stolen property in manner and form as charged in the indictment, and fix his punishment at imprisonment in the penitentiary for the term of two years." Motion for new trial was made by the defendants, and allowed as to Stillman, but overruled as to the other defendants. They then moved in arrest of judgment, but the court overruled the motion, and entered judgment upon the verdict.

The judgment as to Showles cannot be sustained. Our statute provides that "every person who for his own gain * * * shall buy, receive, or aid in concealing stolen goods, * * * or property obtained by burglary, * * * knowing the same to have been so obtained, shall be imprisoned in the penitentiary not less than one nor more than ten years, or, if such goods or other property or thing does not exceed the value of \$15, he shall be fined not exceeding \$1,000, and confined in the county jail not exceeding one year." [Rev. St. Ill. c. 38, § 239.] It is therefore necessary, in such cases, that the jury shall find the value of the property; otherwise it cannot be known that

they have rendered the proper verdict. *Tobin v. People*, 104 Ill. 565; *Sawyer v. People*, 3 Gilman, 53.

The question next presented is whether the judgment can be sustained as to Thompson. We are to assume, from this verdict, that these parties were not jointly guilty under either count. Does, then, the fact that they are guilty of distinct offenses, though it may be arising out of substantially the same transaction, nullify each conviction? The joinder of these counts for the purpose of stating in different ways a single offense occurring in the same transaction was allowable, and the indictment could not have been quashed for that reason. *Lyons v. People*, 68 Ill. 271; *Tobin v. People*, *supra*. The offense was several, and one might therefore have been found not guilty, and the other guilty. *Baker v. People*, 105 Ill. 452. The bill of exceptions before us shows only the instructions given and refused, and the rulings thereon. The presumption, therefore, is that the ruling of the court upon every point of practice not embraced in the motion to arrest, and the rulings upon instructions, was correct. *Gill v. People*, 42 Ill. 321; *Earll v. People*, 78 Ill. 329; *Holmes v. People*, 5 Gilman, 478. There was no plea in abatement; no motion that the parties be tried separately. We must suppose that the evidence sustained the verdict, and that no objection was urged that evidence was admitted which was applicable to the one, but which was not applicable to the other, defendant; for until the contrary be shown it will be presumed that the court decided correctly. *Railroad Co. v. Miller*, 62 Ill. 468. The rule, then, applicable here is thus stated by BULLER, J., in *Young v. King*, 3 Term R. 106: "On the face of an indictment, every count imports to be for a different offense, and is charged as at different times; and it does not appear on the record whether the offenses are or are not distinct. But if it appear, before the defendant has pleaded, or the jury are charged, that he is to be tried for separate offenses, it has been the practice of the judge to quash the indictment. * * * But these are only matters of prudence and discretion. If the judge who tries the prisoner does not discover it in time, I think he may put the prosecution to his election on which charge he will proceed; * * * but, if the case has gone to the length of a verdict, it is no objection in arrest of judgment. If it were, it would overturn every indictment which contains several counts. So, where the evidence affects several prisoners differently, I have, as was done by Mr. J. YATES at Hereford, selected the evidence as applicable to each, and left their cases separately to the jury. * * * But all these are mere matters of discretion only, which judges exercise in order to give a fair trial; for, when a verdict is given, they are not the subject of any objection to the record."

Objections are urged to certain instructions given in behalf of the people. But it is impossible to say, unless the evidence were before us, whether these objections are tenable. An instruction is to be determined solely with reference to the issues, and the evidence before the court. It may lack in fullness and accuracy of definition; yet, if the respect wherein it thus lacks is impertinent to anything before the court, it will be unimportant. An instruction may be very inaccurate as an abstract definition, yet entirely accurate in its application to the question to be passed upon by the jury. And so, on the other hand, it may be entirely accurate as an abstract definition, yet misleading, and therefore erroneous, if applied to the question to be passed upon by the jury. Moreover, a case may be so clear, under the evidence, that we can see that no other verdict could have been rendered than that which was rendered by the jury; and in such case we always refuse to reverse for mere error in the instructions. The judgment is affirmed as to Thompson; but as to Showles the judgment is reversed, and the cause is remanded for a new trial.

(125 Ill. 426)

SINGER, NEMICK & CO. v. STEELE.

(Supreme Court of Illinois. June 16, 1888.)

1. ATTORNEY AND CLIENT—COMPENSATION—EXTRA SERVICES.

An attorney agreed to collect and remit certain notes for a fixed fee, which at the time were regarded good, but, before they all became due and collected, the makers failed, and the attorney was compelled to take an assignment of other demands as collateral security for the notes, which required additional labor and expense to collect. *Held*, that he was entitled to extra compensation therefor above the fee agreed on, whether done in person or by his law partner.

2. EQUITY—MASTERS IN CHANCERY—REPORTS—WAIVER OF OBJECTIONS.

Where the trial court determines the basis of a report, and sends the case to a master for an account, matters reported by him, and not excepted to in that court, will be taken as acquiesced in.

Appeal from appellate court, First district.

Bill for an account filed by Singer, Nimick & Co., a corporation, against its attorney, Henry T. Steele, in the superior court of Cook county. The case was heard in that court before H. M. SHEPARD, J., and appealed to the appellate court of the First district, and thence by plaintiffs to this court.

Gardner, McFadon & Gardner, for appellants.

Appellee, being appellants' employed attorney, cannot avoid liability for all collections made, or which might have been made, by turning the business over to another attorney, (*Walker v. Stevens*, 79 Ill. 193; *Pearse v. Green*, 1 Jac. & W. 135;) and for a stronger reason, when the business is intrusted to a law partner. *Weeks*, Attys. § 314.

John McGaffey, for appellee.

SCOTT, J. This appeal is from a judgment of affirmance by the appellate court of the decree rendered by the trial court in the case of Singer, Nimick & Co. against Henry T. Steele. The bill, as originally framed, prays for an account of all transactions of defendants in respect to the disposition made of certain notes taken from the Chicago Plow Manufacturing Company in exchange, or as collateral thereto, for complainants' claim against one N. S. Bouton, and of "all collections thereof made by him, or which, without his defaults, might have been received." The bill was afterwards amended, by leave of the court, by inserting in the place of "or which, without his defaults," as follows: "or which, without his willful defaults or neglect." It is seen the evidence was quite sufficient to warrant the interlocutory decree that was rendered. It proceeded on well-recognized equitable principles. The only questions that can arise as the case comes before this court are: (1) Whether defendant could rightfully charge additional compensation, under the circumstances, for the services of the person he employed to assist him about the business of complainants; and (2) whether any portion of complainant's claim was lost through the "willful default or neglect" of defendant. It seems the relation of client and attorney existed between the parties to this litigation; and that, while such relations existed, complainants placed in the hands of defendant for collection a claim of \$15,720 against N. S. Bouton. That claim was compromised by defendant with the debtor by taking, in the settlement, lands valued at about \$7,500; cash, \$1,120; and notes of the Chicago Plow Manufacturing Company for \$7,200, which notes were made payable to the order of defendant for the convenience of collection. These notes became due and payable at stated periods. That settlement of the claim was fully approved by complainants, and no complaint is made on that ground. It was agreed defendant should receive \$500 for his services in making that settlement, and for his further services in collecting the notes as they should fall due, and remitting the proceeds. That sum defendant retained out of funds in his hands, with the approval of complainants. At the

time these notes were taken it was thought by all parties concerned the Chicago Plow Company was entirely solvent; but, before all the notes were paid, that company failed; and, in order to secure the notes in question, the company assigned certain claims it had against its customers to defendant and J. Blackburn Jones as collateral security for its unpaid notes to defendant for the benefit of complainants. It was for the services of Jones in trying to collect these collaterals that defendant charged additional compensation, and which was allowed to him by the decree of the court. In the decree in this respect it is not perceived there was any error. The \$500 it was agreed should be paid to defendant was for his services in making settlement of complainants' claim against Bouton, and for collecting and remitting the notes of the plow company "as the paper falls due." As before remarked, it was then thought the plow company was solvent, and its notes in the hands of defendant would be paid in the manner agreed upon. It was not contemplated defendant would undertake the collection of collaterals assigned to him and his partner, Jones, without further compensation. That was not his contract. All he agreed to do in the future, for the \$500 paid him, was to "collect and remit" the notes of the plow company as the same became due. So far as the notes were paid by the plow company in accordance with the agreement, defendant observes his contract in that respect. The collaterals assigned to defendant and his partner were upon persons residing in other states, and far distant from the residence of defendant; and it would be an unreasonable construction of his contract that he should go to such distant points to make collections of collaterals not contemplated by his agreement. Nor was he bound to go in person. It was entirely proper that he should employ any competent person to make, or endeavor to make, collection on the collaterals.

As respects the second question, it is sufficient to say it does not appear defendant failed to make collections, either on the notes taken from the plow company, or on the collaterals assigned to him and his partner, by "his willful defaults or neglect," or otherwise. Reasonable diligence was shown in efforts to collect the collaterals placed in his hands, and that is all the law requires. The cause was referred to the master in chancery to take an account in accordance with the directions given in the interlocutory decree. The master heard evidence, and stated an account between the parties; and, as no exceptions were taken to the report, the court decreed according to his findings, except as to the finding as to the allowance of extra compensation to defendant for legal services, a part of the amount having been remitted by defendant. The practice is, where a party is dissatisfied with the finding of the master in chancery, he shall make distinct exceptions, so that the court can readily understand what matters are at issue between the parties; otherwise it will be understood he acquiesces in the conclusions and findings of the master. According to the well-settled practice, the court in this case first determined, by its interlocutory decree, the rights of the parties, and fixed the basis upon which the account should be taken, and then referred the cause to the master in chancery. On the coming in of his report, if either party was dissatisfied with its conclusions or findings, it was his privilege to file exceptions, specifically pointing out any errors thought to have been made by the master, which could be readily determined by the court. That was not done by complainants, and they will not now be heard to make objections to the master's report which they did not make and insist upon in the trial court. The judgment of the appellate court will be affirmed.

(125 Ill. 412)

WHITE et al. v. CANNON et ux.

(Supreme Court of Illinois. June 16, 1888.)

GIFTS—INTER VIVOS—BY DISCHARGE OF INCUMBRANCES—TRUSTS—CONSTRUCTIVE.

On a bill against a decedent's heirs, to compel a conveyance of land, it appeared that decedent had undertaken, as alleged, by way of gift to plaintiff, his niece, to discharge certain incumbrances on her husband's farm, under an oral arrangement that they should convey to him, and that he would reconvey to plaintiff, but afterwards died without having reconveyed the land. Plaintiff and her husband were in possession at the time, and have been continuously since decedent obtained title. *Held*, that the circumstances of his retaining the evidences of indebtedness taken up and discharged by him, and of his having, at plaintiffs' request, while holding title, leased a part of the land to her son, are not inconsistent with the fact of a gift, rather than a loan; and that a trust is raised by construction of law against his heirs, entitling plaintiff to a decree for a deed.

Error to circuit court, Whiteside county; C. J. SCOFIELD, Judge.

Bill filed by Quincy J. Cannon and Ann, his wife, against Charles W. White and others, heirs at law of James G. White, to compel a conveyance of land. Quincy J. Cannon owned a farm worth about \$10,000, which was heavily incumbered, and James G. White, the uncle of Ann Cannon, as alleged, agreed with plaintiffs to furnish the money to pay off the debts against the farm, and that plaintiffs should convey to him, and he would reconvey to Ann. White took up and discharged various notes and mortgages, retaining the vouchers in his own possession, and plaintiffs conveyed the farm to him accordingly, and he was afterwards killed, not having made a reconveyance. Plaintiffs contend that his payments constituted a gift, and that defendants held the land in trust for their benefit. Defendants contend that they were merely a loan, and that they held the land in fee-simple absolute. The circuit court rendered judgment in favor of plaintiffs. Defendants bring error.

Wm. Garnett, Jr., for plaintiffs in error. *J. D. Andrews*, (*O. F. Woodruff*, of counsel,) for defendants in error.

SCHOLFIELD, J. It can subserve no useful purpose to discuss the evidence in this record at length. It is sufficient to say that it has all been carefully read and considered, and that we concur in the conclusion reached, as to its effect, by the master in chancery and the circuit court. The facts, as found, do not establish a mere promise to make a gift, but an executed gift. The title having been conveyed by Quincy J. Cannon and Ann Cannon to James G. White, at his instance, for him to convey to her any payments of the liens thereon, thereafter made by him, must be regarded as pursuant to his promise to make a gift to her and therefore extinguished such liens, and were an executed gift to her. His retention of the notes and mortgages thus paid off is of no consequence; for, having been paid, they were extinguished and valueless, save as proofs that they had been paid. It is only where the payment of incumbrances is necessary to protect rights of the payer, or where they are paid pursuant to an agreement with the debtor that the payer shall hold them as security for the money advanced, that the payer will be subrogated to the rights of the holders of such liens, and the liens will be kept alive for his benefit. Where the demand of a creditor is paid with the money of a third person, not himself a creditor, without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, the demand is absolutely extinguished, (*Hough v. Insurance Co.*, 57 Ill. 318; *Small v. Stagg*, 95 Ill. 39; *Peurce v. Coal Co.*, 121 Ill. 597, 13 N. E. Rep. 561;) and *a fortiori* must the debt be extinguished and the lien discharged when the payment is made, as here, as a gift to the owner of the land upon which the debt is a lien. The retention of the possession of the evidences of indebtedness by White, after their payment, is entirely consistent with the idea that their payment was a gift, for furnishing, as they do, evidence of the fact of payment, they were very properly retained with the evidence of title, which was still in him.

V.17N.E.no.7—48

The evidence, it may be admitted, shows that the Cannons, when conferring with White in regard to their indebtedness, and their desire for relief, did not expect a gift from him; but it also shows that he determined to make a gift to Ann Cannon, and that when the title was conveyed by Quincy J. Cannon and Ann Cannon to James G. White it was at his request, and for the sole purpose and pursuant to an agreement with him that he should convey it to Ann Cannon. There was no express agreement that a trust should be created. It was not agreed that White should take and hold title for Ann Cannon for some definite time or purpose. It was simply, at his request, agreed that title should be conveyed, and it was conveyed to him that he might convey it to her, and so the case is not affected by the statute. His duty to reconvey attached *eo instanti* the delivery of the deed to him. Having received the title pursuant to such contract, and died without having made the conveyance pursuant thereto, the law, by construction, raises a trust in his heirs, to whom the legal title descended, in behalf of Ann Cannon. *Henschel v. Mamero*, 120 Ill. 660, 12 N. E. Rep. 203; *Allen v. Jackson*, 122 Ill. 567, 13 N. E. Rep. 840; *Wright v. Gay*, 101 Ill. 241; *Fischbeck v. Gross*, 112 Ill. 209. The fact that White delayed conveying to Ann Cannon, with her consent, can be of no consequence so long as no contract was made between them changing her rights. With her consent, he executed a lease of a part of the land to her son; but since he had but the naked legal title, while the possession and right of possession were in her, his act in leasing is to be regarded as her act, and she was and is entitled therein to whatever rights belong to the landlord. We find no cause to disturb the decree, and it is therefore affirmed.

(125 Ill. 522)

GAGE v. BROWN.

(Supreme Court of Illinois. June 16, 1883.)

1. TAXATION—TAX TITLES—ACTION TO SET ASIDE DEED—PLEADING—AMENDMENTS.

It is error, on the trial of an action to set aside a tax deed, after an amendment attacking the validity of a tax deed, against which no relief was sought in the original bill, or any prior amendment, to proceed with the hearing without first laying a rule on defendant to answer, so that he could be placed in default.

2. DEPOSITIONS—FAILURE TO ATTACH PERMANENTLY.

Depositions returned into court unsealed, and not permanently attached, but merely pinned together, and showing that the fastening had been removed one or more times, should, on motion, be suppressed.

3. APPEAL—RECORD—ASSIGNMENT OF CROSS-ERRORS NOT ATTACHED TO RECORD.

An assignment of cross-errors not "written upon or attached to the record," as required by rule 15 of the supreme court, but assigned on a separate piece of paper, and filed with other papers in the cause, will not be considered.

Error to circuit court, Cook county; L. C. COLLINS, Judge.

Armanella R. Brown filed a bill in the circuit court on February 5, 1884, against Asahel Gage to set aside a tax deed issued to defendant. On April 5, 1884, defendant answered, denying generally the allegations of the bill, and setting up by way of plea another tax deed. A cross-bill by defendant, asking for affirmative relief on each of those deeds, was demurred to, the demurrer sustained, and the cross-bill dismissed. On October 4, 1887, defendant moved to suppress certain depositions on various grounds. The court found, as alleged, that the depositions are not permanently attached, but are merely pinned together, with one pin to each series of deposition; that the documents show that the fastening of each deposition had been removed one or more times; and that said depositions were not inclosed, sealed up, and directed to the clerk of the court, with the names of the parties litigant indorsed thereon, nor any order made that the same should be opened as required by law, but were returned into court unsealed; but overruled the motion. When the cause was presented, and proof offered by complainant in relation to the issues in the bill, and after complainant had rested her case, defendant moved

for leave to file an amendment to the bill, to the effect that defendant's tax deed, set up in the answer, was in law and fact absolutely null and void because the tax sale upon which said deed issued occurred more than three years before its issuance, and because of defects in the tax notice. Defendant objected to the amendment, as the bill was filed in 1884, and the answer in April of the same year, and that complainant had before him, all the time, knowledge of defendant's tax deed, and declined to present it for adjudication; and that complainant could not on trial come in for an amendment, taking defendant by surprise. The amendment was allowed, and a motion for continuance overruled. On December 12, 1887, the court rendered a final decree finding that complainant was the owner and in possession of the property, and that each of the tax deeds to the defendant were void, and a cloud upon her title; decreeing that the same be set aside as such, and the defendant perpetually enjoined from asserting title thereto, and ordering complainant to deposit in court the sum of \$172.48 as a condition of receiving this relief. Defendant, having alleged exceptions to the rulings by the court, assigns error, and complainant cross-errors, because the court did not decree the tax deed a nullity for not having been taken and recorded within a year after the time of redemption expired, and in requiring payment of the taxes as a condition to relief.

Augustus N. Gage, for plaintiff in error. *Consider H. Willett*, for defendant in error.

SCOTT, J. After both parties had submitted this cause for hearing on the original and amended bill, and upon answers thereto, and upon the proofs taken, the court, against the protest of defendant, granted complainant's motion to further amend the original bill. That was done, and, in the amendment made, complainant asked relief against a certain tax deed, not prayed for in the original bill, nor by any amendment to it. Thereupon defendant entered a motion for a continuance on the ground of surprise by the character of the amendment; that it made an entirely separate and distinct issue; and that, as defendant is not a resident of this state, but of New Jersey, and is not now in this state, his counsel was not ready for trial upon any other issue than that presented by the bill. Counsel filed his own affidavit in support of the motion for a continuance, stating the grounds of such motion with the usual fullness. On counsel for complainant stipulating he would "only use the record upon which the deed itself was issued" in support of the allegations of the amendment just made to the bill, the court overruled the motion for a continuance, and defendant saved an exception to that decision. The court then proceeded to hear further testimony, both oral and what complainant's counsel calls "record" evidence, touching the matters alleged in the last amendment to the bill, and rendered a decree concerning matters alleged in the original bill, and also concerning matters contained in the last amendment to the bill. It is quite evident the court proceeded erroneously. It could not properly proceed to hear the case as made by the last amendment to the bill without first requiring defendant to answer the same. As has been seen, it made an entirely distinct and separate issue, and asked for relief not demanded by the original bill, nor by any previous amendment to it. No rule was laid upon defendant to answer *instantly*, or within any reasonable time, and it was manifest error in the court to proceed to further hear the cause upon additional proofs without answer, unless a rule had been first laid upon defendant to answer, so that he could have been placed in default.

The motion to suppress certain depositions ought to have been allowed. It may be that what they contain is not very material to the real issues involved; but, conceding the depositions had been returned in the condition the court found them to be, the court should have allowed the motion to suppress.

The question argued by counsel for complainant that the chancellor "should

have decreed without the imposition of any conditions, under the peculiar circumstances of the record," cannot be considered, for the reason no assignment of "cross-errors" have been "written upon or attached to the record," as required by rule 15 of this court. What purports to be cross-errors are assigned upon a separate piece of paper, and are filed among other papers in the cause. That, this court has frequently held, is not a compliance with the rule. *Ditch v. Sennott*, 116 Ill. 288, 5 N. E. Rep. 395; *Benneson v. Savage*, 119 Ill. 135, 11 N. E. Rep. 66. For the error indicated the decree will be reversed, and the cause remanded.

SHEPARD v. ALLEN.

(*Supreme Court of Illinois*. June 16, 1883.)

1. ELECTIONS AND VOTERS—CONTESTS—PLEADINGS.

On contest of an election, an answer that a large number of illegal votes were cast and counted for the plaintiff is sufficient, when not excepted to, without stating why the votes were illegal, or by whom they were cast.

2. SAME—QUALIFICATION OF VOTERS—PERSONS LIVING TEMPORARILY IN DISTRICT.

A person having no home or fixed abode, but living in a certain district temporarily, is not entitled to vote at an election for school director therein.

3. SAME—PERIOD OF RESIDENCE.

Where, by the weight of the evidence, it appears that persons living in one school-district rented, in the middle of February, a house in another district, which was to hold a special election on the 19th of March, but that on the morning of February 22d no one was living in the house, while on the afternoon of the same day furniture was moved into it, they not being able to testify as to the exact date they moved, their votes, cast at such election, are illegal; they not having been residents of the district for 30 days previous to the election.

Appeal from La Salle county court; F. P. SNIDER, Judge.

Petition filed by Thomas W. Shepard to contest the election of John E. Allen to the office of school director. The answer stated "that at said poll a large number, to-wit, seven, illegal votes were cast and counted for said John Peters," the opposing candidate. As to one Hamill, who had voted for Peters and whose vote was declared illegal by the court, the evidence showed that he was a man without home or fixed abode; that he pensioned himself sometimes upon a friend in Hennepin, sometimes upon relatives in Peru, and sometimes with different parties living in the district in question; that neither Hennepin nor Peru is in that district. From a judgment declaring defendant legally elected, plaintiff appeals.

Edwards & Evans, for appellant. *Duncan, O'Connor & Gilbert*, for appellee.

PER CURIAM. This was a proceeding instituted in the county court of Putnam county to contest the election of John E. Allen to the office of school director in district No. 2, township No. 32 N., range 2 W of the third principal meridian, in that county. A vacancy had occurred in the office by the removal of the incumbent from the district, and a special election was held to fill the vacancy on the 19th day of March, 1887. There were 22 votes cast at the election, of which 11 were counted as cast for John E. Allen, and 11 were counted as cast for John Peters, the only other candidate for the office. There being thus a tie in the election, it was determined by lot in favor of Allen. It is alleged in the petition that Harvey K. Bascom, Jere Allen, Daniel Allen, and Edward Allen, who voted at the election, and whose votes were each counted for John E. Allen, were not legal voters, and hence that their ballots were improperly counted for John E. Allen. The answer denies the allegations of the petition, and alleges that seven illegal votes cast at the election were improperly counted for John Peters. The venue was changed to the county court of La Salle county; and that court, after hearing the evidence, found that Harvey K. Bascom, who had voted at the election, and whose bal-

lot was counted for John E. Allen, was not a legal voter, and hence that his ballot was improperly counted; that James Hamill, who voted at the election, and whose ballot was counted for John Peters, was not a legal voter, and hence that his ballot was improperly counted; and that each candidate had received 10 legal votes, making a tie in the election, which had properly been decided by lot.

The answer was certainly sufficient, until excepted to, and the evidence fully proves that Hamill was not a resident of the district at the time of the election, and we are therefore of opinion that there was no error in the ruling in this respect. We are, however, of opinion that the clear preponderance of the evidence is that Jere Allen, Daniel Allen, and Edward Allen had not been residents of the district for 30 days before the election, and that, therefore, their ballots were improperly counted for John E. Allen. The district's southern boundary is a road running in an easterly and westerly direction from Granville to Hennepin. Jere Allen, Daniel Allen, and Edward Allen were brothers, who resided together at the time of the election, and who had done so previously to that time. They had for several years resided on the south side of the Granville and Hennepin road, on land belonging to Nelson Cofoid. He, also, owned land on the north side of the road, and hence within the district, upon which was a dwelling-house near the road, opposite, or nearly opposite, the house in which the Allens had resided, on the south side of the road. This house had been occupied by one Simmons, a tenant of Cofoid, who abandoned it; and thereafter Cofoid rented that house to Jere Allen, and he and his brothers, Daniel and Edward, moved into it, and were residing in it on the 19th day of March, 1887. As to these facts, there is no controversy. The sole controversy is, when did Jere Allen move from the house on the south side of the road into this house on the north side of the road? He testified: "Made arrangements to change from south side of the road about the middle of February, 1887, and did move afterwards. Don't know the date we moved. Was to get a horse and wagon from Mr. Cofoid to move, and did get them, and believe I did move on that day." And he swears that, at the date of the election, he believes he had lived in the district 30 days. Nelson Cofoid testified: "I rented the house on the north side of the Granville and Hennepin road to Jere Allen, February 15, 1887. As near as I know, they moved the 16th of February, 1887. I told Jere I wanted him to move to-morrow if you can. He asked me for a horse and wagon to move with. He came and got them on the 16th. I don't know whether he moved that day or not. * * * Was there at the place on the south side of the road the following Sunday. The Allens had moved then." On cross-examination, he said: "Allen got my horse and wagon often. * * * I did not see him move, when he got my horse and wagon, the 16th of February, 1887. I don't know whether he moved or hauled coal, but he got it to move with." It will be observed, there is nothing in the evidence of either of these witnesses that renders it absolutely certain that the removal occurred on any particular day 30 or more days prior to the election. Jere Allen believes that the time was 30 days; but he gives no date by which to give assurance that his belief must be accurate. Cofoid does not know on what day the removal took place. He speaks positively that it had occurred on the Sunday after the 16th of February. But the 16th was Tuesday, and his statement may be true, and the removal have occurred on the 18th or 19th, which was less than 30 days before the day of the election. He does not show why he recollects that the time that he visited the house after the removal occurred was the Sunday next succeeding the 16th. On the other hand, William F. Thomas testified that in the forenoon of February 17, 1887, he passed along the road between these houses, going to a public sale that took place on that day, and that he returned by the same road, about 5 o'clock in the afternoon of that day; that Nelson Cofoid was with him; that the house on the north side of the road was then empty;

that the lights of the windows on the south side were most all out or broken; that he then said to Cofoid, "You have lost your tenants;" to which he replied, "Yes; and the ——— took the window lights with him, and did not pay his rent." Cofoid also said, "Jere is going to move there soon." As we understood the record, Cofoid substantially admits this conversation, and does not deny the time when it took place. Stouffer testified that he also went to the sale; that it was on the 17th day of February, 1887; that he stopped on his way, and went into the house on the north side of the road, and remained there for a few minutes for shelter from a rain; that this was about 10 o'clock in the forenoon; that most of the glass was then out of the windows. The circumstance of the sale, and of the attending it by these witnesses, is a material one in aid of their memory. It furnishes a sufficient reason for recollecting the date. If the date as given had not been accurate, it is to be presumed that would have been shown, since it is apparent that it could not have been difficult to establish the date by other witnesses, copies of notices, etc. Moreover, on the 22d of February, 1887, Thomas Hamill, Laura Hamill, and Joseph Lites, each, as they testify, passed along the road by these houses in the forenoon, and returned along the same road, by them, in the afternoon. They each testify that in the morning no one was living in the house on the north side; that the panes of the windows were then out; but in the afternoon the panes had been put in, some furniture was in the house, and some in the yard, and a wagon was in front of the house on the south side of the road, into which goods were being loaded by Jere Allen. The 22d of February, the anniversary of the birthday of Washington, is a day much more readily remembered by most persons than, say, the 16th of that month, and it is not nearly so probable that a person would be unable to recall the date of an event occurring on that day as an event occurring on the 16th, or some other day unmarked by an important association. After making due allowance for the superior opportunity the trial court had to judge of the credibility of these witnesses, we feel compelled to say that the preponderance of evidence is that the removal by the Allens from the south to the north side of the road occurred within less than 30 days of the election, and consequently that they were not legal voters at the election. Deducting these votes from those to be counted for John E. Allen leaves a majority in favor of John Peters, for whom judgment must be entered.

The judgment of the county court is reversed, and the cause is remanded to the county court, with direction to that court to enter judgment in accordance with the views herein expressed.

ENGLISH v. LEMAN.

(*Supreme Court of Illinois. June 16, 1888.*)

APPEAL—REVIEW—HARMLESS ERROR.

Where a bill to establish a trust in land alleged to have been purchased under an oral agreement to purchase for complainant, was dismissed on the ground that the alleged agreement was not satisfactorily proved, and it does not appear from the evidence that the dismissal on that ground was error, the court will not pass upon the question raised by the plea of the statute of frauds.

Appeal from circuit court, Cook county; L. C. COLLINS, Judge.

Bill by William J. English against Henry W. Lemman to establish a trust in lands bought by defendant at administrator's sale under the alleged oral agreement that defendant should purchase the whole tract in his own name, —a part for his own benefit, and part for the benefit of complainant. The answer denied the agreement, and set up the statute of frauds. The bill was dismissed, and complainant appealed.

Smith & Pence, for appellant. *John S. Miller*, for appellee.

PER CURIAM. We have given careful consideration to all the evidence preserved in this record, and also to the elaborate and exhaustive printed arguments with which we have been favored. Having done so, we deem it unnecessary to pass upon the questions raised by the plea of the statute of frauds, because we are unable to say that the court below erred in dismissing the bill upon the ground alone that the agreement alleged between complainant and defendant is not satisfactorily proved by a preponderance of evidence. It can subserve no useful purpose to quote and discuss the evidence at large. It is sufficient that this is our conclusion after as full and mature reflection as we are able to bestow upon the subject. The decree is affirmed.

(125 III. 478)

HOLMES v. PARKER.

(*Supreme Court of Illinois*. June 16, 1888.)

1. JUDGMENT—BY CONFESSION—WARRANT OF ATTORNEY—REPUGNANCY—SURPLUSAGE.

Where defendant make her accommodation note payable to J. H., her husband, or order, and a warrant of attorney, in the same instrument, authorizes the confession of judgment thereon in "favor of said H. & Bro. or their assigns," which name does not appear elsewhere in the instrument, the words "& Bro." may be rejected as meaningless; and judgment thereon confessed by the indorsee of the husband is good.¹

2. SAME—JUDGMENT AS COLLATERAL SECURITY—OPENING JUDGMENT—DEFENSE TO PRINCIPAL DEBT.

Where defendant gave her accommodation note, with power of attorney to confess judgment, as collateral security for a note previously given by her husband and another to plaintiff, and the affidavits on motion to open judgment entered thereon do not show that there is any defense to the original note, it is proper to refuse to open the judgment, and permit defendant to plead to the merits.

Appeal from appellate court, First district.

Bisbee, Ahrens & Decker, for appellant. *Henry S. Monroe*, for appellee.

SCOTT, J. At the March term, 1887, of the superior court of Cook county, there was a judgment entered by confession against Virginia B. Holmes, and in favor of Augustus A. Parker, for the amount due on a certain promissory note made by defendant to Ira Holmes, and by him indorsed to plaintiff, together with attorney fees therein provided, amounting in the aggregate to the sum of \$5,649.38. With the declaration on the note there were filed the note itself with the power of attorney attached, an affidavit proving the signature to the power of attorney, and a *cognovit* in the usual form, by which the attorney confessed judgment for the amount due on the note, with attorney fees. At the April term next thereafter of the court in which the judgment was entered, defendant appeared, and entered her motion to vacate and set aside that judgment, and for leave to plead, and for a trial of the cause for reasons set forth in writing, and for other reasons that would be stated upon the argument of the motion. Affidavits were filed by the respective parties both in support and against the allowance of that motion. On the hearing of the cause the court refused to vacate and set aside the judgment, but ordered that it be reduced to \$5,285.80, to which ruling of the court defendant excepted. The judgment of the superior court was affirmed in the appellate court of the First district, and defendant brings the case to this court on appeal. The grounds of defendant's motion to vacate the judgment, and for leave to plead, are stated in several propositions, but the substance of all of them is the following: (1) That defendant has a good defense upon the merits to the whole of plaintiff's demand upon the note upon which the judgment was entered; and (2) that there is no sufficient warrant of attorney filed in the cause to authorize the entering of judgment by confession against defendant.

¹ Same point, *Holmes v. Bemis*, *ante*, 42.

On looking into the affidavits in support and against the motion, it does not appear there is any sufficient ground for opening the case to allow defendant to plead to the merits of the cause. It appears that Ira Holmes and Frederick S. Eames were indebted to plaintiff in the sum of \$6,093.75, for which they gave him their note, payable on demand, and bearing date December 10, 1883. Afterwards, when plaintiff was urging payment of the note, Ira Holmes induced his wife, the defendant, to make her note to him for the exact amount of the note of Holmes and Eames to plaintiff, and bearing the same date, and delivered the same to plaintiff as collateral security for the note of Holmes and Eames to plaintiff. It was accommodation paper, and no doubt it was made to be used as it was. To this note of defendant was attached the power of attorney by virtue of which the judgment was confessed. The affidavits do not show that there is or can be any defense successfully made by Holmes and Eames, or either of them, to their note to plaintiff; and, if that is so, of course defendant could make no successful defense to her note in suit. There was no error in the judgment of the court in disallowing the motion to plead to the merits of the case.

The question of most difficulty is whether there is any sufficient warrant of attorney filed in the cause to authorize the entering of the judgment by confession. The objection taken is that the note is made payable to Ira Holmes or order, and the warrant of attorney authorizes the judgment to be confessed in "favor of said Holmes & Bro., or their assigns." There had been such a firm as "Holmes & Bro.," but the affidavits do not disclose there was any such firm in existence at the date of this transaction. Undoubtedly, the blank used for making the note and power of attorney was one of the kind that had been used by the firm of Holmes & Bro., when engaged in business. It will be seen the note and warrant of attorney are both on the same paper, and are both above the signature of defendant; there being but one signature. They should therefore be considered as constituting a single instrument. Where that is done, it seems plain it means the attorney may confess judgment in favor of the said "Holmes or his assigns;" that is, the payee of the note. The firm of Holmes & Bro., if any such firm existed at the time, had not the slightest interest in the transaction, and it would be an unreasonable construction to hold it was intended the judgment should be confessed in favor of strangers to the parties holding or owning the note. The rule that the power to confess a judgment must be clearly given and strictly pursued, otherwise the judgment may be set aside at the instance of the defendant, like all other rules, has its reasonable limitations, and must not be applied with such strictness as to defeat the obvious intentions of the party granting the power. *Keith v. Kellogg*, 97 Ill. 147. Construing the note and warrant of attorney as a single instrument in the light of this reasonable rule, no one can be in doubt as to its meaning. It was the evident intention of defendant the judgment should be confessed in favor of the payee or his assigns. The words "& Bro.," contained in the warrant of attorney, may be rejected as having no meaning in that connection, and it should be construed as it would be had they been omitted, and it contained only the words "said Holmes or his assigns." Any other construction would defeat the evident purpose of defendant in making the note, and would impute to the parties the doing of a useless and even absurd thing, which the law will not do when a reasonable construction will effectuate their manifest intention. The judgment of the appellate court will be affirmed.

(125 Ill. 117)

SINGER, NIMICK & Co., Limited, v. CARPENTER.

(Supreme Court of Illinois. June 16, 1888.)

PARTNERSHIP—TRANSFER OF PARTNERSHIP TO CORPORATION—CHARACTER OF STOCK—FIRM AND PRIVATE CREDITORS.

Where a firm forms a corporation, and transfers to it real and personal property belonging to the firm, and each partner receives corporate stock in payment, the stock is individual property, and a firm creditor is not entitled to have his debt satisfied out of the proceeds of such stock received by one of the partners in preference to individual creditors.

Appeal from appellate court, Second district.

Suit by Singer, Nimick & Co., Limited, against H. W. Carpenter, executor of A. J. Enoch, deceased, to recover a debt due from a firm of which said Enoch was a member. Judgment for defendant in the circuit court of Winnebago county (WILLIAM BROWN, Judge) was affirmed in the appellate court, from which defendant appeals.

Wm. Lathrop, for appellant. *Wm. Marshall*, for appellee.

SCHOLFIELD, J. The members of a firm which had for many years been engaged in the manufacture of agricultural implements agreed with each other, and with some other parties, to form a corporation to carry on the same business. The firm owned and used in its business both real and personal property, and it was agreed by those agreeing to form the corporation that this property should be transferred to the corporation, and that in payment for it the corporation should deliver to each partner a given amount of its shares of stock. The firm was at the time indebted, but it was not known by the partners that it was insolvent, and no fraudulent purpose is shown to have affected the agreement. The corporation was formed, and legally licensed to do business, pursuant to the agreement; but, before the property of the firm was all transferred to it, one of the partners died. The transfer was completed after his death, and the stock was then issued by the company, and \$17,500 of it was delivered to a party to whom the deceased partner had in his life-time contracted it, and the remaining \$2,500 of it was delivered to his executors. A corporation which is a creditor of the firm claims to be entitled to have its debt satisfied out of moneys in the hands of the executors of the deceased partner, which have been realized by a sale of the \$2,500 of stock, and of the property in payment for which the \$17,500 of stock was delivered, before the individual creditors of the deceased partner can resort to that money.

The lower courts each denied this claim, and we think properly. It is not, in this connection, important, as counsel for appellant seem to think, whether the technical legal title passed from the deceased partner to the corporation in his life-time. The law does not recognize the creditor of a firm as having a superior equity to that of the individual creditor for payment from the partnership's assets. It recognizes, however, that the members of the partnership have a superior lien on the partnership property for the payment of the firm debts, and allows the creditors to avail themselves of this lien, to the exclusion of individual creditors, where it has not been surrendered by the partners. *Hapgood v. Cornwell*, 48 Ill. 64. See, also, *Allen v. Valley Co.*, 21 Conn. 130; *Stigler v. Bank*, 8 Ohio St. 516. The other partners here, having joined with the deceased partner in the contract, are, of course, concluded by it if he was. While that contract did not vest a present title, it vested a right in the corporation to have it performed, and, by reason of the peculiar property to be transferred,—partly real and partly personal,—and the personal having its peculiar value by reason of its adaptation to use in connection with the use of that realty, an equity vested in the corporation to have that particular property, and a court of chancery would therefore have specifically

decreed a specific performance of the contract at the instance of the corporation; it not being in default. *Marsh v. Milligan*, 3 Jur. (N. S.) 979. The creditors of the firm cannot interpose the statute of frauds, the members of the firm themselves not having chosen to interpose it. *Kelly v. Kendall*, 118 Ill. 650, 9 N. E. Rep. 261. It would, moreover, seem that the admission here made by the appellant, that the money it is claiming to appropriate is money derived from subsequent sales of the stock of the corporation, is of itself sufficient to deny his right. The stock was not partnership property, and it is therefore impossible that its proceeds can be. If the partnership property did not vest in the corporation pursuant to the contract, it is just as it was before the attempted transfer, and the firm creditors may resort to it; and if the corporation issued stock to the individual for which it had not been paid, and to which the individual was not entitled, the loss is manifestly upon the corporation, and not upon the creditors of the firm of which the individual was a member. But, if the partnership property did vest in the corporation, the interest of the partners in it was thereby terminated, and with their interest terminated that of the firm creditors. In equity it was a conversion of partnerships into individual property as of the date of the contract. In our opinion, in no view was the stock firm property, and as it was so is its proceeds. The judgment of the appellate court is affirmed.

PERRY *et al.* v. BURTON *et al.*

(Supreme Court of Illinois. June 16, 1888.)

APPEAL—MANDATE AND PROCEEDINGS BELOW—CONCLUSIVENESS OF DECISION—ADDITIONAL EVIDENCE.

Where a decree of a superior court of Illinois is reversed by the supreme court, and the cause remanded for further proceedings, the decision of the supreme court is conclusive on a question passed on by it, and, on a second hearing, the lower court cannot review the decision, though additional evidence is produced. *Scott*, 1, dissenting.

Appeal from superior court of Cook county; H. M. SHEPARD, Judge.

Edmund S. Halbrook, (A. D. Eddy, of counsel,) for appellants. *Melville W. Fuller* and *Granville W. Browning*, for appellees.

MULKEY, J. On the 18th day of July, 1873, James S. Perry and John W. Henderson exhibited their bill in the superior court of Cook county against the appellees, John W. Burton and others, praying for the partition of certain real estate therein described, and for the confirmation and quieting their title thereto. In 1881, by agreement, the bill was amended for the purpose of bringing before the court new parties who claimed the property under an obscure title. The cause was heard upon the pleadings and proofs, and a final decree entered therein August 2, 1887, from which the complainants prosecuted an appeal to this court. Upon the consideration given to the case on that appeal, this court was of the opinion that the decree of the court below upon the vital and controlling question in the case was erroneous, and accordingly reversed it, and remanded the cause to the superior court "for such other and further proceedings as to law and justice should appertain." The opinion filed in the cause on the former appeal, which will be found reported in 111 Ill. 138, contains a full statement of all the material facts necessary to an understanding of the questions now to be determined. Hence it will not be necessary to repeat them here, further than is required to present what we regard as the turning point and controlling question in the case. It will be seen from the statement of facts in the former opinion that Cook was the owner in fee of the entire 80-acre tract of which the undivided interest in controversy is a part; that on the 7th of February, 1836, Cook conveyed one undivided half of said tract to Chambers & Benedict, through whom appellants claim; that Cook, on the 28th of October, 1837, conveyed the other un-

divided half to Gibson; that on the 28th of November, 1842, Cook, who then had no apparent interest in the property, purchased an undivided half thereof at a general tax sale for the taxes of 1841. Appellees, on the first as on the last hearing in the court below, proceeded upon the theory that it was the complainants' undivided half of the land that was sold at the tax sale, while the latter insisted that it was the undivided half which Cook had conveyed to Gibson, and which had subsequently devolved upon the latter's heirs by reason of his death. Upon this sharp issue of fact, supported by evidence on both sides, the court below, on the first hearing, found in favor of appellees; but this court reversed the decree on this very ground, holding that, upon the facts shown, the court should have found for the appellants. The decision of this court upon that question was conclusive of it; and, on remanding the cause, the lower court should, in its subsequent proceedings, have so treated it. *Cable v. Ellis*, 120 Ill. 136, 11 N. E. Rep. 188. Instead of this, the court, on the second hearing, opened up the question again, and upon the evidence adduced decided it the same way it did before, and the decree is now sought to be sustained on the ground that appellees offered some additional evidence upon this issue on the last hearing. This makes no difference; for the question, as just stated, was no longer an open one upon which evidence could properly be heard. For the error indicated the decree of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this or the former opinion filed in the cause.

SCOTT, J. I do not concur in this opinion.

(125 Ill. 280)

FISHER v. COOK.

(*Supreme Court of Illinois*. June 16, 1888.)

1. PLEADING—PLEAS IN ABATEMENT—TIME TO FILE.
Where four terms of court have elapsed after amendment of the declaration, a plea in abatement is too late.
2. NEGLIGENCE—PLEADING—PLEAS IN ABATEMENT—JOINT TORT-FEASORS.
In an action for personal injuries caused by negligence of defendant's servant in managing an elevator, a plea in abatement, setting up a joint ownership of the building in which the elevator ran, and joint employment of the servant, by defendant and another, presents an immaterial issue; joint tort-feasors being liable severally.
3. SAME—INSTRUCTIONS—COMPARATIVE NEGLIGENCE.
In an action for personal injuries caused by negligence of defendant's servant in allowing plaintiff to fall into the shaft of an elevator, instructions that the jury should find for plaintiff if the injury was caused by negligence of defendant or his servant, while plaintiff was exercising due care, and that, although she was negligent, they should so find if her negligence was slight as compared with that of plaintiff, are proper.
4. TRIAL—REFUSAL OF INSTRUCTIONS.
Where the court had already given instructions embodying substantially further instructions asked, it is not error to refuse them.

Appeal from appellate court, First district.

Action by Lillie G. Cook against James K. Fisher for personal injuries occasioned by negligence of defendant's servant, who was in charge of an elevator, in opening a door leading to the shaft, whereby plaintiff fell. The court instructed the jury, on the part of plaintiff, that, if the injury was caused by the negligence of defendant or his servant, while plaintiff was exercising due care, they should find for plaintiff; and also that they should so find, although plaintiff was guilty of negligence, if it was slight as compared with that of defendant. Judgment for plaintiff, and defendant appeals.

W. C. Aray, for appellant *J. A. Sleeper*, for appellee.

SCOTT, J. This action was brought in the circuit court of Cook county by Lillie G. Cook against James K. Fisher, and was to recover for personal in-

juries occasioned by the alleged negligent conduct of defendant's servant in the management of an elevator. On the trial in the circuit court, plaintiff recovered a judgment against defendant for the sum of \$3,000. That judgment was afterwards affirmed in the appellate court of the First district, and defendant brings the case to this court on his further appeal. There was evidence tending to sustain plaintiff's cause of action; and, as all controverted questions of fact have been settled by the findings as to them by the courts through which the cause has come to this court, no discussion in relation to the facts will be had in this court.

It is said in argument it was error in the trial court to strike defendant's plea in abatement from the files, as was done. It seems that to the original declaration defendant pleaded the general issue. Afterwards, at the April term, 1883, plaintiff, by leave of court, amended her declaration by adding two additional counts. No new rule was then laid on defendant to plead again to the declaration as amended; but, so far as the record shows, the original plea of not guilty stood as to the amended declaration. At the September term, 1883, of the court, while the record was in this condition, and without withdrawing the plea of not guilty that had been filed, and without leave of court obtained for that purpose, defendant filed a plea in abatement in which it was averred: "The building and property mentioned in the declaration is not and never was the property nor in the possession of James K. Fisher, but is, was, and always has been the joint property and in the joint possession of James K. Fisher and one Archibald Fisher, who is still living; and also that the servant mentioned in the declaration is not and never was in the employ of said James K. Fisher, but is and was, at the time mentioned in the said declaration, in the joint employ of said James K. Fisher and said Archibald Fisher." This plea was not sworn to by defendant, but by one George B. Fleisheim, who says he is the agent of defendant, who has been absent from this country in Europe for more than a year past, and now permanently resides there. On motion of plaintiff, the plea in abatement was by the court stricken from the files in the cause, to which decision defendant excepted. Thereupon, perhaps on the same day, defendant again filed a plea of not guilty, upon which the trial was had. There was no error in the action of the court in striking the plea in abatement from the files. In the first place, it was not filed in apt time. After the declaration was amended, four terms of court intervened before the plea was filed. Being a dilatory plea, it should have been filed at the earliest practicable time. That was not done. But, if it had been, a satisfactory reason for the decision of the court is that it presented an immaterial issue. The action was for a tort, and if two were liable then each was liable, and the action could properly be brought against either wrong-doer.

More instructions were given on behalf of defendant than the nature of the case required. Every principle of law that was thought to have any application to the facts was fully stated in the numerous instructions given at the instance of defendant. But complaint is made that the court refused to give other charges asked. It is seen on examination that the substance of all the refused instructions that was proper to give to the jury was contained in some of the instructions given for defendant, and the court was under no duty to repeat the same thing a second time. No serious error is perceived in the action of the court in giving instructions for plaintiff, especially when they are considered in connection with the facts of the case to which they were applicable. The judgment of the appellate court will be affirmed.

(125 Ill. 458)

CHICAGO, B. I. & P. RY. CO. v. FELTON.

(Supreme Court of Illinois. June 16, 1888.)

CARRIERS—OF PASSENGERS—NEGLIGENCE OF PASSENGER—JUMPING FROM TRAIN ON HEARING DANGER SIGNALS.

A train running on a road which had a double track was stopped by a snow-bank. There was a curve in the track at that point, and during the night some passengers saw the light of an engine, which they supposed was on the same track with them, approaching rapidly from behind, and at the same time the engine of the passenger train gave certain sharp, keen whistles, which they took for whistles of alarm. The light was upon a snow-plow, which was on the other track, and which was known by those in charge of the passenger train to be on that track. One of the passengers, being alarmed, ran out, and was caught in the snow-plow, receiving injuries from which he died. Held that, the whistle not being for passengers, the sounding of it was not negligence, and that the company was not liable.

Appeal from appellate court, Second district.

Action by Egbert W. Felton, administrator of Luke H. Goodrich, against the Chicago Rock Island & Pacific Railway Company for the death of his intestate. Judgment for plaintiff, and defendant appeals. Late on Saturday night of March 19, 1881, the Chicago, Rock Island & Pacific Railway Company started a train, consisting of a sleeper, passenger car, and baggage car, to pass on its road from Bureau Junction to Chicago. There was, at the time, a violent storm of wind and snow, which had begun some 24 hours earlier. The storm had, at some points, so obstructed the railway track by drifting snow as to prevent the passage of cars; and all regular trains had, in consequence of the storm, been much delayed. The train arrived at Ottawa near 2 o'clock in the morning of Sunday, (the 20th,) and, at that place, Luke H. Goodrich and William Maltby got in the passenger car to go to Joliet. From Ottawa to Chicago there is a double track, being used, generally, that on the south side for trains passing east, and that on the north side for trains passing west. The train proceeded from Ottawa east, on the south track, to Morris, where House and Marshall, intending to go to Joliet, and, perhaps others, entered the passenger car. At Morris there was a snow-plow that had been passing eastwardly on the south track, but which had gotten off the track so far as to prevent present passage by that track, and on that account the train was there switched onto the north track, and it then passed on eastwardly. About a mile west of Minooka, which is the next station east of Morris, the train ran into a snow-bank, which stopped its passage. Trains had passed on that track late on the evening before, and it is hence to be inferred that the obstructing snow-bank was piled up by the storm after that time. Whether Goodrich knew that the train had taken the north track, and left the snow-plow on the south track, at Morris, does not appear; but it does appear that Maltby, who got in the passenger car with him at Ottawa, knew it, and that House and Marshall, who got in that car at Morris, knew it. Maltby testified, when recalled for further cross-examination: "I understood at Morris that our train switched off onto the other track. I think I got that understanding from the conductor in coming in the train. I understood that the snow-plow was off, at that time, on the other track; and I understood from the conductor that that was the reason we took the other track coming through." Maltby had previously said that Goodrich sat behind him in the car; he could not recollect whether one or two seats. House testified: "After I got aboard of the train, the train backed off, and switched over on the other track, and proceeded towards Chicago. That would be the north track, or left-hand track coming this way, and the right track going west. At that time the snow-plow was on the track up near the water-tank." Marshall testified: "I knew at Morris that this train was going to take the north track. I heard the conductor say so. I did not hear him aboard the train, but heard it before I got on board. I heard him talking about it to the engineer. I knew the snow-

plow was off the track there, and it was on the track ahead, and would have to get on again. * * * I knew at Morris that if the snow-plow, which was the very one that subsequently passed us on the south track, got on the track, it was going to take the south track." Not long after the train was stopped by the snow-bank, House, who had been seated in the front end of the car, arose, and passed down the aisle, by Goodrich and Maltby, to the rear end of the car, and thence out onto the steps at the rear end of the car. As he passed by Goodrich and Maltby, he attracted their attention by some remark, and they then both arose and followed him. House, when on the steps, looked by the sleeper to the rear, in the direction of Morris, and saw what he thought to be the head-light of an engine coming right into the rear end of the train. Goodrich preceded Maltby, and looked in the same direction in which House had looked; and Maltby, reaching over the shoulders of Goodrich, also looked in the same direction, and he saw what he supposed was an engine coming into the rear end of the train. House immediately turned, and re-entered the car. As he did so, he remarked: "My God, gentlemen, the snow-plow is coming into us." About the same time one of the engines in front of the passenger train gave what Maltby, House, and Marshall understood to be a whistle of alarm. House testified: "They were sharp, quick whistles; * * * signals of danger." Maltby testified: "While standing on the platform, I heard the engines in front of our train whistling;" and, on being asked what sort of whistles they were, he answered: "Whistles of alarm." Marshall testified that he had got off the train on the south side after it stopped, and gone forward towards the engines; that he heard a remark, not loud enough, however, to have been heard by Goodrich, to the effect, "It's running into us," which caused him to turn around; that he looked back, and saw the head-light of the engine to which the snow-plow was attached; it looked as if it was coming directly into the train; that he then stepped up to the car to notify the conductor, and, as he did so, he heard from one of the engines a sort of sharp, quick signal, which he understood to be a danger signal. Marshall says there was one passenger, a young gentleman from Minooka, with him. There was also, besides, on the ground on the south side of the train, near the south track, a brakeman and some other train-men. There is no other evidence in regard to the whistle of the engine. There is nothing explaining its purpose, or the meaning of such a whistle, any further than has been quoted. Immediately after House re-entered the car, and after the whistle from the engine in front, Goodrich and Maltby jumped from the steps to the ground; intending, as Maltby testified, to cross to the bank south of the south track, but advancing parallel with, instead of directly across, the track. The evidence also shows that about the time, or perhaps a few moments earlier than, they jumped, some train-men rushed from near the engines to the bank south of the south track, and that this was observed by Maltby. There is no explanation of what induced them to do so, and it is not shown that either of them had any care over the passengers in the train. The inference is that they were seeking to avoid danger from the advancing snow-plow. Maltby and Goodrich, just after alighting, were caught by the snow-plow, which rushed by at a rapid speed, and Goodrich thereby received wounds of which he died on the Monday night next following. One of the witnesses describes the place where the obstructing snow-bank was as a "cut," but the depth is not stated. He described the snow as "banked up" on the north side of the track as high as the car, but said it was not very deep on the south side. The road curves, at a point a short distance west of the obstruction, to the south, and it is therefore impossible for a person looking from the point of obstruction westwardly to tell whether a car beyond the commencement of this curve is upon the one track or the other. Snow was falling, and a strong wind was blowing from the north or north-west at the time. The hour must have been not far from 3 o'clock in the morning. No one who remained in the passenger

car was in any degree injured or even frightened. The snow-plow threw a large quantity of snow as it advanced; and this snow, falling against the windows, knocked in one or two, but it did no other injury. There is no evidence that any of the railroad employes had any knowledge of the existence of the snow-bank until the train ran into it, and there is no evidence that those in charge of the snow-plow knew that the train was delayed there until after they passed it.

The declaration contains two counts. The negligence alleged in the first is that the servants of the defendant so negligently and carelessly managed "their locomotive engines, and the said snow train and passenger train, that the said snow-plow, in passing with great velocity the passenger train, then standing on an adjoining track, ran upon, struck, and caught up the said Luke H. Goodrich, then and there being a passenger, * * * and while exercising due and reasonable care and prudence to avoid danger, and threw him * * * with great force and violence upon the ground, and against the side of one of the passenger cars," etc. The negligence is thus stated in the second: "And whereas, at the time and place aforesaid, the passenger train whereon the said Goodrich was a passenger, was standing still upon the north or west-bound track, by reason of the obstructions of snow thereon, and in a cut which, by reason of a precipitous wall or bank of snow on the north side of said track, and closely approaching the same, made any escape from the cars in which said Goodrich was being conveyed, as aforesaid, impossible to a passenger therein, in case of occasion to attempt the same, and whereas, at the time and place aforesaid, while the said passenger train, which was bound east, was so standing upon said west-bound track, and the said Goodrich was so being conveyed as a passenger therein, the said snow train, or locomotive engine with snow-plow attached, coming from the west on the south or east-bound track, with great velocity, passed the place where said passenger train was standing, being for the time being obstructed by the snow; and whereas, from the darkness of the night and falling snow the said Goodrich was unable to discern objects at a distance, and by reason of a curve in said railroad was unable to see whether said snow train was approaching on the north or south track, and thereby becoming terrified and alarmed, as well by the apparent direction of approach of said snow train as by the signal of danger sounded by the servants of said company by a prolonged blast from the whistle of one of said locomotive engines to which said passenger train was attached, then and there sought to escape from the supposed danger of collision between said trains, by crossing over the south or west-bound track,—the said defendant, by its servants and agents, then and there so negligently, ignorantly, and unskillfully managed said engines, and with such want of concert and knowledge between the servants of said company managing said trains, respectively, that the said Goodrich was struck with great violence by said snow-plow and was thrown and flung by the impetus of the same upon the ground, and upon and against the side of one of the cars forming said passenger train, whereby he received mortal injuries to his person because of which he afterwards, on the 22d day of March, 1881, died. That the said Goodrich, in leaving said passenger car in the manner and at the time and place aforesaid, exercised reasonable care and diligence to apprehend and escape said apprehended and apparent danger of collision.

The court, at the instance of the plaintiff, gave the following, among other, instructions to the jury: "If, from the evidence, the jury believe that the engineer in charge of one of the engines attached to the passenger train, either from ignorance of the character of the approaching train or any other cause, sounded signals of alarm, such as are usually given to avoid collision on the track, and that the effect of these signals of danger was to produce fright among the passengers, or some of them, besides the deceased, while within the passenger car, and that immediately afterwards one or more of the em-

ployes of the defendant fled across the track with precipitation; followed by one or more of the passengers, as if to avoid danger, or in such a way as to naturally produce that impression on the mind of Goodrich, and that this conduct on the part of said engineer or other employes of the defendant, to the satisfaction of the jury, was the immediate and proximate cause of the effort of said Goodrich to seek safety in the same direction, if the jury believe from the evidence he made such effort, such facts may be weighed, in conjunction with all the other evidence in the case, in determining the question of the alleged negligence on the part of the defendant, even though the jury may further believe from the evidence its employes were themselves deceived by a false and misleading appearance of danger."

Thos. F. Withrow, James C. Hutchins, and Snapp & Snapp, for appellant. G. D. A. Parks and C. W. Brown, for appellees.

SOHOLFELD, J., (*after stating the facts.*) Since the right of recovery here is based upon the negligence of the defendant, it is not sufficient merely that plaintiff's intestate became alarmed by reason of appearances produced wholly or in part by the defendant. It must appear that that which produced the alarm, and, through it, the injury, was negligence of the defendant. The burden is upon the plaintiff to prove this negligence; and that is not done by proof alone that a peculiar signal was given by an engine of the defendant, and that it caused or aggravated the alarm of the intestate. If the signal given was, under the circumstances, a proper one, it cannot have been negligence to give it. The instruction quoted in the preceding statement assumes that there is evidence before the jury tending to prove that the defendant's servants negligently gave an alarm signal by blowing an engine whistle. There is no such evidence in the record. As will be seen by reference to the facts in the preceding statement, the only evidence in regard to the blowing of an engine whistle is that an alarm whistle was blown, or, as one phrases it, "a danger signal" was given by the whistle. There is an entire absence of evidence of the purpose of giving signals by the whistle, for whom they are intended, and the results they are expected to produce; nor is there any evidence tending to show that the signal here was unnecessarily given. If we are left to take judicial knowledge of the purpose of giving signals by the whistle, then we know that they are not intended for the passenger on the train at all. They are for those operating the road, and to notify those who but for the signal might come in collision with the train, of its presence. Communications are ordinarily made with passengers, in regard to matters affecting them, personally by the conductor, more rarely by porters or other employes, but the passenger is never required to understand and heed any signal given by the whistle of the engine. No witness testifies, as this instruction assumes, that the signal given was such as is usually given "to avoid collision on the track." If those in charge of the engine apprehended injury to the cars, or to the other property of the company, or to the passengers or train-men on or near the south track, by the too rapid movement of the snow-plow, it was not only prudent, but it was their duty, to give a danger or alarm signal by the whistle to those in charge of the snow-plow, so that they might moderate its speed; and since, from all the evidence, it is apparent that those in charge of the train knew that the snow-plow was on the south track, and hence that there could be no collision, it is much more reasonable to infer that this was its purpose than that it was to avoid a collision. It is not charged in the declaration that the train on which the plaintiff's intestate was riding was, through negligence, upon the north track, and there is no evidence tending to sustain such an allegation had it been made; and it is clear, beyond all question, that the running into the snow-bank was the result of an inevitable casualty. It is not claimed that the curve in the road, the darkness of the night, or the violence of the storm, can be regarded

as evidence tending to establish negligence; and hence the jury must have accepted the fact that the whistle blew an alarm as conclusive proof of negligence, and the giving of this instruction was therefore error. The judgments of the circuit and the appellate courts are reversed, and the cause is remanded to the circuit court for a new trial. The clerk of this court will tax the costs made in the appellate court against the appellee, upon certificate of the amount to be filed by the clerk of the appellate court.

(125 Ill. 432)

CHICAGO, S. F. & C. RY. CO. v. PHELPS.

(*Supreme Court of Illinois. June 16, 1888.*)

1. EMINENT DOMAIN—PROCEDURE—APPEAL BY CORPORATION—RIGHT TO OCCUPY PROPERTY ON GIVING BOND.

In proceedings to take land for the purposes of a railroad, and ascertain the compensation to the land-owner, the railroad company has the right to enter upon the use of the land, upon an appeal from the trial court by the company, by complying with the eminent domain act, (Rev. St. Ill. c. 47, § 18,) providing that, upon appeal by the land-owner, the company shall be entitled to enter upon the use of the land by giving bond conditioned for paying such compensation as may be finally adjudged in the case; and, if the appeal be by the company, a like bond shall be executed.

2. SAME—PAYMENT OF COMPENSATION WITH REFUNDING BOND—EFFECT ON THE APPEAL.

Where damages are allowed a land-owner for land taken for the purposes of a railroad, and, in contemplation of an appeal, the company pays to the owner, through the clerk, the amount of such damages, conditioned that the same be refunded if the judgment be reversed on appeal, such payment is not a satisfaction of the judgment, so as to defeat the appeal by the company.

3. SAME—TRIAL—ORDER OF EVIDENCE.

At the trial of an issue to determine the compensation to the owner for land taken for a railroad, the company, being plaintiff, offered evidence only of the damages to the land taken, and rested. The owner then offered evidence to show the damages to both the land taken and the residue. *Held*, that the company could, on rebuttal, introduce evidence tending to show that the residue of the land was not damaged, as it was not competent, in chief, to assume a damage, and then prove a negative.

Appeal from county court, Warren county; J. H. STEWART, Judge.

Proceeding by petition filed by the Chicago, Santa Fe & California Railroad Company against De Witt Phelps to condemn certain lands for the purposes of petitioner's railroad. The company appeals from a judgment awarding damages to said Phelps.

Grier & Stewart, for appellant. *J. A. McKenzie*, for appellee.

MULKEY, J. The appellant, on the 19th of July, 1887, presented its petition, under the eminent domain act, to the judge of the county court of Warren county, praying for the condemnation of a strip of land for right of way 100 feet wide, extending across a part of the S. $\frac{1}{4}$ S. W. $\frac{1}{4}$ and W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ section 26, township 10 N., range 3 W., being the property of appellee. The judge made an indorsement on the petition, stating the time it was presented, and fixing the 3d of August for hearing the same. Pending the hearing, which commenced on the day stated, by leave of the court, and with the consent of the parties, it was agreed that the petition should be amended so as to embrace, not only the strip of land required for right of way, but also an additional strip for the purposes of depot buildings, switches, side tracks, etc. To meet this change in the scope of the petition, which appellee claimed would injuriously affect the N. $\frac{1}{4}$ S. W. $\frac{1}{4}$, 26, a part of his farm not mentioned in the petition, it was further agreed that appellee should file a cross-petition setting forth his claim to damages for the alleged injury to the latter tract. With a view of facilitating the trial, it was agreed between counsel that the hearing of the evidence should proceed as though the cross-petition was on file, and that counsel for appellee might prepare it, and place it on file, at their leisure. It appears, however, that, although it was prepared while the trial was going

v.17N.E.no.7—49

on, yet it was never filed by the clerk, or incorporated into the record, until after the present appeal was taken. Indeed, the original cross-petition was lost altogether; yet, upon notice in the lower court to amend the record, its contents were proved, and a substantial copy of it substituted in its stead. It is quite clear the case was tried upon the theory that there was a cross-petition in it, and this was so understood by the court and the counsel on both sides; and, as just seen, when it was discovered the transcript did not contain the cross-petition, the record, upon due notice, was amended. The jury by their verdict fixed the value of the land taken at \$955.52, and assessed the damages to the land not taken at \$1,658, making altogether \$2,613.52, and judgment was entered upon the verdict for that amount. The company prayed an appeal to this court, which was allowed "on petitioner filing bond in appeal in the sum of \$5,000, with approved security; the said bond to be approved by the judge of the county court, and filed in 30 days from that date; * * * the condition of said bond to be for the payment of such compensation as might be finally adjudged in this case." The court, however, refused to make an order permitting the petitioner to go into possession of the premises sought to be taken upon the execution of such bond, to which ruling of the court the petitioner at the time excepted. The thirteenth section of the eminent domain act, and under which said order was asked, provided as follows: "In cases in which compensation shall be provided as aforesaid, if the party in whose favor the same is ascertained shall appeal such proceeding, the petitioner shall, notwithstanding, have the right to enter upon the use of the property upon entering into bond, with sufficient surety, payable to the party interested in such compensation, conditioned for the payment of such compensation as may be finally adjusted in the case; and, in case of appeal by the petitioner, petitioner shall enter into like bond, with approved surety." While this section does not, in express terms, provide that the company, on its own appeal, shall, upon filing the bond therein provided for, have the right to enter upon the use of the property pending the litigation, nevertheless we think this was the intention of the legislature; and any other construction of it would subject the petitioner to great loss and inconvenience in the case of an oppressive and unjust judgment, from which an appeal would afford the only relief. Upon a careful consideration of the question, we are of opinion that the county court erred in not making the order in question. By such entry the petitioner only acquires the temporary use of the premises pending the litigation; and, so far as any constitutional question is concerned, we perceive no difference, on principle, between a case like this and one where a railway company enters upon the land of another for the purpose of making preliminary surveys, and locating its line of road; and the right to do this is not questioned.

It further appears that the petitioner, failing to obtain the order in question, deposited the amount of the judgment with the county treasurer, who executed to the company his receipt therefor, and thereupon the treasurer paid the same over to appellee upon the terms and conditions set forth in the subjoined receipt, which, after being entitled in the cause, proceeds as follows: "Received of W. T. Gossett, county treasurer of Warren county, Ill., \$2,613.52, being the full amount of money deposited with him by the above company, under order of court in the above-entitled cause, which I hereby agree to refund to the Chicago, Santa Fe & California Railway Company in case the judgment in the above-entitled cause shall be reversed by the supreme court of this state on appeal or writ of error. *Dated September 1, 1887.* [Signed] DE WITT PHELPS." Appellee, proceeding upon the hypothesis that the delivery of the money deposited by the company with the county treasurer to appellee, notwithstanding the conditions upon which such delivery was made, operated as an absolute satisfaction and extinction of the judgment, so that no appeal would lie from it, has entered a motion in this court to dismiss the appeal upon the stipulated facts as just stated. That it was not the intention

of the parties that the transaction should have such an effect is manifest. Nor do we think the law, in contravention of the manifest understanding of the parties, attaches to it the serious consequences which appellee's counsel ascribe to it. The motion has little, if anything, to commend it, view it as we may, and it will therefore be overruled.

The petitioner on the trial offered no evidence in chief except as to the value of the land to be taken. The appellee then offered evidence, not only in respect to the value of the land taken, but also for the purpose of showing damages in respect to the land not taken, including that mentioned in the petition, as well as the cross-petition. The appellant then introduced as a witness I. W. Robertson, who, after stating he was acquainted with the manner in which appellant's road runs through the land in question, and how appellee's farm and buildings are located, was asked the following questions: "What effect, in your judgment, will the construction and operation of that railroad where it is proposed to construct and operate it, with a station on the ground of Mr. Phelps, have upon the market value, the selling value, of the land that is not taken? Will the market value of the south half of the south-west quarter of section twenty-six, and the west half of the south-east quarter of section twenty-six, be in any way affected, in your judgment, by the construction and operation of the railroad with a depot on the ground? In your judgment, will the construction and operation of this railroad across the south half of the south-west quarter of section twenty-six, and the west half of the south-east quarter of section twenty-six, diminish the market value of the balance of these two eighths not included in the right of way?" On objection by appellee these questions were all held by the court improper, on the ground, as we gather it, that the evidence should have been offered in chief, and not in rebuttal. Many questions of like character propounded to other witnesses were excluded by the court on the same grounds, to all of which rulings the appellant, by its counsel, excepted. We think the court erred in not permitting the witness to answer the above questions, and in holding other questions of like character improper. While we fully recognize the general rule that a plaintiff will not be permitted to reserve a part of his evidence in chief, to be brought forward in rebuttal, and thereby obtain an undue advantage over his adversary, yet at the same time we do not think the appellant, by reason of this rule, was bound at its peril to assume that the land not taken was damaged, and to go on and try to make proof of it. Nor was appellant, on the other hand, in the absence of any proof tending to show such damage, bound to assume the burden of proving a negative. The appellant's right to the relief asked did not depend at all upon its showing that the land not taken was damaged. Such proof would not have been in support of any allegation in the petition. Yet, under the decisions of this court, the appellee had a right to offer such evidence, under the petition, as to all lands mentioned in it, without filing a cross-petition. Having availed himself of this right by offering new and independent evidence, we think it clear the appellant had the right to be heard in rebuttal.

For the errors indicated the judgment of the court below will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

(125 Ill. 131)

AMERICAN FIRE INS. CO. v. BRIGHTON COTTON MANUF'G CO.

(*Supreme Court of Illinois. June 16, 1888.*)

INSURANCE—CONDITIONS IN POLICY—"VACANT AND UNOCCUPIED"—"CEASE TO BE OPERATED"—TEMPORARY SUSPENSION.

A temporary suspension of the principal work of a cotton factory, the watchmen and others being still employed, does not avoid a policy of insurance thereon, conditioned that the policy shall be forfeited if the property becomes "vacant and unoccupied," or "cease to be operated," except to set up new machinery or make repairs, whether such suspension was to set up machinery or repair or not.

Appeal from appellate court, First district.

Action by the Brighton Colton Manufacturing Company against the American Fire Insurance Company, commenced in the superior court of Cook county, to recover on an insurance policy. On a trial to the court before R. S. WILLIAMSON, Judge, there was judgment for plaintiff, which was affirmed on appeal in the appellate court, and defendant appeals to the supreme court.

Frederic Ullman and Elbert H. Gary, for appellant.

An insurance policy is to be construed by the same rules that govern all other instruments. *Robertson v. French*, 4 East, 195; *Sawyer v. Insurance Co.*, 37 Wis. 518; 1 Arn. Ins. 64; *Potter v. Insurance Co.*, 5 Hill, 147; *Insurance Co. v. Padfield*, 78 Ill. 167; *Insurance Co. v. Martin*, 8 Ins. Law J. 145; *Herrman v. Insurance Co.*, 85 N. Y. 171; *Insurance Co. v. Foster*, 92 Ill. 336; *Carpenter v. Insurance Co.*, 16 Pet. 510; *Mack v. Insurance Co.*, 13 N. E. Rep. 343. As to the meaning in the policy of the provision for a forfeiture for a cessation of operations, see *Keith v. Insurance Co.*, 10 Allen, 228; *Insurance Co. v. Wetmore*, 32 Ill. 245; *Schmidt v. Insurance Co.*, 41 Ill. 298; *Insurance Co. v. McDowell*, 50 Ill. 129; *Hinckley v. Insurance Co.*, (Mass.) 1 N. E. Rep. 737; *Laselle v. Insurance Co.*, 43 N. J. Law, 468; *Ridge v. Insurance Co.*, 9 Lea, 507; *Worthington v. Bearse*, 12 Allen, 382; *Bennett v. Insurance Co.*, 50 Conn. 420, 51 Conn. 507; *Lounsbury v. Insurance Co.*, 8 Conn. 459; May, Ins. § 265; 2 Phil. Ins. § 975; *Insurance Co. v. Meyers*, 63 Ind. 238. The claim that a temporary cessation of operations will not invalidate the condition of the policy under discussion is largely based on *Insurance Co. v. Leathers*, (Pa.) 8 Atl. Rep. 424; *Poss v. Insurance Co.*, 7 Lea, 704,—which are not parallel cases, and the decision in the *Poss Case* was very much modified, if, indeed, that portion of it now complained of was not overruled, in a later case before the same court. *Ridge v. Insurance Co.*, 9 Lea, 507. The books abound in cases where it has been held the length of time of the condition broken is not material, even though an intention to resume the original condition of things existed. *Sleeper v. Insurance Co.*, 56 N. H. 401, 5 Ins. Law J. 538; *Ashworth v. Insurance Co.*, 112 Mass. 422; *Cook v. Insurance Co.*, 70 Mo. 610; *Whitney v. Insurance Co.*, 9 Hun, 39; 1 Wood, Ins (2d Ed.) 211; *Alston v. Insurance Co.*, 80 N. C. 326; *Miller v. Insurance Co.*, 13 Phila. 551; *Woodruff v. Insurance Co.*, 83 N. Y. 133. But it is argued that a cessation of operations for a reasonable time, for purposes incidental to the business of the assured, was permissible, without notice. Such a cessation is not such as was contemplated by the contracting parties as avoiding the policy, but is to be treated the same as the condition of affairs on Sunday, or during the night-time,—supported by *Whitney v. Insurance Co.*, 9 Hun, 39; *May v. Insurance Co.*, 25 Wis. 291. But a careful reading of those cases will show they have no application to the case now under discussion. There is no cessation of operations, within the meaning of the policy, on Sunday. The operatives begin work on Monday, when they quit on Saturday. The suspension arises from the known and universal custom of resting from labor on Sunday. When the contract was made, it was with reference to this custom. But there is a vast difference between a suspension for such a reason and "other reasons occasioned by the usual and ordinary incidents to the business." *Insurance Co. v. Foster*, 92 Ill. 336; *Woodruff v. Insurance Co.*, 83 N. Y. 133; *Houghton v. Insurance Co.*, 8 Metc. 114; *State v. Glucose Co.*, 5 Atl. Rep. 803. It has been contended, also, that the contract is to be affected by the usage of the assured or others engaged in a similar business to cease operations for various reasons that may have arisen. This question is, perhaps, not pertinent to the questions involved in this court, but the following cases are cited: *Woolen Co. v. Insurance Co.*, 21 Conn. 39, and cases there cited; *Insurance Co. v. O'Neile*, 13 Ill. 93; *Luce v. Insurance Co.*, 105 Mass. 302; *Mason v. Insurance Co.*, 29 U. C. Q. B. 585; *Ripley v. Insurance*

Co., 80 N. Y. 136; *Duncan v. Green*, 43 Iowa, 679; *Partridge v. Insurance Co.*, 15 Wall. 578; *Insurance Co. v. Harmer*, 2 Ohio St. 452; *Woolen Co. v. Proctor*, 7 Cush. 417. It is claimed by appellant that the insured premises, at the time of the fire, were "vacant and unoccupied," within the meaning of the condition of the policy upon that subject. *Paine v. Insurance Co.*, 5 Thomp. & C. 619; *Keith v. Insurance Co.*, 10 Allen, 228; *Insurance Co. v. Walsh*, 54 Ill. 164; *Ashworth v. Insurance Co.*, 112 Mass. 422; *Insurance Co. v. Padfield*, 78 Ill. 167; *Reid v. Insurance Co.*, 90 N. Y. 382; *Whitney v. Insurance Co.*, 9 Hun, 39; *Insurance Co. v. Foster*, 92 Ill. 334; *Corrigan v. Insurance Co.*, 122 Mass. 298; *Litch v. Insurance Co.*, 136 Mass. 491; *Sleeper v. Insurance Co.*, 5 Ins. Law J. 538; *Insurance Co. v. Burns*, Id. 69; *Dennison v. Insurance Co.*, 3 N. W. Rep. 500; *Bennett v. Insurance Co.*, 51 Conn. 507, 50 Conn. 420; *Alston v. Insurance Co.*, 80 N. C. 326; *Insurance Co. v. Meyers*, 63 Ind. 238; *Herrman v. Insurance Co.*, 85 N. Y. 162; *Cook v. Insurance Co.*, 70 Mo. 610; *Poor v. Insurance Co.*, 125 Mass. 274; *Insurance Co. v. Wells*, 14 Ins. Law J. 171; *Fitzgerald v. Insurance Co.*, 25 N. W. Rep. 785; 1 Wood, Ins. (2d Ed.) 209. A distinction is sought to be made because of the peculiar language of the policy sued on, which provides an avoidance only in case the premises become vacant and unoccupied, and a case in New York to sustain the position has been cited: *Herrman v. Insurance Co.*, 85 N. Y. 162. It is believed, however, that the New York case is not in harmony with the current of authority. In the following cases a contrary view was adopted: *Insurance Co. v. Padfield*, *supra*; *Insurance Co. v. Zaenger*, 63 Ill. 464; *Alston v. Insurance Co.*, 80 N. C. 326; *Fitzgerald v. Insurance Co.*, *supra*.

Edward W. Russell and D. J. Schuyler, for appellee.

As to the principles of construction governing the contract in this case, the following authorities are cited: *Tierney v. Etherington*, 1 Burrows, 348; *Dow v. Insurance Co.*, 1 Hall, 174; *Hoffman v. Insurance Co.*, 32 N. Y. 405; *Westfall v. Insurance Co.*, 2 Duer, 490; *Insurance Co. v. Cropper*, 32 Pa. St. 351; *Insurance Co. v. Verdier*, 33 Mich. 138; *Insurance Co. v. Eddy*, 49 Ill. 107; *Insurance Co. v. Robinson*, 64 Ill. 268; *Insurance Co. v. Scammon*, 100 Ill. 644; *Schroeder v. Insurance Co.*, 109 Ill. 157; *Bank v. Insurance Co.*, 95 U. S. 673; *Insurance Co. v. Hazelett*, 4 N. E. Rep. 582; *Griffey v. Insurance Co.*, (N. Y.) 3 N. E. Rep. 309; *Burkhard v. Insurance Co.*, 102 Pa. St. 262. On the question as to whether the property was "vacant and unoccupied" the following cases are referred to: *Moore v. Insurance Co.*, (N. H.) 6 Atl. Rep. 27; *Insurance Co. v. Tucker*, 92 Ill. 64; *Assurance Co. v. Mason*, 5 Bradw. 147; *Whitney v. Insurance Co.*, 72 N. Y. 120; *Lead-Works v. Insurance Co.*, 2 Fed. Rep. 479; *Stupetski v. Insurance Co.*, 43 Mich. 373, 5 N. W. Rep. 401; *Dennison v. Insurance Co.*, 52 Iowa, 457, 8 N. W. Rep. 500; *Whitehead v. Price*, 2 Crompt. M. & R. 446; *Shearman v. Insurance Co.*, 46 N. Y. 538; *Herrman v. Insurance Co.*, 81 N. Y. 187; May, Ins. (2d Ed.) §§ 174, 175, 203, 205. It has been held from the earliest times, and when the business was confined chiefly to marine insurance, that the policy is to be construed largely for the benefit of the trade, and for the insured. *Tierney v. Etherington*, 1 Burrows, 348. And it is further held that in the construction of the conditions of the policy inserted, as they are, for the benefit of the insured, that they are controlled by the exigencies and necessities of the business which it was designed to protect. *Townsend v. Insurance Co.*, 18 N. Y. 170; *Insurance Co. v. Leathers*, (Pa.) 8 Atl. Rep. 424; *Poss v. Insurance Co.*, 7 Lea, 704. Defendant's agent knew, when they took the risk, that it was a cotton-mill; that various emergencies were liable to arise when the mill would have to be temporarily closed; that cotton might become scarce, or so high in price that it would be imprudent, and subject the lessees to losses in attempting to manufacture bats and warps for a short time, as in the case of

Insurance Co. v. Leathers, supra; that the machinery was liable to wear out, and require repairing; that strikes might arise; that help might become scarce, or wages exorbitantly high. All this was well known, and the law says this was considered and entered into and became a part of the contract of insurance, and was therefore part of the risk assumed by the underwriter. *Assurance Co. v. Mason*, 5 Bradw. 141; *Garnwell v. Insurance Co.*, 12 Cush. 167; *Insurance Co. v. Foster*, 90 Ill. 121; *Insurance Co. v. Scammon*, 100 Ill. 644; *Insurance Co. v. Cornick*, 24 Ill. 455; 1 Wood, Ins. (2d Ed.) 154; *Grant v. Insurance Co.*, 5 Hill, 10; *Billings v. Insurance Co.*, 20 Conn. 139; *Insurance Co. v. Insurance Co.*, 1 Handy, 181; *Townsend v. Insurance Co.*, 18 N. Y. 168. In the absence of fraud, negligence, a willful breach of the conditions of the policy, or a permanent cessation of business, the insurers should not be heard to say that the policy was avoided unless the law clearly gives them the right to do so. *May v. Insurance Co.*, 25 Wis. 291; *Lead-Works v. Insurance Co.*, 2 Fed. Rep. 478; *Cummins v. Insurance Co.*, 67 N. Y. 260. At the time the policy in question was issued, express permission was granted to the plaintiffs to make all necessary repairs and requisite alterations. But whether this would extend to the plaintiff's lessee is immaterial, for the reason that this privilege is presumed to have been contemplated by the underwriter when the policy was written. *Whitney v. Insurance Co.*, 72 N. Y. 117; *Townsend v. Insurance Co.*, 18 N. Y. 168; *May, Ins.* (2d Ed.) § 224, p. 281, etc. Whether there was a temporary suspension only, based upon reasonable and justifiable grounds, was a question for the jury; in this case for the court. *Insurance Co. v. Leathers, supra*. Does it affirmatively appear from the record that the trial judge, sitting as a jury, found it to be a fact that the mill had even temporarily ceased to operate in violation of the policy, or that an erroneous proposition of law was applied? Assuredly it does not; and the controverted point, as to whether the mill had ceased to operate, must be taken as conclusively settled in favor of the appellees. *Montgomery v. Black*, 15 N. E. Rep. 28; *Brownell v. Welch*, 91 Ill. 523; *Bank v. Proctor*, 98 Ill. 558; *Kreigh v. Sherman*, 105 Ill. 49; *Steinman v. Steinman*, Id. 348; *Paddon v. Insurance Co.*, 107 Ill. 196.

SCOTT, J. The policy upon which this suit was brought, division 3, entitled "Prohibitions and conditions under which this policy becomes null and void," contains provisions which it is alleged assured has suffered to be violated, and hence the insurance contract has ceased to be obligatory upon the company. It is on the alleged violations of these provisions of the contract defendant bases its defense. Concerning many of the principal facts no controversy exists. The property covered by the policy is a four-story and basement brick cotton-mill building, and the usual plant necessary to running such a mill. After the policy was written, plaintiff leased the mill to certain parties, who continued to operate and control it until its destruction by fire on the 16th of July, 1885. Such leasing was made by the consent of the company, and no complaint is made on that ground. The lessees had operated the mill under the lease up to July 8th, just before the destruction of the property. On that day, most of the hands employed about the mill were discharged, until their services should be again needed, when the lessees should be ready to resume work again in all the departments. There is evidence tending to show the employees understood the suspension of work was to be for only a short time. It was conceded by counsel for defendant at the trial, the lessees "did at some time expect to start up again." For that purpose they were getting in coal, and doing other things indicating an intention to resume business. The evidence tends to show the date it was expected labor would be resumed was about the 1st of August next after the destruction of the property in July. So far as other principal facts may be thought to be necessary to an understanding of the decision to be rendered they will be

stated. Otherwise not. One condition of the insurance contract is, if the assured "shall allow the building herein covered to become vacant and unoccupied, the policy shall become null and void." There is no ground for the insistence there was a breach of this condition of the policy. It is undeniable a number of employes were retained in the service of the lessees, and were actually engaged in and about their usual work in the mill up to and on the day the fire occurred. All the plant, and much valuable material, and some manufactured goods, were in the building. One of the lessees was either in or at the building when the fire was discovered, and came there with money to pay persons engaged as laborers about the mill. A night and day watchman were retained, and performed their usual duties. It is so plain it needs no discussion, the property was at no time before the fire "vacant and unoccupied" in the sense those terms are used in the policy.

Another condition of the policy is: "If it be a manufacturing establishment, running in whole or in part over or extra time, or running at night, or if it shall cease to be operated, without special agreement indorsed hereon, all insurance by this policy shall thereupon cease." It is said the mill had "ceased to be operated" by the lessees, and, as a consequence, there was such a breach of this condition as rendered the policy inoperative, and no longer binding upon defendant. It will be noted this provision is contained among the printed conditions annexed to the policy. But there was indorsed upon the policy, at the time the description of the property was written, the following: "Other insurance permitted without notice, and permission granted to set up and operate machinery, and to make such repairs and alterations as may be necessary to keep the premises in good order during the term of this policy, without prejudice thereto," which, of course, became a part of the insurance contract. The original condition and this permission are to be construed together as constituting the contract between the parties. When this is done, it is evident it was understood there might be temporary suspension in the operating of the mill. In the very nature of things, the setting up of machinery, and making repairs and alterations, would require the temporary suspension of some or all work about the factory,—perhaps not all in every instance, but that portion that would be interfered with in making needed repairs. It is therefore within the plain meaning of the contract there might be temporary suspensions of a portion or of all the work for certain reasons, without prejudice to the contract, and among the causes is the one to "make such repairs and alterations as may be necessary to keep the premises in good order." There is some evidence that one object of the suspension of the general work at the mill was that needed repairs might be made. The trial court may have found such was the case, and the finding of the appellate court, by the affirmance of its judgment, the same way, would, of course, be conclusive on this court. Conceding such fact was well found, the temporary suspension of a large portion of the work at the mill, as was done, was rightful, as being within the express terms of the contract. No doubt it is true, as counsel contends, the principal reason for the suspension of work for the time being was the difficulty of securing that quality of cotton at such prices as could be manufactured at a profit; and the contention is it was a breach of the contract to close down the factory, as was done, for any such cause. The argument on this branch of the case assumes for its support that which does not exist in fact, viz., that there was a total suspension of work in the factory. Without this erroneous assumption, the position of counsel has little, if anything, to sustain it. What is the meaning to the words "cease to be operated," as used in the policy? The operation of a large manufacturing establishment means doing everything necessary for its successful and profitable management. It would necessarily be the work of many hands, and the operation would be multiplied many fold. The duties of the many employes would be quite dissimilar, and entirely independent of each other, but all

necessary to either the profitable or successful operation of the factory. It would be the duty of some to buy the raw material to be manufactured, of others to run the engines to drive the spindles, of others to control and manage the carding and spinning, of others to put up and label the goods for the market, of others to make sales and take orders for goods as fast as manufactured, of others to deliver or ship goods when sold, and of others to perform such duties as may be necessary to be done, and which it would be needless to enumerate. The ceasing to perform any one thing, for the time being, of the many required to be done, would certainly not be to cease to operate the factory." Any one might be temporarily suspended, and yet the factory be said to be in successful operation. "Carding and spinning" is not all that is included in a "cotton factory." There must be the engine to drive the machinery, and fuel to make steam. The goods, when manufactured, must be put up and labeled, and, when so prepared for the market, must be sold and shipped or delivered; and the doing of any one of these many things is a part, and even an essential part, of the operation of a large factory. Nor is the ceasing to do any one of them for a shorter or longer period ceasing to operate the factory. "Carding and spinning" is no more all of the operation of a great factory, than the sale of the fabrics when produced. Many, very many, things are included in the operations of a factory, the doing of which is necessary to its successful management. The operating of an extensive factory does not mean it shall be kept employed in all its various departments every day; that is, all the time. It would be unreasonable to construe the contract in this policy that it means the factory, in all its departments, shall be kept in ceaseless motion. No one supposes it means that. It may properly be closed down over Sundays and all legal holidays, or for any cause that a prudent manager of such an establishment would deem prudent and best for the interest of the owners. On the same principle, one department may be kept in operation, and others cease temporarily. It might be, the fabrics manufactured might be in excess of the sales or the demands of trade, and for that reason a prudent superintendent might deem it best to stop the spindles and the looms for a season, or sales might be in excess of the supplies, and for that reason no goods would be contracted for a time. Would any one say that such partial stoppages would be a violation of the contract of insurance contained in the policy in suit? So narrow a construction would make the contract of no value to the assured, and to observe it would render the usual and ordinary management of such an establishment impracticable. A rule of construction is that all contracts shall be so interpreted that they may be capable of performance if it can be done consistently with the intention of the parties. In this case the evidence shows some of the hands were retained in the service of the lessees, and continued to perform their usual duties up to the day the fire occurred. The trial court might have found the mill had not "ceased to be operated." That was one of the controverted questions of fact in the case, not subject to review in this court, and as to which the finding of the appellate court affirming the judgment of the trial court is conclusive. This view leads to an affirmance of the judgment of the appellate court without reference to other questions discussed. But conceding there was a suspension of all work at the mill, and that the sole cause of such stoppage was the difficulty in procuring cotton of the quality that could be worked up at a profit, still it was but a temporary suspension; and the law is, a mere temporary suspension of business at such an establishment for want of a supply of materials is not ceasing to operate the factory in the sense the words "ceased to be operated" are used in the policy in suit. The rule, in this respect, is a reasonable one, and has many authorities in its support. It may be, and doubtless is true, there are cases that sustain a different construction; but it is thought the rule here adopted has more and better considerations in its support than any other. The judgment of the appellate court will be affirmed.

(125 Ill. 447)

GAGE *et al.* v. CARAHER.

(Supreme Court of Illinois. June 16, 1888.)

1. LOST INSTRUMENTS—RESTORATION—CHICAGO BURNT RECORDS ACT—EQUITY—JURISDICTION.

Under the burnt records act, (Rev. St. Ill. 1880, p. 855,) a court of equity has jurisdiction, not only to establish lost instruments, and the destroyed records thereof, but also to inquire, determine, and declare as to the better title to land in dispute, whether legal or equitable.

2. TAXATION—TAX TITLES—VALIDITY OF DEED.

In order to establish the validity of a tax title obtained under Rev. St. Ill. 1845, c. 89, § 78, a valid judgment, precept, and affidavit of notice must be shown.

3. SAME—BURNT RECORDS ACT—CONSTITUTIONAL LAW—IMPAIRING CONTRACTS.

Section 28 of the burnt records act, (Rev. St. Ill. 1880, p. 855,) providing that no tax deed based upon any proceedings, the records of which have been destroyed, shall be received as *prima facie* evidence of the regularity of such proceedings, is applicable to cases where the statute making tax deeds *prima facie* evidence of the regularity of precedent steps was in force at the time of the making of the deeds, and its application to such deeds is not obnoxious to Const. U. S. art. 1, § 10, relative to the inviolability of contracts.

4. SAME—ACTION TO SET ASIDE TAX DEED—REPAYMENT OF TAXES.

Before a party will be entitled in equity to have void tax deeds set aside as a cloud upon his title, he must repay to the holder of the tax deeds all the taxes and costs paid by him which were a just charge upon the land.

5. SAME—SPECIAL ASSESSMENT SALES.

But he cannot be called upon to reimburse such holder the amounts of special assessment sales of the land paid by him, where no deeds were taken out upon the certificates issued at such sales within six months after the time of redemption expired, as required by act Ill. March 8, 1867, (Sess. Laws 1867, p. 167.)

Appeal from superior court, Cook county; H. M. SHEPARD, Judge.

This was a suit in equity upon bill filed by Patrick Caraher against Portia Gage, Asahel Gage, Henry H. Gage, and others, under the burnt records act, to remove tax claims as clouds upon his title. There was a decree in favor of petitioner, and defendants appeal.

Augustus N. Gage, for appellants. *James E. Munroe* and *Ira J. Geer*, for appellee.

SHOPE, J. It is contended that this proceeding is not, properly considered, under the act known as the "Burnt Record Act." This is a misapprehension. This case is essentially different from *Gage v. McLaughlin*, 101 Ill. 155. It was said of that case: "This bill, while ostensibly filed under the act, is in reality one filed to remove the tax deeds of Gage as a cloud on petitioner's title." That the effect of the proceeding may be to remove a cloud from petitioner's title cannot be regarded as a test of whether the proceeding is properly under the act. That will in all cases depend upon the case made by the petition and proofs thereunder. It is averred and shown that the records of Cook county were destroyed by fire, October 9, 1871; that at that time petitioner was the owner of the lots in question; that he had a connected chain of title from the government, evidenced by certain deeds of conveyance, 36 of which, necessary to the completion of his chain of title, were lost; that such deeds had been recorded, and the record thereof destroyed in said fire; that appellants and others were claiming title in fee to said lots, and had caused deeds thereto to be placed on record, etc. The petition was duly verified, and contained all that was necessary to entitle the petitioner to relief under the provision of that act, and was sustained by proof. It is no objection to proceeding under the statute, where the facts alleged and proved bring the case within its provisions, that there are adverse claimants. Whatever may be the power of the court of chancery, where there are controverted titles, to restore by its decree the evidences of title in the respective parties as they were before the destruction of the record, and then, in its discretion, remit the parties to a court of law to there try their titles, it is manifest no such course

was contemplated by the statute or necessary in cases under it. By the act (section 10) the court is given power to inquire into the condition of any title to or interest in the land in question, and to make all such orders, judgments, or decrees as may be necessary to determine and establish said title or interest, either of a legal or equitable character, and (section 15) in such decrees, whether *pro confesso* or otherwise, to determine and decree in whom the title is vested. The court is authorized and required to investigate the interest of all the parties in the premises in question, (*Mulvey v. Gibbons*, 87 Ill. 367;) and to decree in favor of the better title, (*Robinson v. Ferguson*, 78 Ill. 538; *Smith v. Hutchinson*, 108 Ill. 662; *Smith v. Gage*, 11 Biss. 217.) The decrees so entered are by the statute (section 16) made, as to the title so found, forever binding and conclusive. Ample provision is made by the eighteenth section of the act for presenting opposing or conflicting claims of title.

It is also objected that the petition is insufficient to warrant the court in finding the tax deeds void, for the reason that it does not aver the invalidity of such tax deed, as is required to be done in bills to remove tax deeds as clouds from titles, (*Moore v. Wayman*, 107 Ill. 195; *Farwell v. Harding*, 96 Ill. 32; *Barnett v. Cline*, 60 Ill. 205;) and proof thereof was not made by the petitioner. This position is untenable. All that is required in respect of adverse claimants or their titles is that such claimant shall be named in the petition and made defendant. Nothing more is required to give the court jurisdiction, under the statute, to investigate all claims of title to the premises, and by its decree establish and confirm the title in the person in whom it is found to be vested, and to make all such orders, judgments, and decrees as shall be necessary to that end. It was said in *Smith v. Hutchinson*, *supra*, that the petitioner was required to establish the validity of his own title only; and, "when a person is made defendant in a petition of this character, it devolves upon him to establish the title he may claim to the property." If appellants intended to rely on their title set up in their answers, they were required to show its validity. It is said, however, in effect, that this was done when they introduced in evidence their tax deeds, regularly executed by the proper officer; that, by virtue of the statute, such deeds are made *prima facie* evidence of the regularity of all the precedent proceedings necessary to their validity; and that this is so, notwithstanding the burnt record act (paragraph 23) expressly provides that no tax deed based upon any proceedings, the records of which have been destroyed, shall be received as *prima facie* evidence of the regularity of such proceedings, because the statute making the tax deed *prima facie* evidence of the regularity of the precedent step, etc., was in force at the time of the sale and making of the deeds, and formed part of the contract relating thereto, and that the application of the twenty-third paragraph of the burnt record act, passed subsequently to the making of the deed, would be in violation of section 10 of article 1 of the constitution of the United States, preserving the inviolability of contracts. The position of counsel is manifestly untenable. As we have seen, it devolves upon appellants to show that their tax titles, or some of them, were valid, before the court could decree in their favor thereon; and it was essential and indispensable to the validity of such titles that there should be a valid judgment, a valid precept, and the affidavit of notice required by law. We have repeatedly held that a tax deed made in pursuance of the statute in force when these several sales and deeds were made, is void unless it is supported by a valid judgment and precept. Nothing in the act (section 73, c. 89, Rev. St. 1845; Gross' St. 1869, p. 575) makes the tax deed *prima facie* evidence of a valid judgment, precept, or affidavit of notice. These were required to be shown to establish the validity of the tax title. *Pitkin v. Yaw*, 13 Ill. 251; *Baily v. Doolittle*, 24 Ill. 577; *Gage v. Lightburn*, 93 Ill. 248; *Eagan v. Cannelly*, 107 Ill. 458.

But, if this was not so, counsel is in error in supposing that the section of the burnt record act referred to, would have the effect to impair any right of

contract. At most, the statute creating the presumption in favor of the regularity of the proceeding prior to the deed is a rule of evidence only. By the statute referred to, the party claiming under a properly executed tax deed was relieved, in the first instance, of the necessity of proving certain things essential to the validity of this deed, and the burden was cast upon the opposite party of showing irregularity therein if it existed. By the latter act, when the record of the proceedings upon which the tax deed is based have been destroyed, (as here shown,) this presumption in favor of regularity is taken away; and the burden is upon the party claiming under the deed to show that the law has been complied with in each step essential to the making of a valid tax title. What is essential is the same in both cases; the burden of proof only is changed. The power of the legislature in this respect, whether affecting proof of existing rights, or as applicable to rights subsequently acquired, or to future litigation, so long as the rules of evidence sought to be established are impartial and uniform in their application, is practically unrestricted. *Cooley*, Const. Lim. 368; *Hickox v. Tallman*, 38 Barb. 608. The section of the burnt record act referred to is applicable to this case, and its application is not obnoxious to the constitutional objection urged. *Roby v. Chicago*, 64 Ill. 447. It follows that the court was justified in finding that the several tax deeds constituted no legal impediment to its decree confirming the title in petitioner. Although the tax deeds were void, the purchasers at the several sales for taxes, in pursuance of which said deeds were executed, had discharged a burden cast by law upon petitioner, and paid the taxes and costs which were a just charge upon his land, and equity required that before he should, at his own suit, be declared vested with the fee-simple title, as against the holders of the tax deeds, he should be required to repay the money so advanced for his benefit, and to relieve his estate. This was done as to all taxes paid at such sales, and subsequent taxes paid under such deeds, and interest thereon. The question arose here upon the answer of the defendant, and the court properly found an equitable defense to the relief sought by petitioner, to the extent of the taxes paid, and properly refused its relief until the petitioner should do equity by repaying the same, with legal interest thereon.

It is also insisted that the court erred in setting aside said tax deed without requiring appellants to pay the several amounts of said special assessment sales of March 20, 1869, with legal interest thereon. It was shown that said sales were made as alleged in the answers, and that appellants, or one of them, was the legal holder of the certificates issued thereunder. The practice in courts of equity of requiring a party who seeks equitable relief to submit to equitable terms is based on the maxim "that he who seeks equity must do equity." 1 Pom. Eq. Jur. § 385. Upon this principle, courts of equity refuse to remove a tax title as a cloud except upon repayment of the taxes and cost paid at the tax sale, and taxes subsequently paid under the tax certificate or deed, with legal interest thereon. The taxes paid subsequent to the sale will be presumed to have been paid under, and for the support and protection of, the title thus acquired. These special assessment sales were severally made prior to the sales for taxes upon which said several tax deeds were predicated, and in no sense can they be said to have been paid under or in support of the tax deeds declared void. And, if appellee is in equity required to refund the money paid at such special assessment sale, it must be upon some equitable consideration other than that of the decree finding the tax deeds void, and setting them aside. It is apparent that, so far as the sales and certificates are to be regarded in equity as affecting the right of appellee to the relief sought by his petition, the decree conclusively determines against appellants; and the effect of confirming the absolute title in fee in appellee is to disregard the equitable rule announced, if appellants have an equitable right to satisfaction of the sums so paid by them, or their assignors or grantors. That the special assessments for which said sales were severally made were valid burdens on appellee's lot,

and that the payment of the same inured to his benefit, may be conceded. These sales were severally made March 20, 1869, and redemption thereon would expire March 20, 1871. The court found, as it was justified by the evidence in doing, that no deed or deeds were "taken out" upon the certificates severally issued at such sales, or either of them. The statute in force at the time of making said sales, and at the expiration of redemption, was the act of March 8, 1867, (Sess. Laws 1867, p. 167,) by which it was provided that unless the holders or owners of certificates of sale for taxes or assessments, whether made for city, state, county, or any other purpose, under and in pursuance of any of the laws of this state, should in all cases, within six months from and after the time of redemption should expire, take out deed or deeds, as contemplated by said act, said certificates, and the sale or sales on which they were based, should thereafter "be absolutely null, and should constitute no basis of title, and should cease to be a cloud on the title to the property to which such certificates refer." The time limited in which tax deeds must be taken out upon the three tax certificates issued upon the sale for said special assessments would, under the provisions of this act, expire September 20, 1871. Nothing is shown to take the case out of the operation of the statute. When, therefore, the petition in this case was filed, the certificates issued upon these sales for special assessments, not only were not evidence of title, but constituted no basis of title, and had ceased to be clouds upon the title of appellee. By going into a court of equity, appellee submitted to giving appellants their legal and equitable rights,—nothing more. He neither gave up nor waived any legal or equitable right of his own. No vitality was thereby given to the claim of appellants for money paid at such special assessment sales, or the certificates issued thereon. The court was therefore fully justified in disregarding so much of the claim of appellants as related to the money so advanced, and the interest claimed under and by virtue of said certificate, and in decreeing title in appellee as if no such sale had been made or certificates issued.

Finding no error in this record, the judgment of the appellate court affirming the decree of the lower court is affirmed.

(125 Ill. 345)

THOR *et al.* v. OLESON *et al.*

(Supreme Court of Illinois. June 16, 1888.)

1. HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—WHAT CONSTITUTES—APPEAL—REVIEW.

On a bill by the wife's creditors to charge the husband as her trustee of lands held in his name, alleged to have been bought by her with her money, where the husband testifies positively that he bought and paid for the property with his own money, and states the source from which he obtained the funds, and the evidence to the contrary is unsatisfactory, the finding of the trial court in favor of the husband will not be reversed.

2. SAME—ESTOPPEL—IN PAID.

On a bill to charge the wife's debts upon land, the record title to which is in the husband, and on which he and his family reside, on the ground that he is estopped, as against the wife's creditors, from claiming title to the same, the fact that he allowed the wife to receive and use the rents, his reason for doing so, as stated by him, being to secure peace, will not support the alleged estoppel; and where the husband denies alleged statements by him as to his wife's ownership, upon the faith of which it is alleged credit was given, the findings of the trial court in the husband's favor will not be disturbed.

Appeal from appellate court, First district.

Bill by Carl Thor and others against Ole G. Oleson and Herman Oleson to subject to the payment of the debts of Martine Oleson, deceased, who was the wife of Ole G. Oleson, lands to which Ole has the legal title, and in which Herman has an interest under a contract to convey. The bill was dismissed in the circuit court of Cook county, the appellate court affirmed the decree, and complainants appeal to this court.

J. K. Boyesen and John L. King, for appellants. Frank J. Crawford and B. F. Richolson, for appellees.

SCOTT, J. The bill in this case is the ordinary creditors' bill, and was brought by Carl Thor and others against Ole Oleson and others to subject the property described to the payment of certain claims allowed against the estate of Martine Oleson, deceased, who was the wife of defendant Ole Oleson. All the assets belonging to the estate had been exhausted by administration in the regular way, and it was sought to compel payment of the residue of the claims against decedent's estate out of the real property claimed by her husband. It is alleged in the bill the title to the property in controversy was in defendant Ole Oleson, and had been since it was purchased from the former owner, in 1865. It is sought to maintain the bill on two grounds: (1) That Martine Oleson, since deceased, was the equitable owner of the property; that it was purchased by her with her own money; and that the title was taken in the name of her husband, defendant Ole Oleson, to place the property beyond the reach of her then creditors, and all future creditors, and that the legal title was in her husband in trust for her. And, (2) if it should be held that defendant did not hold the property as trustee for his wife, then it is alleged his acts in respect to the property were such that he should be held to be equitably estopped to claim the property as against the creditors of his wife.

It is thought that neither ground of relief is sufficiently sustained by the evidence to warrant the relief demanded by the bill. Of course, the burden of proving the facts upon which the right to relief is based, rests upon complainants. There is no satisfactory testimony showing that the money used in paying for the property was the money of the deceased wife. There is some evidence tending to show defendant Ole Oleson paid his own money for it, and took the deed to himself, as any purchaser would do. On this controverted fact in the case, as to whose money was in fact used in paying for the property, it may be conceded the evidence is, in a measure, unsatisfactory. On a close and careful study it is seen it is hardly sufficient to overcome the denial of defendant, both in his answer and in his testimony at the hearing of the cause, that his wife's money was used in paying for the property. Before it it would be held defendant was a mere trustee for his wife, the evidence of that fact should be clear and satisfactory. Defendant states positively he bought the property, and paid for it with his own money, and states the source from whence he obtained the funds used. On the whole case considered, this court cannot say that the finding of the trial court on this branch of the case is so much against the weight of the evidence that it ought for that reason to be reversed.

Nor is the other ground for relief insisted upon any better sustained. There are few, if any, facts proved that would authorize complainants to invoke against defendant the doctrine of an equitable estoppel. That doctrine proceeds on the theory that the party is forbidden to set up his legal title because he has so conducted himself, in regard to the property, that to do it would be contrary to equity and good conscience. That principle finds no just application to the facts of this case. It is said defendant, by his conduct and statements, encouraged the belief that his wife was the owner of the property, and in that way induced complainants to loan her money on the faith of her wealth, the reputation for which he created and encouraged. The principal thing it is proved he permitted his wife to do in regard to the property is that he permitted her to receive rents from the tenants, and to use the same as her own. His conduct and hers, in this respect, is explained by the fact the wife was a trader, and carried on several kinds of business on her own account, and had been so engaged since before her marriage with defendant, in 1862, up to the time of her death, which occurred in 1883. Her former husband left quite considerable real property, which descended to his and her children at his death.

It seems she controlled that, and used the income in her business. She was constantly borrowing money wherever she could obtain it. It appears she was a woman of great energy of character and vigor of will. Defendant's explanation is that he allowed his wife to collect and retain the rents of the property that he might thereby secure "peace," and under the evidence in this record that would seem to be a reasonable explanation of his conduct in that respect. This he might properly do without any injury to persons dealing with his wife in her individual capacity. It is said, also, he was silent when he ought to have made known his rights. The rule on this subject is, when the foundation of the estoppel insisted upon is silence and omission to give notice of one's rights, the party relying upon the same must not have had the means of ascertaining the true state of the title by reference to the public records. Here the title of defendant was a matter that appeared on the public records, and was open to the inspection of every one. Besides that, he lived with his family on the premises from 1865, when he alleges he bought the property, up to 1868, when his wife died, except one year that he lived on premises that had belonged to his wife's first husband. Although the wife was a trader on her own account, yet, while she lived with him, her husband, in law, would be regarded as the head of the family. The property was therefore his homestead. Persons dealing with the wife, if they wished to know anything concerning the property occupied by her husband, they should have inquired of him in possession, and he would be bound by his answers. Had any one about to give credit to the wife inquired of her husband, in possession, to whom the property belonged, and had been assured it belonged to the wife, that would have estopped him forever after from claiming title to the property, as against such creditors; but it can hardly be said that the husband said anything to any one about to give credit, does say he that could mislead, except in a single instance. One creditor testified: "It asked defendant to sign the note given by his wife, and that he refused." This was no use for me. I have not got anything. Everything is hers. . . . The conversation is expressly denied by defendant; and, as to the fact in controversy, there is no preponderance of the evidence in favor of complainant. Defendant also denies the statements made by Mrs. Lurnsen on the same subject. Any further comment on the testimony in detail would be useless and profitless work. The controversy, as has been seen, is largely one of fact. The trial court had some advantages for ascertaining the facts, not possessed by this court, and no sufficient reason is perceived for reversing the findings of that court upon either branch of the case. The judgment of the appellate court will be affirmed.

(125 Ill. 430)

GRIFFIN v. GRIFFIN *et al.*

(Supreme Court of Illinois. June 16, 1883.)

1. WITNESS—COMPETENCY—SUITS BY AND AGAINST EXECUTORS.

Starr & C. St. Ill. c. 51, par. 1, § 2, provides that "no party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify of his own motion, or in his own behalf, when any adverse party sues or defends * * * as executor, administrator, heir, legatee, or devisee of any deceased person, or as guardian or trustee of any such heir, legatee, or devisee, * * * except * * * in any such action, suit, or proceeding, a party or interested person may testify as to facts occurring after the death of such deceased person," etc. *Held*, that in a suit to set aside a deed, brought against the widow and minor heirs of the grantee, testimony of the widow that she found the deed among his papers, is competent, as "a fact occurring after the death of such deceased person."

2. SAME.

The grantor is alike competent to testify in rebuttal to the facts testified to by the widow of the grantee, but was not, under the above statute, a competent witness generally against the minor heirs of the grantee.

3. SAME—INTEREST OF PARTY—CONTINGENT REMAINDER—MAN.

A son of the grantor, who had a contingent remainder in fee in the land conveyed by the deed, which was destroyed by the deed, is likewise incompetent as a witness in the suit.

4. SAME—CONFIDENTIAL COMMUNICATIONS—ATTORNEY AND CLIENT.

Where the grantor and grantee in a deed brought it to an attorney, already signed and acknowledged, and asked his opinion as to what was necessary to convey the title, statements made to the attorney by the parties in the presence of each other are not confidential communications, and the attorney is competent to testify thereto in a suit to set aside the deed.¹

5. DEED—DELIVERY—PRESUMPTION.

Where a deed duly executed is found in the hands of the grantee, the presumption is, in the absence of clear and convincing evidence to the contrary, that it has been delivered.

6. SAME—ACKNOWLEDGMENT—IMPEACHING CERTIFICATE.

The evidence to impeach a certificate of acknowledgment of a competent officer to a deed must be so full and satisfactory as to convince the mind that the certificate is false or forged. A mere suspicion or even preponderance of evidence, less than sufficient to establish a moral certainty to that effect, is insufficient.

Appeal from circuit court, Mercer county; JOHN J. GLUM, Judge.

Bill to set aside a deed as a cloud upon title. The material facts of this case are as follows: John Griffin died in Mercer county, Ill., in 1865, seized of the land in controversy. He left a will, in which he devised all of his land to his wife, Mary Griffin, to use during her life-time, with power to sell and convey any of it that she might need for her support; the remainder to go to his children. He left four children,—three sons, George, Henry G., and Septimus, and one daughter, Hulda Calkins. A deed bearing date May 23, 1866, was placed upon record in Mercer county, on April 16, 1868, which was signed by Mary Griffin, conveying to George Griffin the land in controversy. In 1886 Amelia Griffin and the other defendants commenced a suit in ejectment against Mary Griffin to recover the land; whereupon Mary Griffin filed her bill of complaint to set aside the deed to George Griffin as a cloud upon her title. The bill states that the complainant was the owner of the land; that by some means unknown to her a deed to George Griffin from her was placed upon the records of Mercer county, April 16, 1868, dated May 23, 1866; that she had no knowledge that said deed was in existence, or that it was recorded, until March, 1886, when she obtained an abstract of title to the land; that she never knowingly and intentionally executed said deed; if she did execute it, it was through a mistake, not having sold or given the land to the grantee, and that she never received anything for the same; that George Griffin never claimed to own the land, and never exercised any acts of ownership over the same, but always claimed that the same was owned by complainant; that George Griffin rented the land from her for the years 1877 to 1880, inclusive, and occupied it as her tenant; that complainant was in the open and exclusive possession of said land, except as occupied by her son George, as her tenant, and used the same for agricultural purposes, and paid the taxes all of the time; that the deed so recorded is a fraud upon her rights and ought to be set aside; that George Griffin is dead, and left Amelia Griffin and the other defendants his widow and heirs at law; prays that the deed be set aside and held for naught, to remove the cloud upon her title, and for general relief. The answers deny all of the material allegations of the bill. On the hearing of the cause complainant introduced the deed in evidence, and offered to testify in her own behalf. The defendants objected to her testimony, because she was a party to the suit, and, the grantee of the deed being dead, witness was incompetent, under Starr & C. St. Ill. c. 51, par. 1, § 2, which provides

As to what communications to an attorney are privileged, see *Manufacturing Co. v. Frawley*, (Wis.) 32 N. W. Rep. 768, and note; *Appeal of Goodwin Co.*, (Pa.) 12 Atl. Rep. 736; *Michael v. Foil*, (N. C.) 8 S. E. Rep. 264; *Hall's Adm'r v. Rixey's Adm'r*, (Va.) 1d. 215; *Simmons v. Kaufman*, (Tex.) 8 S. W. Rep. 283; *Chapman v. Peebles*, (Ala.) 4 South. Rep. 273.

that "no party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic, or distracted person, or as the executor, administrator, heir, legatee, or devisee of any deceased person, or as guardian or trustee of any such heir, legatee, or devisee, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely: *First*. In any such action, suit, or proceeding a party or interested person may testify to facts occurring after the death of such deceased person," etc. The court sustained the objection. Henry G. Griffin was offered, and at request of defendant John Griffin's will was introduced, and Henry G. Griffin objected to as a witness, because he was an interested party, and the court sustained the objection, which ruling was excepted to by complainant. The complainant then introduced witnesses who testified to the declarations of George Griffin that he rented the land from complainant; that the land was not his; and that complainant occupied and used it exclusively for 20 years or more, and paid the taxes on the same. John C. Pepper, an attorney, testified to a conversation between George Griffin and himself, and of another between George and the complainant with him, in which the complainant stated certain facts to him in regard to a deed then before him, and asked his opinion as to what was necessary to convey title. This witness was objected to by complainant, for the reason that the information came to the witness in his capacity of attorney, and was privileged. This objection was overruled by the court, and excepted to. Amelia Griffin testified that she found the deed among her husband's papers after his death. Her testimony was objected to by complainant. Objection overruled. The court entered a decree dismissing the bill, which is assigned for error

I N. Bassett, for appellant. H. Bigelow, for appellees.

SCHOLFIELD, J. 1. The material part of the testimony of Amelia Griffin, widow of George Griffin, deceased, is that she found the deed, after the death of George Griffin, among the papers that had belonged to him. This being "a fact," in the language of the statute, "occurring after the death of such deceased person," it is competent to prove it by her. Rev. St. 1874, p. 488, §§ 1, 2. The statement that she saw it before his death, at the time it was acknowledged, in view of the entire evidence in the case, is not very important; but we have no doubt that it, also, is competent. While it is true that complainant's title was originally derived under and by virtue of the will of her deceased husband, yet that title is not here disputed. It is conceded she had title, and it is immaterial how it was acquired; but it is contended by appellees that she subsequently conveyed it to George Griffin, while she denies that she did so; and this presents the only issue. She therefore neither sues nor defends here as conservator, executrix, administratrix, heir, legatee, or devisee. See *Pigg v. Carroll*, 89 Ill. 205. The minor defendants, however, defend as heirs of George Griffin deceased, and as to their rights, she is not, in the first instance, and of her own motion, a competent witness. But as against her, and on behalf of the defendants, the widow of George Griffin is a competent witness. See statute *supra*. And the widow of George Griffin having testified, complainant was a competent witness to testify to the same facts. See statute *supra*, exception third.

2. As above stated, complainant was not a competent witness generally. She was competent to testify, in rebuttal, as to the same facts testified to by the widow of George Griffin; but she was not offered for that purpose.

3. John Griffin, the husband of the complainant, by his will, devised the property in controversy, and other property, as follows: "I give and bequeath to my wife, Mary Griffin, all my personal property, after my debts are paid, for her own use forever, and the use of all my real estate, during her

natural life, with the same right to sell the same for her support and maintenance, that I would have if living." This invested complainant with a life-estate, and a power of sale of the fee for her maintenance and support. *Funk v. Eggleston* 92 Ill. 515. If complainant's deed to George Griffin was valid, it executed the power, and left no estate undisposed of. *Christy v. Pulliam*, 17 Ill. 59. But, necessarily, if the deed was invalid, the remainder in fee is still in the heirs at law of John Griffin, deceased. Henry Griffin was one of the children and heirs at law of John Griffin, deceased. He was, therefore, directly interested in defeating this deed, and so he was incompetent as a witness against the children and heirs at law of George Griffin, deceased, who here defend in that capacity. See statute in relation to evidence, *supra*; and *Comer v. Comer*, 119 Ill. 170, 8 N. E. Rep. 796.

4. The relation of attorney and client did not exist between complainant and Pepper at the time of the conversation testified to by him. The facts, as he states, are: George Griffin, Mary Griffin, the complainant, and John B. Hoag brought the deed to the witness already signed and acknowledged, and asked his opinion what was necessary to convey title to George Griffin. John B. Hoag was the nephew of complainant, but had no interest in the matter. Pepper says he was never attorney for complainant about this land, and that he was called in by George Hoag. Very clearly he was a competent witness. We held in *Lynn v. Lyerle*, 113 Ill. 129: "Where two parties go together to an attorney, and make statements to him in the presence of each other, such statements are not confidential communications intended to be withheld from the opposite party, and there is no error in permitting the attorney to testify thereto in a suit between the parties relating to the subject-matter of such communications."

5. Where a deed duly executed is found in the hands of the grantee, there is a strong implication that it has been delivered, and only clear and convincing evidence can overcome the presumption. *Reed v. Douthit*, 62 Ill. 348; *Tunison v. Chamblin*, 88 Ill. 378. There is no evidence in this record that this deed was not delivered; but, on the contrary, there is, in addition to this legal presumption, affirmative evidence in effect acknowledging that it had been delivered.

6. The evidence to impeach a certificate of acknowledgment of a competent officer to a deed of conveyance must be so full and satisfactory as to convince the mind that the certificate is false or forged. A mere suspicion, or even preponderance of evidence less than sufficient to establish a moral certainty to that effect, is insufficient. *Fitzgerald v. Fitzgerald*, 100 Ill. 386; *Lickmon v. Harding*, 65 Ill. 505; *McPherson v. Sanborn*, 88 Ill. 150; *Crane v. Crane*, 81 Ill. 165; *Russell v. Union*, 73 Ill. 337; *Heacock v. Lubuke*, 107 Ill. 402; *Lock Co. v. Russell*, 68 Ill. 430; *Kerr v. Russell*, 69 Ill. 666; *Watson v. Watson*, 118 Ill. 56, 7 N. E. Rep. 95. The only evidence in this record tending to question the *bona fides* of this deed, does not tend to prove that it was not executed, or that it was executed by mistake, but rather, if anything, to establish a secret trust. It wants much of being sufficient to warrant a decree in conformity with the prayer of the bill. The decree is affirmed.

FINLEN v. HOWARD.

(*Supreme Court of Illinois*. June 16, 1888.)

APPEAL—FAILURE TO ASSIGN ERRORS.

On an appeal from the appellate court, where no error in that court is assigned on the record, the appeal will be dismissed without prejudice.

Appeal from appellate court, Second district.

Action by Lewis Howard, for use of Lawes & Co., against Patrick Finlen as garnishee. Judgment for plaintiff, and garnishee appeals.

v.17N.E.no.7—50

Samuel Richolson, for appellant. *Moloney & Stead*, for appellee.

PER CURIAM. No errors have been assigned on the record of the appellate court in this court, and as there is nothing before this court to be considered, the order taking the cause will be set aside, and the appeal will be dismissed, without prejudice. *Ditch v. Sennott*, 116 Ill. 288, 5 N. E. Rep. 395; *Bennesson v. Savage*, 119 Ill. 135, 11 N. E. Rep. 66. Appeal dismissed.

(125 Ill. 289)

PEOPLE, to Use of STATE BOARD OF HEALTH, v. MCCOY.

(*Supreme Court of Illinois*. June 16, 1888.)

1. PHYSICIANS AND SURGEONS—REVOCATION OF CERTIFICATE—UNPROFESSIONAL CONDUCT.

Under the act of 1877, § 10, regulating the practice of medicine in Illinois, authorizing the state board of health to revoke certificates issued for the practice of medicine for "unprofessional or dishonorable conduct," a charge that the holder of a certificate made statements and promises with reference to the cure of sick which are calculated to deceive and defraud the public, though sufficient to authorize a revocation, is not sustained by evidence of an advertisement headed "A Surgical Triumph," and reciting that the holder had opened an office for a limited time, nor by other advertisements reciting his wonderful attainments and success.

2. SAME—NOTICE OF CHARGE—SERVICE—WITNESS—IMPEACHMENT.

Where a certificate for the practice of medicine is revoked by the state board of health, and in an action for the penalty for practicing without it plaintiffs put defendant on the stand, and he testified that notice of the proceedings to revoke was never served on him, plaintiffs' affidavit of service of notice is not sufficient to overcome such testimony, and the proceedings must be taken to be invalid.

Appeal from criminal court of Cook county; A. N. WATERMAN, Judge.

Action by the people, for the use of the state board of health, against John C. McCoy, to recover the statutory penalty prescribed for practicing medicine without a certificate. Judgment for defendant, and plaintiffs appeal.

John M. Hamilton and *Chas. C. Gilbert*, for appellant. *William Brown*, for appellee.

SCOTT, J. This suit was brought in the criminal court of Cook county under and by virtue of the provisions of section 12 of the act of 1887, to regulate the practice of medicine in this state, in the name of the people, for the use of the state board of health, against John C. McCoy, *alias* J. Cresap McCoy, to recover the statutory penalty imposed by that section for practicing medicine without a certificate from the state board of health. On the trial the court found the issues for defendant, and rendered judgment against plaintiff for costs. The court was asked by defendant at the trial to hold a great number of propositions to be law applicable to the facts in evidence, which it did. It is only thought to be necessary, however, to notice the twenty-third of the series in the decision of the case. It is as follows: "The court holds, as a matter of law, that under the law and evidence the judgment in this case should be for defendant." It is conceded defendant has a certificate, issued to him by the state board of health, under which it was lawful for him to practice medicine in this state. But it is contended that the certificate has been legally revoked by the state board of health, under power conferred upon that board by the tenth section of the act of May 29, 1877, to regulate the practice of medicine in the state of Illinois, and that since such revocation it is unlawful for defendant to practice medicine in this state. As has been seen, the court before whom the cause was tried found the "issues for defendant." The court held that under the "law and the evidence" the judgment should be for defendant. There is one view that may be taken, aside from all other questions discussed, that leads to an affirmation of the judgment. It may be conceded that under the tenth section of the act of 1877, to regulate the practice of medicine in this state, the state board of health had power to revoke certificates is-

sued to individuals to practice medicine for the same reasons it might refuse to issue such certificates, viz., for "unprofessional or dishonorable conduct." The statute, in this respect, however, must have a reasonable construction. The board cannot from mere caprice, or without cause, revoke a certificate fairly issued upon sufficient evidence of the applicant's qualifications. The right of the citizen to practice his profession for which he has expended time and money to qualify himself is too important to be taken away from him without some reasonable cause. It must be for some act or conduct that would in the common judgment be deemed "unprofessional" or "dishonorable." There is no evidence in this record that shows or tends to show defendant was not a reputable physician; nor does it appear the state board of health, from any evidence submitted to it or otherwise, ever found defendant had been guilty of any act or conduct that was unprofessional or dishonorable. It is recited in the minutes of the board in evidence that charges had been preferred against defendant. The specific charge was that defendant had made "statements and promises with reference to the treatment and cure of the sick and afflicted which are calculated to deceive and defraud the public." It is said he was notified to appear before the board and defend against this charge. The fact of the notice is denied. Be that as it may, defendant never appeared; and it does not appear from anything in this record that that charge against defendant was ever investigated by the board at the time stated in the alleged notice, or at any other time. It does appear from their minutes the board met to investigate charges against defendant, and it is recited in the record of their proceedings that "on the 27th day of February an advertisement appeared in the News Democrat, of Belleville, Ill., under the caption 'A Surgical Triumph,' and announcing that Dr. J. Cresap McCoy, late of Bellevue Hospital, N. Y., had opened an office for a limited time only in a building fronting on the public square, Belleville, Ill. Copy of advertisement submitted to members of the board. Similar advertisements appeared in the St. Louis papers filled with matter pertaining to J. Cresap McCoy and his wonderful attainments and success, with coarse woodcuts of the human body and its members. After due consideration of the evidence, and on default of defense, it was ordered * * * that certificate No. 6,793, issued to Dr. J. Cresap McCoy, be revoked for unprofessional and dishonorable conduct." It will be assumed from the recital that, "after due consideration of the evidence," it was on account of the "advertisements" submitted to the board that defendant's certificate was revoked. That seems to have been regarded as "unprofessional and dishonorable conduct." So far as the contents of these "advertisements" are given they are of a very harmless kind; but, whether harmless or not, the specific charge against defendant was not for causing these publications. It was for making "statements and promises * * * calculated to deceive and defraud the public," and it is not perceived how these "advertisements" could tend in the remotest degree to prove that specific charge. Had the board found him guilty of the charge alleged against him, that defendant had made "statements and promises * * * calculated to deceive and defraud the public," that, indeed, would have been "unprofessional and dishonorable conduct." But the board did not find him guilty of any such conduct, nor does it appear the board ever investigated that particular charge against him, and that was the only specific charge alleged against him.

It is said the state board, in regard to revoking certificates issued to physicians, must investigate, hear, and determine certain questions, and to the extent it exercises such powers its functions are judicial. It is therefore claimed that the question whether a physician has been guilty of "unprofessional or dishonorable conduct" is a question of fact, the finding as to which, when submitted to the board, is final and conclusive, and is not open to review by other tribunals. The doctrine contended for finds support in the decision of this court in *People v. Examiners*, 110 Ill. 180. Treating the record of the board

in the matter of revoking the certificate that had been issued to defendant as having the force of a proceeding in its nature judicial on the part of the board in a case where it had jurisdiction of the subject-matter to be investigated, yet the present record is fatally defective, for the reason it is made to appear defendant had no notice of the proceedings proposed to be taken against him. The prosecution put defendant on the stand and made him their own witness, and he distinctly stated at their instance that the notice found in the record was never in fact served upon him. The affidavit of service is not sufficient to overcome his testimony in that respect. It is contrary to the analogies of the law that a proceeding in its nature judicial should be obligatory and conclusive upon a person not a party thereto; otherwise a party might be deprived of important rights, with no opportunity to defend against wrongful accusations. Whether the right to practice medicine or law is property in the technical sense, it is a valuable franchise, and one of which a person ought not to be deprived without being afforded an opportunity by timely notice to defend it. This view of the case renders it unnecessary to discuss the constitutional questions raised on the record. The judgment will be affirmed.

(125 Ill. 320)

CHICAGO, M. & ST. P. RY. CO. v. WEST.

(Supreme Court of Illinois. June 16, 1888.)

1. RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE—DUTY TO TRESPASSERS—CHILDREN.

A railroad company is liable for injuries to a child seven years of age, who was riding on an engine, in violation of the rules of the company, and, while the engine was in motion, was told by the engineer to get off, which he did, being thereby injured, whether the child was or was not on the engine by the engineer's invitation.¹

2. SAME—MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT—WHEN DOCTRINE APPLICABLE.

In an action for injuries to a child seven years of age, who was riding on an engine, contrary to the rules of the company, and, while the engine was in motion, was told by the engineer to get off, did so, and was thereby injured, it is proper to refuse to charge that if plaintiff went upon the engine to ring the bell by request of the engineer, and under the engineer's promise to pay him therefor, without defendant's authority, and if plaintiff was injured by the negligence of the engineer or fireman, plaintiff, the engineer, and fireman were co-employees, and the company was not liable, the doctrine having no application to the case.

3. APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.

In Illinois the supreme court will not review questions of fact in an action for personal injuries where the evidence is conflicting, and the judgment has been affirmed by the appellate court.

Appeal from appellate court, First district.

Action by Walter West, by Elizabeth West, his next friend, against the Chicago, Milwaukee & St. Paul Railway Company, for damages for personal injuries sustained while getting off one of defendant's engines. The instructions requested by defendant which were refused, are as follows: "(1) It appearing from the evidence in the case that neither the engineer nor fireman in charge of the defendant's engine had authority to invite the said Walter West to ride upon the engine, and that if such invitation was extended, and by the promises alleged to have been made by the engineer to pay the said Walter West a consideration for ringing the bell upon said locomotive, then the court instructs you that such employment and such invitation was entirely outside of the employment of the said engineer and fireman, and was without authority, expressed or implied, and therefore the court instructs you that the evidence in this case will not support a verdict in favor of the plaintiff, and that you should therefore find for the defendant. (2) If the jury believe from the evidence that the said Walter West received the injuries complained of while attempting to alight from the defendant's locomotive, as

¹ See, also, *Biddle v. Railway Co.*, (Pa.) 4 Atl. Rep. 485.

charged in the declaration, and if you further believe from the evidence that if the engineer in charge of said engine had no authority, expressed or implied, from the defendant to request or permit the plaintiff to ride upon such engine, but, on the contrary, was prohibited from doing so by the printed instructions and rules in force at the time of the injury, then you should find for the defendant. * * * (4) The court further instructs the jury, as a matter of law, that if you believe from the evidence that the engineer and fireman in charge of the defendant's locomotive were guilty of willful misconduct and negligence in inviting the said Walter West to ride upon the locomotive, and in requiring or compelling him to leave the same, as charged in the plaintiff's declaration, and that in such conduct the said engineer and fireman were not acting in pursuance of the authority given them, and were not in furtherance of their employment by the defendant, but were directly contrary to the instructions and orders of the defendant, then the court instructs you that you should find for the defendant. * * * (6) The court further instructs the jury that if you believe from the evidence that the engineer, Lincoln, in charge of the defendant's locomotive, employed the said Walter West to ride upon the engine, and to ring the bell, for a promised reward, and that during said employment the said Walter West was injured through the negligence of the said engineer or fireman, there can be no recovery for such damages, unless you further find that the said Lincoln had authority from the defendant to so employ the said Walter West, or had knowledge of such employment. (7) If the jury believe from the evidence that Walter West was induced to go upon the defendant's locomotive, and to ring its bell, for a promised reward of twenty-five cents, made by the said engineer for the service of ringing the said bell, and if the jury further find from the evidence that the said Walter West did enter upon said engine under said promise of said engineer, and did ring the bell as requested, and if the jury further find from the evidence that said engineer made such promise and undertaking without authority from the said defendant, and if you further find from the evidence that said Walter West was injured, as charged in said declaration, by the negligence of the said engineer or fireman engaged upon said engine in operating the same with the said Walter West, then the court instructs you that, under the law, the said engineer and fireman, and the said Walter West, would be co-employees in the same line of employment, and the defendant would not be liable for injuries to the said Walter West from the negligence of his co-employees." Plaintiff had judgment, which was affirmed by the appellate court, and defendant appeals.

E. Walker, for appellant. *Selden Fish*, for appellee.

SCOTT, J. This appeal is from a judgment of affirmance, by the appellate court of the First district, of a judgment rendered by the trial court in favor of Walter West, who brought suit by his next friend, Elizabeth West, against the Chicago, Milwaukee & St. Paul Railway Company. The action was to recover for personal injuries to the beneficial plaintiff, occasioned by the improper conduct of defendant's servants in putting him off an engine on which it is alleged plaintiff had been riding by the invitation of the engineer. Of course, evidence in relation to controverted questions of fact cannot be discussed, and the argument addressed to this court on that branch of the case will not be considered. Among the controverted questions of fact made before the jury, were (1) as to how plaintiff got on the engine,—whether by the invitation of the engine-driver or otherwise; and (2) whether he was on the engine at all. It is insisted on behalf of plaintiff that he got upon the engine by invitation of the engine-driver, and that he was injured by the negligent conduct of the engineer in putting him off without first stopping the engine; and on the part of defendant it is claimed plaintiff was not on the engine at all, but that he was injured in attempting to get on a flat car while the train

was in motion, without any knowledge on the part of the train-men that he was trying to do so. There is testimony tending to sustain both positions. The jury, by their verdict, sustained plaintiff's theory of the case; and as there is testimony tending to support the verdict, since that finding has been affirmed by the appellate court, the finding of the latter court is conclusive on this court. It will therefore be assumed, in the consideration of the questions of law discussed, that plaintiff was on the engine by invitation of the engine-driver, and that the injuries sustained by him were caused by the negligent manner in which plaintiff was put off the engine while in motion. It is not necessary for this court to express an opinion whether it would have found the same way, from the evidence, the trial and appellate courts did. The statute provides this court shall not reconsider controverted questions of fact. That is the appropriate work of the courts through which the cause has come to this court. It has now passed that stage where controverted questions of fact can be reviewed.

Undoubtedly, the law as counsel states it to be, that where the relations of master and servant exist between the railway company and the person whose act is the cause of injury to another person, the company is not liable if the servant, in causing the injury, is not acting within the scope of his employment; but, on the other hand, the law is equally well settled that the master is responsible, where the servant acts within the general scope of his employment, for acts done while engaged in his master's business, with a view to the furtherance of that business, by which injury is caused another, whether negligently or wantonly committed. Applying these general principles of law, the case in hand will be found to present no serious difficulty. Conceding, as must be done, the engineer invited plaintiff to ride with him on his engine, he was acting without the scope of any duty he owed to his employer; and had any injury come to plaintiff on account of that act of the engineer itself, whether negligently done or not, the master would not be liable. If that were all there is of this case, it is plain the judgment would be contrary to law, and should be set aside. The action is not based on any such ground. It is sought to recover for a very different reason. It is because, when plaintiff was on the engine, no matter how he got there, it was the duty of the engineer to put him off, and in doing so he was obliged to observe reasonable care. The rules of the company, in evidence, show it was unlawful for any one, other than certain employees, to ride upon the engine. Should any stranger get upon the engine, it would clearly be the duty of the engineer to put him off, and in doing so he would be acting within the general scope of his employment; and if, in the discharge of that duty, he negligently or wantonly injured such person, the master would be liable. In this case it may be conceded plaintiff was wrongfully on the engine, whether he was there by the invitation of the engineer or by his own wrongful conduct; and it was the duty of the engineer to cause him to get off. At the time of the accident, plaintiff was about seven years old, and, of course, was too young to observe much, if any, care for his personal safety. It was the duty of the engineer to observe care, even if plaintiff was in the wrong in getting upon the engine. It was admitted by counsel at the trial, "the engineer has no right to throw a boy off, or to kick him off." That concession is in harmony with the law that makes it his duty to observe reasonable care, under the circumstances, in putting a person off the engine, even when wrongfully there. The evidence tends to show, and it must be assumed such is the fact, that, when the engine-driver saw the yard-master, he said to plaintiff: "Cheese it! the old man is coming;" and then told plaintiff to get off. The engine was then in motion, and the boy undertook to get off, as he was told to do; and in doing so was injured, as is alleged in the declaration. Conceding these to be the facts, it was negligent conduct in the engineer to direct a child only seven years old to get off the engine while in motion. It may be the engine-driver was guilt-

less of improper or negligent conduct in the matter, but the lower courts have found otherwise, and this court is prohibited from reviewing that finding, and it must consider the case as it comes before it. The instructions given for plaintiff are not so variant from views here expressed as to make the giving of them any serious ground of error. The second and fourth requests of defendant, which the court refused to give, do not contain accurate expressions of the law applicable to the facts of the case, and the court very properly refused to give them. The other instructions asked were properly refused for the same reason. The doctrine applicable to "co-employees in the same line of employment," as stated in the seventh refused instruction, could have no appropriate application to the facts of the case, and was properly refused. The judgment of the appellate court will be affirmed.

(125 ILL. 423)

COUNTY OF COOK v. SENNOTT, Clerk of Probate Court.

(*Supreme Court of Illinois*. June 16, 1888.)

CLERK OF COURT—PROBATE COURT OF COOK COUNTY—DUTY TO PAY OVER FEES.

An order of the board of commissioners requiring the clerk of the probate court of Cook county, Ill., to pay over the receipts of his office to the county treasury monthly, is void; section 31 of act Ill. March 20, 1872, as amended by act July 1, 1887, (Sess. Laws Ill. 1887, p. 185,) expressly providing for an accounting by such officer on the 1st day of June and the 1st day of December of each year, and payment of the balance in his hands "as soon as his account shall have been audited."

Appeal from circuit court, Cook county; R. S. TUTHILL, Judge.

Petition filed by the county of Cook for a writ of *mandamus* to Thomas W. Sennott, clerk of the probate court of said county. From an order sustaining respondent's demurrer, and dismissing the petition, plaintiff appeals. *E. R. Bliss*, for appellant. *Sidney Smith* and *John M. Hamilton*, for appellee.

SCOTT, J. Respondent, Thomas W. Sennott, is clerk of the probate court of Cook county, which court it is alleged is a "court of record." It seems he was elected, and entered upon the duties of such office on the first Monday of December, 1886, for a term of four years. The petition is for a writ of *mandamus* to compel respondent, as clerk of such court, to pay into the county treasury, in compliance with an order of the county board, all fees, perquisites, and emoluments of his office over and above the amount of his own compensation as fixed by law, whatever that may be, received by him during the month of December, 1887. It is alleged that on the 12th day of September, 1887, the board of commissioners ordered all clerks of courts of record in Cook county, including the clerk of the probate court, to pay into the county treasury all the fees, perquisites, and emoluments of their offices over and above the amount of their own lawful compensation; that a committee was appointed to make demand upon these officers, and that demand was made upon respondent, as clerk of the probate clerk, to comply with such order, but that he refused; that respondent made his semi-annual report on the 30th day of November, 1887, and paid into the county treasury the balance of the earnings of his office for that half year; and that during the month of December, 1887, respondent received, as such clerk, the sum of \$3,318.70, which money, less the amount due him on account of salary, should have been paid over, under such order of the board, at the end of that month, but that he refused to comply with the order in that respect, notwithstanding legal demand had been made upon him. To the petition alleging these and other facts with the usual fullness the court sustained a demurrer, and dismissed the petition. That decision is assigned for error. It is plain the order of the county board requiring all clerks of courts of record in Cook county to pay into the county treasury monthly all fees, perquisites, and emoluments of their respective offices, above the amount of their own salaries as fixed by law, so far as it relates to

the clerk of the probate court, contravenes the provisions of the statute on that subject, and respondent was under no duty to observe it. Section 31 of "An act concerning fees and salaries," approved March 20, 1872, as amended by the act in force July 1, 1887, (Sess. Laws 1887, p. 185,) declares: "Every such officer, respectively, shall, on the 1st day of June and the 1st day of December in each year, during the term of his office, and while receiving a salary as herein provided, make to the chairman of the board of commissioners a report in writing, under oath, of all the fees and emoluments of his office, of every name and description whatsoever, and of all necessary expenses, for clerk hire, stationery, and other expenses, for the half year, or fraction thereof, ending at the time of said report. * * * It shall be the duty of said board of commissioners to audit such accounts as soon as may be, and correct and adjust the same in accordance with the facts. The balance found in the hands of any such officer * * * shall be paid over by such officer to the county treasurer as soon as his account shall have been audited as aforesaid." Among the officers enumerated in this section of the statute is the "clerk of the probate court of Cook county." It is seen this statute requires that respondent shall make semi-annual reports of certain matters pertaining to his office; that is, on the 1st days of June and December, respectively, in each and every year. It is made his duty, after his accounts shall have been audited, to pay the balance found in his hands into the county treasury. He is not required to make "monthly reports" of the affairs of his office, nor is he required to pay the balance found in his hands, except after his semi-annual reports shall have been audited by the county board, as the statute requires shall be done. It is conceded respondent made his semi-annual report on the 30th of November, 1887, and paid into the county treasury the balance of the earnings of his office for that half year. The contention is as to the fees received during the month of December, 1887,—whether the balance over and above his own compensation should be paid over at the end of that month. It is a proposition that needs no argument in its support that an order of the board of commissioners that requires respondent to pay over funds received by him in his official capacity, otherwise than he is directed by statute to do, is not binding upon him, and he cannot be compelled, by *mandamus* or otherwise, to comply with such an order.

Besides the question as to the power of the board to require all these fees, in excess of the officer's salary, to be paid over "monthly," the petition also asks the court to determine the amount of compensation respondent is lawfully entitled to take since the passage of the amendatory act of 1887. That question is not involved in the present decision, and for that reason this court declines to express any opinion concerning it. The judgment of the circuit court is affirmed.

(126 Ill. 361)

GERMANIA FIRE INS. CO. OF NEW YORK v. HICK.

(*Supreme Court of Illinois*. June 16, 1888.)

1. INSURANCE — APPLICATION — ESTOPPEL — BY KNOWLEDGE AND ACQUIESCENCE OF AGENT.

In an action on an insurance policy, where it appears that defendant's agent, at the time he made the application and answered the questions of his own knowledge, knew the true title and situation of the property insured, defendant is estopped from saying that the policy is void by reason of the property standing on leased ground, under a condition in the policy that, "unless specially agreed to in writing, * * * the situation of an insured building on leased ground" will avoid the contract.

2. TRIAL—BY THE COURT—REFUSAL TO STATE UNNECESSARY PROPOSITIONS.

Where, by consent, an action is tried by the court without a jury, and the holdings of the court correctly state every principle of law applicable to the case, the refusal to hold other propositions submitted to be correct, though erroneous, is not ground for reversal.

Appeal from appellate court, Fourth district.

Barnum, Rubens & Ames, for appellant. *Carl Roedel*, for appellee.

SCOTT, J. This suit was brought in the circuit court of Gallatin county, by Sophia L. Hick, for the use of Thomas S. Ridgeway, against the Germania Fire Insurance Company. The declaration is in *assumpsit* on an insurance policy. The risk covered by the policy is a mill, with the plant connected therewith, situated on leased land. One of the conditions contained in the policy upon which the insurance contract would be void, "unless specially agreed to in writing in or upon the policy," is, "the situation of an insured building on leased ground." The only defense insisted upon is that the fact the mill was situated on "leased ground" was not agreed to in writing in or on the policy covering the risk in this suit. There is no controversy made as to the fact that the mill was situated on "leased ground," nor is it pretended it was agreed to in writing on the policy or otherwise that such was the fact. Admitting these facts, as was done, plaintiff contended the agent of defendant who made the application for insurance knew the true title and situation of the property at the time he filled up the application, and it was as to such alleged knowledge of the agent issue was formed and the trial was had in the circuit court. No other point in the case seems to have been contested. The record contains very clear and satisfactory evidence that the agent did know, when he made the survey, and "answered the questions from his own knowledge," upon which the policy was written, that the mill property stood on "leased ground." He states so distinctly. But if it were a controverted question of fact, the finding of that fact by the appellate court, as did the trial court, would be conclusive upon this court. Assuming, then, as must be done, that the agent of defendant, when he made what he called a "mill survey," and answered the questions of his own knowledge, without any inquiry of the assured or the party for whose benefit it was taken, knew the mill was situated on "leased ground," the law is for plaintiff, and defendant will be estopped to say the policy was void for that reason. An insurance company that knowingly takes a premium for a policy under conditions that would render it invalid will not be permitted to say it is not a binding contract for that reason. In all such cases the company will be regarded as having the same knowledge of the condition and situation of the property as possessed by the agent transacting the business for it. This view of the law has frequently received the sanction of this court in its previous decisions. *Insurance Co. v. Wright*, 22 Ill. 462, is a case quite analogous in its facts with the one now before this court, and is therefore an authority exactly in point. It was there said: "When the agent of the company undertook to make the survey, the applications and representations of the interest which the assured had in the property, and dispensed with any acts of the assured, and acted upon his own knowledge of the facts, the company ratified his acts by granting the policy. They are bound by his acts as their agent, and if he was mistaken in his representations to them of the ownership, they have no right to insist upon it as a defense to a recovery." The doctrine of this case was expressly approved in the subsequent case of *Insurance Co. v. Fish*, 71 Ill. 620, and its correctness is not now doubted.

By consent of parties the case was tried by the court without the intervention of a jury. At the trial defendant submitted six propositions, which the court was asked to hold as law applicable to the facts, four of which the court held to be the law, and the other two—the fourth and fifth of the series—the court refused. That decision of the court is assigned for error. It matters little whether the propositions the court refused contain correct expressions of the law or not. It is sufficient if it clearly appears that the propositions which the court held to be correct state every possible principle of law necessary to be considered in the decision of the case. Other propositions were wholly unnecessary, and the court was not bound to hold them to be the law.

The same thing may be said of the propositions submitted by plaintiff, and which the court held to be correct, and which states the law with entire accuracy. It is certain from the propositions which the court held that the trial court understood and applied the law to the undisputed facts of the case precisely as this court had declared it to be by its previous decisions, and no mere slight error in holding or refusing other propositions will be regarded as sufficient ground for the reversal of the judgment. The judgment of the appellate court will be affirmed.

(125 Ill. 376)

BALDWIN *et al.* v. RATCLIFF.

(*Supreme Court of Illinois.* June 16, 1888.)

1. LIMITATION OF ACTIONS — ADVERSE POSSESSION — BY CO-TENANT — WHAT CONSTITUTES.

An intestate left a large tract of land, out of which the widow was assigned dower, and all his children subsequently died without issue, save one son, who entered and took possession of the entire tract, except the part set off as dower, under claim of absolute and exclusive ownership; and shortly after conveyed to the mother the dower tract in consideration of a conveyance to him of her interest in the other lands. He then made extensive and valuable improvements thereon, sold a part, dealt with the land and paid the taxes as owner, and continued in open and notorious possession up to his death, about nine years later. *Held* sufficient to establish title by adverse possession as against the heirs and children of the mother by a second marriage.¹

2. SAME—COLOR OF TITLE—PROBATED WILL.

A probated will devising land held by the testator under claim of adverse possession, and payment of taxes, for nine years prior to his death, to his widow and children, who continue in possession and pay taxes thereon, is sufficient "color of title made in good faith," under the act of 1839, § 8, (Rev. St. Ill. c. 88, § 6,) to establish, after the lapse of seven years, their legal ownership; there being no proof of bad faith.²

Error to circuit court, Hardin county; R. W. MCCARTNEY, Judge.

Bill exhibited by George W. Ratcliff against Martha Jane Baldwin, Wiley Palmer, Mary Palmer, and others for partition of certain lands of which Wiley R. Palmer died seized. From a decree for plaintiff defendants bring error.

W. H. Boyer and W. S. Morris & Son, for plaintiffs in error. *L. F. Twitchell and John F. McCartney*, for defendant in error.

CRAIG, J. This was a bill in equity, brought by George W. Ratcliff against the plaintiffs in error to partition certain lands in Hardin county of which Wiley R. Palmer died seized on the 1st day of January, 1853. It is alleged in the bill that Wiley R. Palmer died in Hardin county, January 1, 1853, intestate, the owner of the N. E. N. E., the N. W. N. E., the S. W. N. E., the N. E. N. W., the S. E. N. W., the S. W. N. W., the N. $\frac{1}{2}$ S. E., the S. E. S. E., all in section 4, and N. W. N. W. section 10, and the S. W. S. W. section 3, all in township 12, range 9, in Hardin county, Ill. That at his death he left his widow, Mariah Palmer, (afterwards Mariah Belt,) and Nancy, John, Epaminondas, and Richard Palmer, his children and only heirs. That the widow afterwards married Hiram Belt, and by him had the following-named

¹ As to what constitutes adverse possession between co-tenants, see *Berg v. Lafferty*, (Pa.) 12 Atl. Rep. 460, and note.

² Color of title is not every pretense or claim of title, but consists in a writing or conveyance of some kind purporting to convey the land under which the claim of title is asserted. *Armijo v. Armijo*, (N. M.) 13 Pac. Rep. 92. But a deed which contains no designation or description by which the land intended to be conveyed can be identified presents no semblance or appearance of title, and does not constitute color of title. *Hershy v. Thompson*, (Ark.) 8 S. W. Rep. 689. Any instrument purporting upon its face to convey title to the grantee is sufficient to constitute color of title. *Swift v. Mulkey*, (Or.) 12 Pac. Rep. 76, and note; *Webber v. Clarke*, (Cal.) 15 Pac. Rep. 431; *Hill v. Weir*, 33 Fed. Rep. 100; *Weinig v. Holcomb*, (Iowa,) 34 N. W. Rep. 787; *Hickman v. Link*, (Mo.) 7 S. W. Rep. 12; *Walsh v. McIntire*, (Md.) 13 Atl. Rep. 348; *Goodwin v. McCabe*, (Cal.) 17 Pac. Rep. 705; *Perry v. Perry*, (N. C.) 6 S. E. Rep. 83.

children, born on dates as follows: Arthur H., born July 7, 1854; Eliza Ann, born September 6, 1856; James D., born May 20, 1858; Delilah, born September 24, 1860; William G., born January 11, 1864; and George W. Belt, born January 4, 1867. It is also alleged that Nancy Palmer died unmarried, and without issue, on the ——— day of ———, 1857; that John Palmer died April 6, 1862, unmarried and without issue; that Epaminondas died November 18, 1863, unmarried and without issue. The bill then charges that on the ——— day of ———, 1867, Mariah Belt was the owner of 50-220 of all of said lands, and that at that time she made a general warranty deed to Richard Palmer, and thereby conveyed to him all her interest in all the lands described in the bill, except the N. W. of the N. W. section 10, and the S. W. S. W. of section 8, and 10 acres off the east side the S. E. S. E. of section 4, township 12, range 9,—90 acres. The bill also alleges that Richard Palmer then took possession of all the lands as tenant in common, except the 90 acres, and occupied the same until he died, July 15, 1874; that on 3d day of June, 1883, James D. Belt conveyed his interest in the lands to complainant; that Delilah Belt married William Lyons, and they, on June 14th, conveyed to complainant; that Eliza A. Belt conveyed to complainant on 23d June, 1883; that William G. Belt conveyed his interest to complainant, October 19, 1883. It is also alleged that Richard Palmer died on the 15th day of July, 1874, testate, and by his will he devised the lands described in the bill to his widow and children by name. In the answer it is denied that complainant obtained any title to the lands through the conveyances set up in the bill. It is also set up in the answer that the possession of Richard Palmer was adverse, open, and notorious,—continued from 1865 or 1866 until his death; that he cleared the lands, and placed them in cultivation, and erected buildings thereon, amounting in value to \$2,000; that he paid all taxes assessed on the lands. It is also set up in the answer that the will of Richard Palmer, under which the lands were devised to the defendants in the bill, is color of title, under which they have held the continuous adverse possession of the lands, and paid all taxes thereon, for a period of more than seven successive years, and that they rely upon such adverse possession and payment of taxes as a bar to the relief prayed for in the bill.

As to the main facts in this case there is no substantial dispute between the parties. Wiley Palmer died seized of the lands described in the bill, January 1, 1853, leaving a widow, Mariah, and four children, John, Richard, Epaminondas, and Nancy. The children all died unmarried and without issue, as stated in the bill, except Richard. The widow, Mariah, married Hiram Belt in July, 1853, and subsequently had six children born at the respective dates stated in the bill. Wiley R. Palmer did not reside on the lands here involved at the time of his death, but he resided on a farm on the river, in section 21, called by the witnesses the "Walls Place" or the "River Farm." The widow continued to reside on this place until 1857 or 1858, when she moved on her "dower land," so called, which is the 90 acres on sections 3, 4, and 10 named in the bill. There was but a small quantity of the remaining portion of the lands in cultivation prior to 1865. One witness testified that he "tracked deer through the fields in 1864; very little cleared then; a thicket of briars; some old fields with bad fences; no house." Another witness thinks there were 15 acres cleared. Richard Palmer returned from the army in 1865, and at once went into possession of all the lands except the 90 acres occupied by the widow. He went on as owner, and at once commenced clearing and improving the lands as fast as possible. He erected two dwelling-houses, stable, corn-crib, and smoke-house, and also had log-houses put up by lessees to reside in while they cleared and cultivated portions of the land. The evidence is clear that from the time Richard Palmer first took possession of the lands, down to his death, he claimed to be owner of the absolute title to all the lands. He leased, cut, and sold timber, burned lime-kilns on the lands, and

sold and conveyed 80 acres. The lands were assessed in his name, from year to year, by the county assessors. He paid all taxes as owner. Soon after taking possession, he entered into an arrangement with his mother, Mariah Belt, by which he conveyed to her the 90 acres, the dower tract, and she conveyed to him her interest in the other lands. John W. Hughes, a brother of Mariah Belt, heard the contract, and testified to its terms. He further testified: "Richard moved on his part in 1865 or 1866, and began to build, clear, and fence it, and lived on it till he died. His widow and children have controlled and lived on it since, and live on it now. I know of no claim or possession adversely to Richard during his time. I never heard of any one claiming the land adversely to him till this suit was brought. He put a fine frame building on it, several cabins for renters, and cleared and fenced a great deal of it, and the improvements were of a substantial character." There is in the record much evidence of this character; and while it is true, when a tenant in common undertakes to establish an adverse possession of lands, in order to constitute a disseizin, there must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the co-tenant that an adverse possession and an actual disseizin are intended to be asserted against him, as held in *Busch v. Huston*, 75 Ill. 345, and subsequent cases, yet we regard the evidence here ample for that purpose. If the possession of Richard Palmer was adverse, the possession of the widow and children, who derive title from him by devise upon his death, July 15, 1874, was also adverse.

The next inquiry is whether the evidence is sufficient to establish color of title in the defendants, possession and payment of taxes for seven successive years, so as to bring them within the terms of section 8 of the limitation law of 1839. There is no question in regard to the sufficiency of the evidence to establish possession and payment of taxes for the requisite period to bar a recovery. Indeed, defendants occupied the lands and paid all taxes for nine years before this action was commenced. The only question, therefore, to be determined is whether they held under color of title. The will under which they held was executed by Richard Palmer, properly attested, and probated in the county court of Hardin, in the summer of 1874. In it the lands were described as follows: "I give and devise to my wife, Martha J. Palmer, the north-west quarter of the north-east quarter, and the south-west quarter of the north-east quarter, section 4, town 12, range 9 east, in the county of Hardin and state of Illinois for her natural life; and, at her death, to my son, Wiley R. Palmer, in fee. To my daughter Mary Palmer I give and devise the east half of the north-west quarter, section 4, town 12, range 9, in said county and state, to hold in fee-simple. To my daughter Dora Palmer I give and devise the north-east quarter of the north-east quarter, and the north-west quarter of the south-east quarter, section 4, township 12, range 9 east, in said county and state, to hold in fee-simple. To my daughter Etta Palmer I give and devise the north-east quarter of the south-east quarter, and the west three-fourths of the south-east quarter of the south-east quarter, section 4, township 12, range 9, in the same county and state, in fee-simple." Was this instrument claim and color of title made in good faith? It will be observed that the legislature, in enacting the law, has used no language from which the inference may be drawn that it was intended to confine the words "claim and color of title" to any particular kind of paper title. The language used is: "Every person in the actual possession of lands or tenements under claim and color of title made in good faith * * * shall be held and adjudged to be the legal owner," etc., "to the extent and according to the purport of his or her paper title." There is nothing here requiring a deed to establish color of title; and, under the former decisions of this court, color of title may exist without a deed. In *McCagg v. Heacock*, 84 Ill. 479, it was held that any instrument indicating an intention to pass a title to

lands, of which a description is given, from one party to another, gives color of title to the lands described. In *Woodward v. Blanchard*, 16 Ill. 434, it was held that an auditor's deed made upon a tax sale was color of title, without regard to its extrinsic worth as a title, and without regard to the constitutionality of the law under which it was derived. In *Chickering v. Falles*, 26 Ill. 519, a mortgage and decree of strict foreclosure were held to be color of title. In *Hassett v. Ridgely*, 49 Ill. 201, a judgment in a partition proceeding was held to be color of title. A will is an instrument in writing, and, when probated, passes title to lands devised therein as effectually as does a deed; and no good reason occurs to us why a will may not be held to be color of title. By the terms of the will the lands were directly devised to the persons named in the will, and all claim and title held by Richard Palmer passed, under the instrument, in as complete a manner as if he had executed his deed. And if a deed is color of title because it purports on its face to transfer the title to lands from one person to another, for the same reason and upon the same principle a will like the one here involved must be held to be color of title. The question here involved arose in *McConnell v. McConnell*, 64 N. C. 342, and the court held that a probated will was color of title. See, also, *Stumpf v. Osterhage*, 111 Ill. 82.

But it is said in the argument there was no consideration for the lands devised, and for that reason the will cannot be regarded as color of title. There is nothing in the statute requiring color of title to be based upon a moneyed consideration, and, in the absence of a provision of the statute, we are not inclined to adopt a construction of that character. Natural love and affection is a sufficient consideration to support a deed; and, if Palmer had conveyed the lands to his children before his death on such a consideration, his deed would have been color of title; and upon the same principle the will may be regarded as color of title. As to the question of good faith, alluded to in the argument, the record shows no evidence of bad faith; and, in the absence of such evidence, good faith will be presumed. For the reasons given we think the decree of the circuit court was erroneous, and it will be reversed, and the cause remanded, with directions to the circuit court to dismiss the bill.

(125 Ill. 303)

OHIO & M. RY. CO. v. BARKER *et al.*

(*Supreme Court of Illinois*. June 16, 1883.)

LIMITATION OF ACTIONS—ADVERSE POSSESSION—COLOR OF TITLE.

Defendant in ejectment claimed under a conveyance of "all the line of railroad heretofore belonging to the S. R'y Company, * * * together with the right of way and all the real and personal property late of the said railway company in any manner used or appropriated for the operating and maintaining of said line of road," and showed that such line of railroad ran through and occupied the land in question, but did not show that such land was a part of the line of railway or right of way owned by such company. *Held*, that the conveyance, without evidence showing the land in question to be the land described, was not color of title to the land such as would bring defendant within Rev. St. Ill. c. 83, § 6, providing that every person in actual possession of land "under claim and color of title" made in good faith, and who shall for seven years continue in possession and pay all taxes thereon, shall be held to be the owner thereof to the extent of his paper title.¹

Appeal from circuit court, Clay county; C. S. CONGER, Judge.

This was an action of ejectment in the Clay circuit court, by Clara Barker, Henry Barker, Harvey Barker, John Barker, Ella Barker, and Matilda Barker against the Ohio & Mississippi Railway Company. The declaration contains but one count, and it recites that the plaintiffs were possessed of certain premises situated in the said county of Clay and state of Illinois, and described as follows, to-wit: A strip of land running through the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 2, township 3, range 6; the said strip being 100 feet wide, and the

¹See *Baldwin v. Ratoliff*, *ante*, 794, and note.

center of the track of the Ohio & Mississippi Railroad being the center line of said strip; and, being so possessed thereof, the said defendant afterwards, to-wit, on January 30, 1870, entered into such premises, and it unlawfully withholds from said plaintiffs the possession thereof. And said plaintiffs aver that they claim title to said premises in fee, wherefore the said plaintiffs say that they are injured, and have sustained damages to a large amount, to-wit, \$100, and therefore they bring suit, etc. "Not guilty" was pleaded, and by agreement of parties the cause was tried by the court without the intervention of a jury. The plaintiffs, to maintain the issues on their part, gave in evidence to the court sitting as a jury the conveyances showing a connected title in fee from the government to them to the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 2, township 3, range 6. Defendant, to maintain the issue on its part, gave in evidence a deed of conveyance, dated September 15, 1874, of J. A. Jones, master in chancery of the circuit court of the United States for the Southern district of Illinois, under decree of foreclosure made by said court in a certain cause on the chancery side thereof, wherein the Farmers' Loan & Trust Company, of New York, as trustees, was complainant, and the Springfield & Illinois Southeastern Railway Company, a corporation of the state of Illinois, was defendant, by which deed was conveyed to M. Hildreth Bloodgood "all the line of railroad heretofore belonging to the Springfield & Illinois Southeastern Railway Company, extending from Shawneetown, in the county of Gailatin, on the Ohio river, north-westerly through or touching at the towns of Fairfield, Wayne county, Louisville, Clay county, Pana and Taylorville, in Christian county, Springfield, in Sangamon county, to Beardstown, together with the right of way and all the real and personal property of the said railway company in any manner used or appropriated for the operating and maintaining of said line of road," etc.; also deeds showing that said railroad property was conveyed by the said M. Hildreth Bloodgood to Frederick Schuchardt and John Bloodgood, by deed dated January 28, 1875, and by said Schuchardt and wife, and Bloodgood and wife, to Daniel Torrence, by deed dated January 29, 1875, and by said Torrence and wife to the Ohio & Mississippi Railway Company, the defendant, by deed dated January 30, 1875; and also showed that said line of railroad ran through and occupied the strip of land in question prior to and at the time of said conveyance; that defendant had since the date of said last-mentioned conveyance, and up to the date of the bringing of this action, continuously been in possession of and had occupied by its railroad a portion of said strip of land in the declaration described about 50 feet through the center thereof, and had during said time used and burned over said strip as its right of way, claiming title in good faith; that the right of way of said company through said land had been annually assessed by the state board of equalization as railroad right of way; and the railroad tax-books describe 18.40 acres and 8,135 feet in length of right of way in said section; and that it, the defendant, had annually paid all taxes assessed on the right of way of said railroad through said county from the year 1876 to the year 1887, both inclusive, as shown by tax receipts introduced giving the dates and amounts of said payments. Plaintiffs, in rebuttal, then showed payment on their account annually of all taxes assessed during the same period against the said S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section 2, through which the said strip of land described in said declaration runs, said strip not having been excepted therefrom in the assessment and levy of taxes on said tract, but not of the taxes assessed on the said right of way against the railroad company, which were paid by said company, as above stated; and that they had cultivated a portion of said strip from time to time, except said 50 feet; said strip not being fenced apart from their farm at the sides thereof, though cattle-guards and wing fences 50 feet in length on either side thereof had been maintained by the defendant at either end of said strip,—which was all the evidence offered by either of the said parties. And thereupon the court gave judgment against the defendant, to

which the defendant then and there excepted. Whereupon counsel for defendant filed motion for new trial, which was overruled by the court, to which the defendant then and there excepted.

Pollard & Werner, (Ramsey, Maxwell & Ramsey, of counsel,) for appellants. *Rufus Cope*, for appellee.

SCHOLFIELD, J., (*after stating the facts as above.*) The description of the property conveyed to appellee is "all the line of railroad heretofore belonging to the Springfield & Illinois Southeastern Railway Company, * * * together with the right of way and all the real and personal property late of the said railway company." The subsequent words, "in any manner used or appropriated for the operating and maintaining of said line of road," do not describe an additional kind or title of property intended to be conveyed, but describe simply the use to which the property intended to be conveyed has heretofore been devoted; and so we must first ascertain whether the property in suit is a part of "the line of railway heretofore belonging to the Springfield & Illinois Southeastern Railway Company," or whether it is a part of "the right of way late of the said railway company." The words "right of way late of said railway company" plainly can only mean right of way owned by said company; for the property of and the property owned by an individual or corporation, as commonly used and understood, mean precisely the same thing. There is no evidence in this record that the land in suit is a part of the line of railway heretofore belonging to the Springfield & Illinois Southeastern Railway Company, or that it is a part of the right of way owned by that company. The deed is only color of title¹ of that which is shown to be within the description of the grant, and is therefore, under this evidence, not color of title to this land. *Stumpf v. Osterhage*, 111 Ill. 82; *Holbrook v. Forsythe*, 112 Ill. 306. There being wanting proof of color of title, the judgment below is right, and it must be affirmed.

(184 Ill. 666)

PEOPLE *ex rel.* STANDERFER, County Treasurer, v. HAMILL.

(*Supreme Court of Illinois. June 16, 1888.*)

1. RAILROAD COMPANIES—MUNICIPAL AID—CONSTITUTIONAL LAW—TITLES OF LAWS.

Const. Ill. 1848 provides that no private or local law shall embrace more than one subject, and that that shall be expressed in the title. Act March 10, 1889, entitled "An act to incorporate the St. Louis & Southeastern Railroad Company," provides not only for the incorporation of the company, but also for the subscription to the capital stock thereof by certain counties. *Held*, that the latter provision is within the prohibition of the constitution, and that bonds issued by a county in pursuance thereof are void.

2. SAME—BASIS OF ASSESSMENT—COUNTIES—LIMIT OF INDEBTEDNESS.

Act Ill. March 10, 1889, to incorporate the Evansville & Southern Illinois Railroad Company, (section 18,) provides that counties through which the road should run might donate sums not exceeding 5 per cent. of the taxable property of the county, upon a vote first submitted to the people. The constitution limits the power of counties to contract indebtedness to 5 per cent. of the "last assessment for state and county taxes." *Held*, that the assessment meant was that made by the county assessors, and not that ascertained by the state board of equalization, and that, the people having voted for the issue of bonds within such limit, as provided by the act, a tax levied to pay them is valid.

Appeal from Hamilton county court; JOHN C. EDWARDS, Judge.

Application by the people *ex rel.* John B. Standerfer, county treasurer, *ex officio* collector of Hamilton county, for judgment against the real estate of

¹The statute of limitations, (Rev. St. Ill. c. 83, § 6,) relied upon by appellant, provides that "every person in the actual possession of lands or tenements under claim and color of title made in good faith, and who shall for seven successive years continue in such possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements to the extent and according to the purport of his or her paper title. * * *"

William Hamill on unpaid taxes levied to discharge certain railroad bonds. The act of March 10, 1869, to incorporate the Evansville & Southern Illinois Railroad Company, (section 18,) provides that any county through which the road should run might donate and give as a bonus to said railroad company any sum not exceeding in amount 5 per cent. of the taxable property of the county, provided the same be first submitted to a vote of the people. Judgment for defendant, and plaintiff appeals.

Geo. L. Hunt, Atty. Gen., and *Leonidas Walker*, State's Atty., for appellant. Appellee, *pro se*.

SCOTT, J. This was an application to the county court of Hamilton county by the county treasurer, *ex officio* collector of taxes, for judgment against the owners of lots and lands for the taxes of 1886, and prior years. The objector in this case had paid all taxes against his lands and lots for the years specified, except what is designated as "Railroad Taxes." That tax was levied by the proper authorities of the county to pay interest on \$237,000 of bonds issued by the county of Hamilton to certain railroad corporations. The court sustained the objections made to the validity of the taxes so levied, and refused the people judgment for the same against the property of objector. The case is brought directly to this court on the appeal of the people, and the decision of the county court refusing judgment against the lands of objector is assigned for error.

It seems that \$200,000 of the bonds in controversy were issued by the county of Hamilton to the St. Louis & Southeastern Railroad Company in payment for stock in that corporation, and that \$37,000 of the bonds were issued by the same authority, and are a part of a donation alleged to have been voted by the people of the county to the Evansville & Southern Illinois Railroad Company. As the validity of these bonds depends upon the construction of different statutes, it will be necessary to consider them separately.

1. As respects the \$200,000 bonds issued to the St. Louis & Southeastern Railroad Company, it is not claimed that they were ever authorized by any vote of the people of the county to be issued to that particular corporation, either in payment for stock or otherwise. It is claimed, however, that at an election held on the 3d day of November, 1868, the voters of the county elected to subscribe \$200,000 to the capital stock of the Shawneetown Branch of the Illinois Central Railroad, and authorized the issuing of bonds to that amount in payment for a like amount of stock in that company, and that by the twentieth section of the act to incorporate the St. Louis & Southeastern Railroad Company, approved March, 1869, the county was authorized and empowered to subscribe to the capital stock of such railway company the \$200,000, or any part thereof, voted by a majority of the legal voters of the county to the "Shawneetown Branch of the Illinois Central Railroad." There is no pretense that there is any enabling act other than the act of March 10, 1869, under which the county of Hamilton could have subscribed for \$200,000 stock in the St. Louis & Southeastern Railroad Company, and issued the bonds in question for the payment; and as the point made, that that section of the charter of the corporation authorizing such subscription is unconstitutional, must be sustained, it is fatal to the validity of this whole series of bonds. It is seen that the act of March 10, 1869, to which reference is made as giving the requisite authority to the county to subscribe for the stock and issue the bonds, is "An act to incorporate the St. Louis & Southeastern Railroad Company." That is all it purports to be by its title. The constitution of 1848, under which this act was passed, contained a restriction that "no private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title." This is a private or local act, and it can hardly be maintained the making of the subscription and issuing bonds in payment thereof by a county through which such road might

be constructed is germane to the subject expressed in the title of the bill, viz.: "An act to incorporate the St. Louis & Southeastern Railroad Company." No such object as the making of municipal subscriptions, and the issuing of bonds in payment thereof, being expressed in the title of the bill, section 20 of the act that purports to authorize that to be done is inhibited by the constitution of 1848, and is therefore inoperative as a valid law. Here there were two distinct things provided for in the bill: *First*, to incorporate a certain railroad company; and, *second*, to enable certain counties named, and among them Hamilton county, to subscribe to the capital stock of that corporation all or any part of the sum theretofore voted by the legal voters of such counties to the Shawneetown Branch of the Illinois Central Railroad. It cannot be insisted with any show of reason that the latter object is expressed in the title of the bill, and section 20 must therefore be held to have been inhibited by the constitution of 1848, and is for that reason void and of no effect. *Lockport v. Gaylord*, 61 Ill. 276; *Middleport v. Insurance Co.*, 82 Ill. 562. It is well settled by the previous decisions of this court that municipal bonds issued for stock in railroad corporations, without authority of law, are void, no matter into whose hands they may come. As this view of the law is conclusive of the whole case in regard to this series of bonds, it will not be necessary to remark upon any other objections discussed in the argument. Holding, as is done, that these \$200,000 of bonds were issued without authority of law, it follows the taxes levied to pay the interest on the same is also without authority of law, and the people should not have judgment for the same against the lands of the objector.

2. The other bonds (\$37,000) stand upon a different footing. At the general election held on the 2d of November, 1869, a proposition was submitted to the legal voters of Hamilton county whether the sum of \$74,000 be donated to aid in the construction of the Evansville & Southern Illinois Railroad. That proposition was adopted, and the county court found it was authorized to make a donation to such railroad company in bonds to run 20 years, and to bear interest at the rate of 7 per cent. per annum. The \$37,000 of bonds in controversy are one-half of the donation voted, the issuing of bonds for the other half of the donation having been, for some reason, waived. Although these bonds were not issued and delivered until since the adoption of the present constitution, the donation was authorized under existing laws by a vote of the people of the municipality issuing them, prior to its adoption, and no reason is perceived why these particular bonds are not binding obligations upon the county. It is said the donation of \$74,000 voted exceeds 5 per cent. of the taxable property of the county for that year, and is, for that reason, void, as being inhibited by that clause of the constitution which fixes a limit beyond which counties may contract indebtedness. But it is the value of the taxable property, to be ascertained by the "last assessment for state and county taxes, previous to the incurring of such indebtedness," upon which the rate per cent. is to be computed, which is to limit the power of the county to contract indebtedness, and not the "equalized valuation," as fixed by the state board of equalization. It is not said that such indebtedness shall not exceed 5 per cent. of the taxable property, as ascertained by the state board of equalization, but as ascertained by the "last assessment for state and county taxes;" that is, the assessment made by the local assessors. It is conceded that the valuation of the taxable property for that year, for county purposes, was \$1,503,087, as fixed by the local assessor. Five per cent. of that amount, of course, would exceed the sum of \$74,000, the amount voted to be donated.

Other points made against the validity of these particular bonds are thought to require no discussion. They were voted for by the people, and issued in conformity with enabling acts, and no valid reason appears why the people that voted for the issuing of these bonds should not be required to pay the taxes assessed to pay the interest upon them. The judgment of the county

court will be reversed, and the cause remanded to that court, with directions to enter a judgment against the lands of the objector for that proportion of the taxes levied to pay the interest upon the \$37,000 of bonds, which may be readily ascertained by computation, and refuse judgment for the residue of such taxes.

(125 Ill. 334)

PEOPLE *ex rel.* GREENWOOD *et al.*, Highway Com'rs, v. BOARD OF SUPERVISORS.

(Supreme Court of Illinois. June 16, 1888.)

1. JURY—SUMMONING AND IMPANELING—PRESUMPTION.

Under Rev. St. Ill. c. 78, § 12, providing that if, for any reason, at the opening of a term of court, the panel of petit jurors shall not be full, the clerk shall repair to the office of the county clerk, and draw more jurors, till the panel shall be filled, and that if, before that time, a jury is needed, the court shall direct the sheriff to summon, etc., where the court orders the clerk to issue a special *venue* to the sheriff for a given number of jurymen, no proof to the contrary being shown, it will be presumed that the clerk repaired to the office of the county clerk, and drew the jurors, as required by law.

2. SAME—MOTION TO QUASH ARRAY—APPEAL—REVIEW.

Upon a challenge of an array of jurors for irregularity in obtaining them, the refusal of the court to quash the panel cannot be assigned for error where no injury is shown.

3. BRIDGES—ESTABLISHMENT—PROCEEDINGS OF BOARD OF HIGHWAY COMMISSIONERS—EVIDENCE—PAROL.

Under act Ill. 1879, in relation to roads and bridges in counties under township organization, section 110, authorizing the highway commissioners of a town, acting at a meeting of the board, to determine that the construction or repair of a bridge within their town was necessary; that its construction or repair would be an unreasonable burden on the town; that the cost would exceed the ordinary amount of taxation for bridge purposes in the town for one year; and that they had provided for one-half the necessary expense; also requiring them to make and keep a record of such facts, and making it the duty of the county board, upon such determination, to appropriate, out of the county treasury, the other half of such necessary expense,—the record required is the only evidence of such facts, and that, being defective, cannot be supplied by parol evidence.

4. SAME—UNAUTHORIZED ACTS OF COUNTY BOARD—ESTOPPEL.

Under act Ill. 1879, in relation to roads and bridges in counties under township organization, section 110, which requires the county board, upon the determination, by the highway commissioners of a town, that the construction or repair of a bridge within their town is necessary, that such construction or repair would be an unreasonable burden on it, that the cost would exceed the ordinary amount of taxation for bridge purposes in the town for one year, and that they had provided for one-half the necessary expense, to appropriate the other half of the necessary expense, such facts are jurisdictional; and, although the county board has appropriated a certain sum without legal proof of their determination, its acts were without authority, and no further appropriation can be required.

5. MANDAMUS—COSTS—COUNTIES—OFFICERS—PERSONAL LIABILITY.

In a proceeding by *mandamus* by highway commissioners of a town against a county board to compel an appropriation for a bridge for the town, upon a failure to obtain the *mandamus* they are liable for the costs in their capacity as commissioners, and not individually.

Appeal from appellate court, Fourth district.

Proceeding by *mandamus* by Peter Greenwood, J. M. Kendall, and John T. Brown, highway commissioners of the town of Wood River, against the board of supervisors of Madison county, to compel an appropriation of one-half of the cost of building a bridge in the town of Wood River. *Mandamus* denied, and relators appeal. Rev. St. Ill. c. 78, § 12, provides that if, for any reason, at the opening of a term of court, the panel of petit jurors shall not be full, the clerk shall repair to the office of the county clerk, and draw more jurors till the panel shall be filled; and that if, before that time, a jury is needed, the court shall direct the sheriff to summon, etc.

Alexander W. Hope, for appellants.

SHOPE, J. Various errors are assigned upon this record. The first arises upon the ruling of the circuit court in respect to the jury to which the issues were submitted. Appellants objected to the whole array of jurors because they had not been drawn by the clerk of the court as required by the statute, but had been selected by the sheriff, and moved to quash the *venire*, which motion was overruled. By agreement of parties, the statement of the clerk as to the manner in which the panel of jurors was obtained, was received. From the clerk's statement it appears the panel was obtained upon an order of the circuit judge, made the preceding Wednesday, ordering the issuance of a special *venire* for 24 men, and upon that order the clerk issued the writ to the sheriff. And this is all the evidence disclosed by the record. The objection is met by two sufficient answers: *First*. If it be assumed that the jury was obtained irregularly, a challenge to the array will not be sustained where it is not also shown that a positive injury has been sustained in consequence of the court's refusal to quash the panel. *Wilhelm v. People*, 72 Ill. 468; citing *Mapes v. People*, 69 Ill. 523. There is no pretense here of injury to appellants, or that the trial was not fair. What the jury did in this case, as will be seen hereafter, was to return a verdict as directed by the court. The issues were taken from the jury entirely, and they made no independent finding whatever. And, *second*, there is nothing in this record, save the language of the motion itself, that shows, or tends to show, that every requirement of the statute as to the drawing of jurors was not observed. The evidence is that the panel was obtained upon an order of the judge of the court directing the clerk to issue a special *venire* to the sheriff for a given number of jurymen. *Non constat* the clerk repaired, as by law required, to the office of the county clerk, and there drew the 24 names from the proper box, and inserted those names in the *venire* issued to the sheriff. Presumptively, the clerk did his duty, and that presumption appellants should have overcome by proof. The record contains no proof whatever tending to impeach the regularity of the panel, or the qualifications of the jurors.

The main controversy, however, arises upon the instruction given by the court directing a verdict for the defendant. As the case stood at the time the instruction was given, it was entirely competent for the court, and correct practice, to direct a verdict for the defendant, for the reason that there was not before the jury sufficient evidence to support a verdict for the relators. But back of this instruction lay the action of the court in rejecting the evidence offered by the relators. If the offered evidence was competent, and tended to sustain the issues on behalf of the relators, its rejection was erroneous, and the instruction improperly given. Under the practice prevailing prior to the present statute relating to *mandamus*, the alternative writ became the foundation of all subsequent proceedings in the case, answering the same purposes as the declaration in ordinary actions. This being so, it was necessary that the alternative writ should show upon its face a clear right in the relator to the relief demanded. Therein the relator was required to distinctly set forth all the material facts on which he relied, so that the same could be admitted or traversed. *Trustees v. People*, 12 Ill. 248. The statute referred to, (Starr & C. p. 1584,) while it has changed the practice, dispensing with the issuance of the alternative writ, and requiring the defendant to answer, plead, or demur to the petition, has not modified or dispensed with the common-law requirement resting upon the relator to set forth and show a clear and indubitable right to the relief demanded. In every case, to entitle the relator to relief, it must appear that the defendant is under a legal obligation to do and perform the act required, and every material fact necessary to show such legal duty must be averred in the petition. *Hall v. People*, 57 Ill. 307; *People v. City of Elgin*, 66 Ill. 507; *People v. Village of Crotty*, 93 Ill. 180. The act in relation to roads and bridges under township organization, approved May 28, 1879, and in force July 1, 1879, (Laws 1879, p. 257,)

is broad and comprehensive in its terms and provisions, embracing within its scope the establishment, alteration, construction, repair, maintenance, and supervision of roads and bridges within organized towns. The immediate control and supervision of roads and bridges in a town was vested in three commissioners of highways, who were required to meet at a designated time and place, and to organize by choosing one of their number treasurer, and thereafter to fix their own time and place of meeting; and, by the thirteenth section of the act, the commissioners were required to "keep a correct record of their proceedings at all meetings." Although reference is here made to the particular act named, in prior as also in subsequent acts similar provisions appear, and like powers were vested in, and duties imposed upon, these boards of highway commissioners; and they are now, and were under this particular act, regarded and held to be a *quasi* corporation, powerless to act except together and as a body, (*Commissioners v. Baumgarten*, 41 Ill. 254; *McManus v. McDonough*, 107 Ill. 95,) and of which action, as we have seen under the act of 1879, they were required to "keep a correct record." It seems clear that the same rules of law are to be applied to this corporate body, in respect to its corporate action, and the evidence of such action, as are applied to other municipal corporations; and that the record of its action, required by law to be made and kept, becomes the best, and, if in existence and capable of being produced, the only evidence thereof. The 110th section of the act of 1879 provided under what circumstances a moiety of the expense of the construction of a bridge in any town might be borne by the county. To avail of such county aid, and as the basis of any action to that end by the county authorities, it must appear (1) that a necessity existed for the construction or repair of such bridge; (2) its construction or repair must be an unreasonable burden on the town; (3) the cost must exceed such sum as could be raised in one year by ordinary taxation for bridge purposes in the town; and (4) that one-half the necessary funds therefor had been provided by the town. These facts are by the law made jurisdictional; and, without their existence and concurrence, the county board was without power to appropriate money from the county treasury for the purpose stated. The determination of these jurisdictional facts is by the act left to the commissioners of highways. Acting, as alone they had the power to act, together and as a board, at a meeting of the board, they were to determine that the construction or repair of a bridge within their territorial jurisdiction was necessary; that its construction or repair would be an unreasonable burden on the town; that the cost thereof would exceed the sum that could have been raised in one year by ordinary taxation for bridge purposes in the town; and that they, by means under their control, had provided for one-half the necessary expense,—of which determination they were required by the act to make and keep a record. And this same section of the act (section 110) made it the imperative duty of the county board, whenever the commissioners of highways of a town brought themselves within the provisions of the act, to appropriate out of the county treasury one-half the cost of the proposed construction or repair. In the case under consideration, the commissioners of highways of Wood River township sought to avail of the provisions of the act referred to; and, if the case made by their petition and proofs was such as to bring them within the law, the writ should have been awarded. By the averments of relators' petition a *prima facie* case was made. Issue being taken thereon, it became necessary for relators to maintain, by competent testimony, the truth of every material averment; taking upon themselves the same burden that rests upon the plaintiff in an ordinary action at law where the averments of the declaration are put in issue. To meet this requirement the relators produced as a witness the town clerk of Wood River, who was also the clerk of the commissioners of highways for the year 1882, who testified that the commissioners held meetings on April 19, August 19, and September 2, 1882; and, on his being asked if the com-

missioners of highways of the town did not determine to build a bridge, an objection was interposed by the defendants, and sustained by the court. This ruling of the circuit court was unquestionably correct. As we have before stated, the determination by the commissioners of highways that a necessity existed for the construction or repair of a bridge, as a basis for an application to the county board for county aid under the statute, was an exercise of a corporate power vested in the commissioners of highways, which could only be at a meeting of the commissioners, and be shown by the record required by the law to be made and kept. Before the county board could be legally moved in the matter, or any legal duty be cast upon them, the commissioners must have determined that such necessity existed, and have preserved the evidence of that fact in their record. In the proceeding then before the circuit court, the corporation, the commissioners of highways, could only speak by their record, unaided by parol testimony.

The principles announced seem to be well supported by authority. Where the law requires records to be kept, they are the only lawful evidence of the action to which they refer, and such record cannot be contradicted or supplemented by parol. The whole policy of the law would be defeated if they could rest partly in writing and partly in parol. *Stevenson v. Bay City*, 26 Mich. 44; *Hall v. People*, 21 Mich. 456; *Morrison v. City of Lawrence*, 98 Mass. 219; *Hunneman v. Fire-Dist.*, 37 Vt. 40; *Mayhew v. District of Gay Head*, 13 Allen, 129. So, where county commissioners and township trustees were required by law to keep a true record of their proceedings, it was held that they could "only speak by their record" when legally assembled. *Commissioners v. Chitwood*, 8 Ind. 504. And, where school-districts are required by law to keep an account of their proceedings by a sworn clerk, such proceedings can only be proved by the record. Offered parol proof was rejected. *Jordan v. School-Dist.*, 38 Me. 164. And in respect of the county court in counties not under township organization, constituting in such counties the county board, having the management and control of the fiscal affairs of the county, it was held that, in matters of allowance or rejection of claims against the county, the records of the court are the only admissible evidence of their official acts. *McHaney v. Marion Co.*, 77 Ill. 488.

The relators read in evidence the record of the commissioners of highway of August 19, 1882, as follows: "The amount of taxes was fixed at forty (40) cents for bridges, and twenty (20) cents for roads; for making and repairing bridges, \$6,000.40; for other purposes, \$2,100.01; total, \$8,001.41. Moved to petition county for aid in building bridge over Wood river. Carried." And offered, in that connection, to prove by their clerk that, at the meeting on August 19th, it was determined to build the particular bridge; that it was necessary it should be built; that its construction would be an unreasonable burden on the township; that a tax was levied by the commissioners for the purpose of providing one-half the estimated cost thereof; that the estimated cost was \$5,000; and that the memorandum on the records was the result of the determination and action of the commissioners. The court sustained an objection to the offered testimony. The offered testimony was in the highest sense material; and, had it been embodied in the record of the commissioners, it would have tended to establish every material averment of the petition. But the imperfect record of the determination and action of the commissioners could not thus be cured and aided by parol. Considerations of the gravest character require us to hold that, where the law has required a record to be kept of corporate action by any of the agencies of the state, the record alone can be resorted to to establish such action in all collateral proceedings. Further offers of proof were made by relators in respect to the estimate by the commissioners of the sum needed for making and repairing bridges for the year 1882, including one-half the cost of this new bridge; that an estimate of the cost of this bridge was procured from the county surveyor, of

which, however, no record was made; of the rate per cent. of the levy for bridge purposes; of the amount collected and turned over to the commissioners, and what part of it was for this new bridge,—to all of which objection was sustained. As will be seen, every material fact offered to be proved by parol should have appeared in the record of the action of the commissioners, or was capable of proof by the public records of the county, and the ruling of the circuit court was correct. Relators did read in evidence their petition to the county board asking for county aid, and also the record of the action of the county board thereon, from which it appeared an allowance from the county treasury was made of \$1,000. The fact that the county board was petitioned for county aid might, no doubt, be shown by the petition itself; but such petition, though made and signed by the commissioners, cannot be regarded as proof of the facts recited therein, so as to supply the absence or take the place of the record of the commissioners' action required by the law to be kept.

But the petition itself shows upon its face that at least one of the conditions precedent—provision made by the town for one-half of the cost of the proposed bridge—did not exist. One-half the cost was \$2,500, and only \$2,200 of the amount raised was, it appears, available for this bridge. When, therefore, the court was asked to give the instruction directing a verdict for the defendant, it was manifest there was no evidence authorizing a verdict for the petitioner. The most that can be said of this record of the commissioners, made at their meeting August 19th, is that it tended to show that the commissioners had levied a tax of 40 cents for bridge purposes, and 20 cents for road, the sum raised thereby, and a proposition to "petition the county for aid in building bridge over Wood river."

None of the facts necessary to authorize them to demand aid from the county are shown thereby to have been found or determined by the commissioners. It was, however, shown that the county board appropriated \$1,000 for that purpose, and it is contended that the county is estopped thereby to question the validity and sufficiency of the action of said commissioners of highways. Unless the county board, by its action in making the appropriation of \$1,000, in a case where, under the law, they were not required or authorized to make any appropriation whatever, is estopped from afterwards refusing to make a further unlawful appropriation of \$1,500, there was no competent evidence before the jury proving, or tending to prove, the several material averments of relators' petition. That the action of the county board in making the \$1,000 appropriation was wholly unauthorized, because of the non-existence of one or more of the jurisdictional facts, seems clear. And while it is true that the county board is vested with the control and management of the fiscal affairs of the county, its powers are such only as are given it by the law. Within the scope of the powers granted or necessarily implied, it may act. But we cannot lend our sanction to the doctrine that an illegal and unauthorized exercise of power by a municipal corporation can be made the basis for compelling a repetition of such illegal act. The doctrine here announced is not at all inconsistent with former rulings of this court, that in a proper case the doctrine of estoppel may be invoked against municipal corporations. This case presents none of the elements necessary to an application of the doctrine of estoppel. The court properly gave the instruction complained of. The relators had wholly failed to support, by competent testimony, the jurisdictional facts necessary to the maintenance of their petition. There were no controverted questions of fact to be passed upon and settled by the jury, and no testimony upon which a verdict for the relators could have rested had one been returned. In such case the practice is well settled that the court may direct a verdict for the defendant.

The modification by the appellate court of the judgment of the circuit court, in respect of costs, was clearly correct. The proceeding was begun and con-

ducted by appellants, not as individuals, but in their official character of commissioners of highways, and appellee's costs, for which it was entitled to judgment, were properly made a charge upon relators in the capacity in which they sued. Perceiving no error in the judgment of the appellate court, it is affirmed.

(126 Ill. 48)

REED v. OHIO & M. RY. CO.

(Supreme Court of Illinois. June 16, 1883.)

1. RAILROAD COMPANIES—CHARTERS AND FRANCHISES—TRANSFERS—EVIDENCE—DEED OF MASTER IN CHANCERY.

Evidence of a mortgage executed by a railroad company and a deed of a master in chancery purporting to convey the railroad property and franchises in pursuance of a decree of foreclosure is not sufficient to show the acquisition of the rights and privileges of the road conveyed, as the master's deed is *prima facie* evidence of the regularity of the sale, but is not evidence of the decree under which the sale was made.

2. EMINENT DOMAIN—PROCEDURE—PLEADING—EFFECT OF ANSWER.

While under the statutes of Illinois no other pleadings than the petition are necessary in proceedings to condemn lands, an answer by defendant, denying each material allegation except the ownership of the land, does not enlarge or restrict the burden cast upon the petitioner to make out such a case as entitled him to appropriate the land.

3. SAME—PETITION—ALLEGATION OF INABILITY TO AGREE ON COMPENSATION.

A petition to condemn land to the uses of a railroad cannot be maintained where there is no allegation as to the inability of the company to agree with the owner as to the price to be paid for the land.

4. SAME—COMPENSATION—MEASURE.

The price to be paid by a railroad company for land taken under eminent domain is its value for any purpose for which it is shown by the evidence to be available, and not simply its value as land as it is at the time.

Appeal from Gallatin county court; E. D. YOUNGBLOOD, Judge.

R. Cope, for appellant. C. A. Beecher and Hanna & Adams, for appellee.

PER CURIAM. This was a proceeding by appellee to condemn 10 acres of land lying outside of its right of way, for the purpose of taking therefrom sand, rock, gravel, and earth for ballast, and to maintain its roadway. The petition, after averring the incorporation of petitioner, and that it has for 10 years owned and operated, and is now operating, a line of railway through Gallatin county, avers that by an act of the legislature of Illinois, approved February 25, 1867, a charter was granted to the Illinois Southeastern Railway Company, by which it was authorized to build, construct, equip, and maintain a railroad through Gallatin county, and for that purpose to condemn right of way; and in addition thereto said railway company was authorized and empowered by its charter to condemn other lands besides that required for right of way, for the purpose of procuring sand, gravel, stone, and earth and other material for the purpose of constructing and maintaining said railroad. That under certain foreclosure proceedings against said Illinois Southeastern Railway Company, the petitioner, by purchase, became the owner of all the property, rights, and franchises belonging to said railway, whereby petitioner became authorized and empowered to operate and maintain said railroad, with all the rights, powers, and franchises delegated to said last-named company by virtue of its charter and the laws of this state. That in order to procure rock, gravel, earth, and sand to properly ballast and maintain said railroad and improve the same, it is necessary to take and appropriate other lands than that included in the right of way thereof through Gallatin county. The land sought to be taken is then described, and it is averred that the company has in said county no suitable material for the purposes named, on its right of way. It is alleged that appellant, who is made defendant, is the owner of the land sought to be appropriated. The defendant, appellant, answered, denying each material allegation of the petition except the ownership of the land sought to

be appropriated. The case was submitted to a jury, who returned a verdict fixing the compensation to be paid the land-owner, and the court entered the usual order thereon.

While under the statute no other pleading than the petition is required, it is manifest that the answer filed neither enlarged nor restricted the burden cast by law upon the petitioner, to make such a case as clearly entitled it to take and appropriate the land sought to be taken. *Smith v. Railroad Co.*, 105 Ill. 511.

It is contended by appellee railway company that under and by virtue of the deed of the master in chancery, made, as is alleged, in pursuance of a decree of foreclosure against the Illinois Southeastern Railway Company, it succeeded to all the rights, privileges, and franchise of said last-named company, and is by the charter of said company authorized to appropriate the land of appellant for the purposes shown. No discussion of this question is necessary, as no conveyance of the property and franchise of the Illinois Southeastern Railway Company is shown in this record. The petitioner introduced in evidence a mortgage made by said company, and a deed executed by the master in chancery of the circuit court of the United States for the Southern district of Illinois, purporting to be made in pursuance of a decree of foreclosure entered in said court, conveying the property and franchise of said corporation to one Bloodgood, and conveyances vesting whatever title Bloodgood derived by said master's deed, in petitioner; but no proceeding or decree upon which said deed was based was produced. By section 83, c. 72, Rev. St., the master's deed is made *prima facie* evidence that the provisions of the law relating to the sale has been complied with, and it is only in case of the loss or destruction of the record of the decree that such deed becomes *prima facie* evidence of the recovery and existence of the decree. If petitioner desired to insist upon any right acquired under that deed, it should have produced a decree of the court authorizing a sale and deed. The deed is evidence of the regularity of the sale, but not of the prior proceedings authorizing it. *Fischer v. Eselman*, 68 Ill. 78. But, independently of these considerations, this proceeding is clearly erroneous. In all cases when private property may be taken for public uses, proceedings to condemn are authorized only when "the compensation to be paid for, or in respect of, the property sought to be appropriated or damaged, * * * cannot be agreed upon by the parties interested," unless the owner is incapable of consenting, or his name and residence is unknown, or he be a non-resident of the state. Section 2, c. 47, Starr & C. St. p. 1042. If the right to condemn appellant's land for the purposes here sought be conceded, such proceedings are permitted by the statute, whether for the purpose of acquiring land or material, only in the event that the corporation seeking the appropriation is unable to agree with the owner for the purchase of the same. Sections 18, 19, c. 114, p. 1312, Starr & C. St.; *Railroad Co. v. Chamberlain*, 84 Ill. 333; *Bowman v. Railway Co.*, 102 Ill. 470. Nor if it be conceded that appellee railway company succeeded to all the rights and privileges of the Illinois Southeastern Railway Company, under the charter, will it affect the question under consideration. By the fifth section of its charter that company was given the right to acquire and hold property for its corporate purposes, and it is provided that, "in case of disagreement as to the right of way, price of land or lands, or other privileges embraced in this section, the same may be condemned," etc., under the eminent domain laws in force. 2 Priv. Laws 1867, p. 751. The taking of private property by the exercise of the right of eminent domain is in derogation of common right, and the grant of power for its exercise must be strictly followed. We have held in numerous cases that the averments in petitions for condemnation need not be in the language of the statute, but that any allegation showing affirmatively that the corporation has been unable to agree with the land-owner in respect of the compensation to be paid will suffice. *Railroad Co. v. Chamberlain*, 84 Ill.

833; *Bowman v. Railway Co.*, 102 Ill. 459. But there is in the petition and proof in this case a total want of any reference to the jurisdictional fact of the inability of appellee railway company to agree with the land-owner as to the compensation to be paid. There seems to have been no effort made to purchase the land, or agree on the compensation or price to be paid therefor, before resorting to this proceeding. The petition was clearly insufficient to give the court jurisdiction, or to entitle the appellee company to appropriate appellant's land.

Numerous errors are pointed out in the rulings of the court in modifying the defendant's instructions. Only one is of sufficient importance to require discussion. The second instruction asked by defendant told the jury, in effect, that the compensation to be paid to the defendant land-owner for the land taken was its value "for any purpose for which it was shown by the evidence to be available." The modification consisted in striking out the words quoted, and confining the value to the worth of the land, "as land as it is at this time, as shown by the evidence." The modification was improper. The present market value of the land taken furnishes the true basis for determining the compensation to be paid the land-owner for land taken and appropriated to the public use. This value of the land is to be determined by the jury from the evidence, either as furnished by the testimony of witnesses, or by their personal inspection of the premises; and in so far as its adaptability to uses other than that to which it is applied enhances or fixes its present market value, such uses are competent to be considered by the jury. *Haslam v. Railroad Co.*, 64 Ill. 353; *Railroad Co. v. Jacobs*, 110 Ill. 414; *Railway Co. v. Walsh*, 106 Ill. 253; *Dupuis v. Railway Co.*, 115 Ill. 98, 8 N. E. Rep. 720; *Railway Co. v. Moore*, 15 N. E. Rep. 764, (opinion March term, 1888.)

The judgment of the county court is reversed, and the cause remanded to that court.

(125 Ill. 325)

ROTH v. MICHALIS et al.

(Supreme Court of Illinois. June 16, 1888.)

1. DEED—TO TAKE EFFECT AFTER DEATH OF DONOR—EFFECT.

A deed by which a husband purports to convey in trust for the heirs of his wife one undivided half part of his real and personal estate, claims, money, and demands which he may leave at the time of his death, reserving to himself free control and disposal of all his estate during his life-time, cannot operate as a present conveyance of the property he then owned, to take effect in possession at his death, it referring expressly to what he may leave at his death, and is therefore void as a conveyance.

2. TRUSTS—UNCERTAINTY OF DESCRIPTION—TESTAMENTARY DISPOSITION—FORMALITIES.

Such a deed cannot be supported as a declaration of trust, it disclosing no existing property right in any distinct subject-matter, and, not having been executed with the formalities entitling it to be admitted to probate, it cannot take effect as a testamentary disposition.

Error to circuit court, St. Clair county; AMOS WATTS, Judge.

Wm. Winkelman, for plaintiff in error. *J. M. Hay*, *A. S. Wilderman*, and *J. M. Hamill*, for defendant in error Michalis. *W. C. Kueffner*, for defendants in error Gotschalk and others.

MULKEY, J. This writ of error is prosecuted to reverse a decree of the circuit court of St. Clair county dismissing, on the hearing, a bill in equity, filed by the plaintiff in error against the defendants in error. The object of the bill is to subject an undivided half of the estate of George Heberer, after the payment of debts, to an alleged trust. The facts disclosed by the bill, and established by the proofs, are in substance these: In the year 1867, and prior thereto, George Heberer and his wife, Sarah, were living in Belleville, St. Clair county. George was then the owner of property, real and personal, to the amount of about \$20,000. Sarah was a widow, and the owner of some

property, when George married her. He had nothing, though he proved to be a quite thrifty, successful business man. Neither of them had any children, or descendants of children. On the 5th day of November, 1867, George Heberer executed and delivered to John M. Stolberg the following instrument: "Know all men by these presents, that I, George Heberer, of Belleville, St. Clair county, Ill., for and in consideration of the love and affection which I bear to my wife, Sarah Heberer, and to her relations, and also in the sum of one dollar, to me paid by John M. Stolberg, trustee, for the purpose hereinafter set forth, at and before the ensealing and delivery hereof, the receipt whereof I do hereby acknowledge, have given, granted, released, and confirmed, and by these presents do give, grant, release, and confirm, unto the said John M. Stolberg, trustee, the undivided half part ($\frac{1}{2}$) of my real and personal estate, claims, money, and demands, which I may leave at the time of my death, after the payment of all my just debts. To have and to hold the said undivided half of my real and personal estate, money, claims, and demands, which I may leave at the time of my death, after the payment of my just debts, in trust for the heirs of my wife, the said Sarah Heberer: provided, however, if I, the said George Heberer, should die before my wife, the said Sarah Heberer, then, and in that case, this deed is to be null and void, and of no effect: and provided, also, that I hereby resume to myself the absolute and free control and disposal of all my real and personal estate, claim, money, and demands during my life-time. In witness whereof I, the said George Heberer, have hereunto set my hand and seal this, the 5th day of November, A. D. 1867. GEORGE HEBERER. [Seal.]" Stolberg at no time ever exercised, or attempted to exercise, as trustee or otherwise, any authority or control over the property owned by Heberer, at the date of the instrument, or which he subsequently acquired, and the evidence shows that Heberer contrived to exercise the same dominion and control over it after the making of the instrument that he did before. Thus, on the 26th of February, 1868, Heberer and his wife executed a deed for lot 46, on Richland street, in Belleville, to John B. Willie, which was owned by Heberer at the time of the conveyance to Stolberg, the consideration, as expressed in the deed, being \$3,350. Shortly after the conveyance to Stolberg, Heberer and his wife moved from Belleville to Freeburg, a village in the same county, where they lived together up to the time of her death, which occurred on the 1st day of September, 1878. She died intestate, leaving the following nephews and nieces as her next of kin, and, with the exception of her husband, her only heirs at law, namely. Maria Gotschalk, Pauline, Louis, and Christopher Wiegand, Maria Westenberger, and Adam Schrodt, defendants in error, and Adam Roth, plaintiff in error. About three months after her death George Heberer married Louisa Knampert, now Louisa Michalis. On the 24th day of August, 1885, George departed this life testate. By his will, which was duly admitted to probate, he gave to his wife his entire estate, with the exception of two small legacies, amounting to \$55 only, and nominated her as his executrix. On the 15th day of December, 1885, his widow intermarried with the defendant in error Louis Michalis. It appears that of the personal assets belonging to the estate there is now on hand \$6,841.18; also the following real estate: Lot 29, Abend's Third addition to Belleville, valued at \$1,500, and lot 11, village of Freeburg, valued at \$1,200.

The theory of plaintiff in error is that by virtue of Heberer's deed to Stolberg a present interest in all the former's property, real and personal, passed at once upon its delivery to the latter, to be held by him for the use of Mrs. Heberer's heirs, to take effect in possession upon Heberer's decease. It is clear enough that, unless this view can be maintained, the court below very properly dismissed the bill. There seems to us, however, insuperable objections to the theory of the bill, which counsel for the heirs of Mrs. Heberer have not so much as alluded to. The instrument, it will be observed, does

not, as counsel assume, purport to convey an undivided half of the property which he then owned; but, on the contrary, only that which he might "leave at the time of his death, after the payment of all his just debts." What portion of the effects he then owned, if, indeed, any at all, would be on hand at the time of his death, and thus brought within the terms of the grant, was at that time, as is manifest, a matter of pure conjecture. This being so, it is clear that no present estate or interest in the property then owned by him could have passed by this deed, and it therefore follows, as a legal sequence, that the instrument in question, considered as a conveyance, was and is simply void. This conclusion rests upon the fundamental principle that a deed takes effect upon its delivery, if at all. *Cline v. Jones*, 111 Ill. 563. Had the instrument in question been a will, there would have been no difficulty in the case, for a will speaks only from the death of the testator, and operates on property then on hand. Suppose, however, it be assumed, for the purposes of the argument, that the legal estate in the property passed by virtue of the deed in question to Stolberg upon its delivery, as is claimed by counsel, could the trust theory of the bill be maintained? It is not perceived how it could be, so far as the real estate is concerned. As respects it the deed clearly does not contemplate a trust of any kind, notwithstanding the term "trust" is used in it. It will be noted that no act or duty to be performed by Stolberg in respect to the property is enjoined or pointed out. Leaving out of view the objection stated, it is simply a conveyance to one person in trust for others, and in this respect presents the clear case of an executed use instead of a trust. It is a familiar rule that, where a conveyance is made either for life or in fee to one person for the use of another, the latter will take, under the statute of uses, the legal estate. The same construction follows where the word "trust" is used instead of the word "use." Thus, by a conveyance to A. in trust for B., the latter takes both the legal and equitable estate, and A. takes nothing. If the instrument under consideration had simply conveyed a specifically described piece of land to Stolberg in trust for the heirs of Mrs. Heberer, all the other provisions of it remaining as they are, Heberer would have taken an estate for life by way of resulting use, and the heirs of Mrs. Heberer, upon his decease, would have taken the legal as well as equitable estate in remainder, expectant upon the termination of his life-estate. This being so, their remedy would be at law, and not in equity. The hypothetical case here put, and the observations made upon it, must be understood as a mere argument to show that in no event, so far as the real estate is concerned, can the present bill be maintained upon the theory that the property sought to be recovered is a trust-estate.

It is urged by counsel, however, that, conceding the deed to be void as a conveyance, it may nevertheless be given effect as a declaration of trust. It is unquestionably true that where one, for a valuable consideration, attempts to make a conveyance of property to another, and by some casualty or inadvertence the instrument is defective and inoperative as a conveyance, a court of equity will, in a proper case, treat the instrument as a declaration of trust or as a contract for a conveyance, as the circumstances may require. But this doctrine has no application to a case like the present, where an essential element of the trust is wanting. An existing property right in or to some distinct subject-matter is essential to the existence of every trust, and any instrument, however perfect otherwise, which fails to disclose this, cannot properly be established as a declaration of trust. We regard the instrument under consideration in the nature of a testamentary provision, and it was so treated by all the parties. The so-called trustee never attempted to exercise any control over the property of Heberer, and, as we have already seen, the latter exercised the same dominion over it after the conveyance that he did before it. Of course, the instrument cannot be given effect as a testamentary disposition, for the reason it has not been so executed as to entitle it to pro-

bate, and give it effect as such. *Badgley v. Votrain*, 68 Ill. 25. The complainant set up in the bill an alleged agreement between Heberer and his wife, by which the latter was induced to relinquish her right of dower in certain real estate belonging to her husband as the consideration for the deed to Stolberg. The proofs wholly fail to sustain the bill in this respect. But in the view we take of the case the proof of that charge would not have changed the result. The authorities cited by counsel for plaintiff in error we do not regard as in point. Decree affirmed.

(125 Ill. 440)

SAWYER et al. v. BRADSHAW et al.

(Supreme Court of Illinois. June 16, 1888.)

1. FRAUDULENT CONVEYANCES—WHAT CONSTITUTES—DEEDS OF TRUST—NOMINAL CONSIDERATION MORE THAN ACTUAL.

The execution of a deed of trust on real estate to secure a debt of \$3,000, when in fact only about half that amount is due, is not in itself sufficient to show the deed to be fraudulent and void as to other creditors, where the value of the real estate is found to be well \$650.

2. SAME—EVIDENCE—DECLARATIONS OF GRANTOR.

In an action by an execution creditor against trust creditors to set aside a deed of trust as fraudulent as to other creditors, the statement of the grantor, after the sale under the deed, to a tenant of the premises, who had gone into possession before the sale, that he would have to let the trust creditors have the property to keep the execution creditor from selling it; that he would not pay the latter's debt if he could help it,—is not competent evidence against defendants to show that the deed was fraudulent.

3. SAME—SECRET TRUSTS—EVIDENCE.

In an action to set aside a deed of trust on real estate to secure a debt, on the ground of a fraudulent secret trust between the insolvent grantor and the creditors secured thereby, proof that the trust creditors had purchased a lot of the debtor's personal property which had been sold under an execution, and afterwards sold it back to him at cost and interest, and had taken the assignment of a prospective judgment, and out of it paid an execution against the debtor, and credited the balance on a debt he owed them, is insufficient to show such secret trust as will avoid the deed.

4. MORTGAGES—DEEDS OF TRUST—SALE UNDER POWER—ACTION TO SET ASIDE—PLEADING.

A sale under a deed of trust will not be disturbed for an alleged defect in the notice of sale, where the bill filed for the purpose contains no allegation to that effect, but seeks to set it aside as a fraud on creditors.

Error to appellate court, Fourth district.

R. S. Sawyer and Wise & Davis, for plaintiff in error.

SHELDON, C. . . On November 29, 1879, Seth T. Sawyer and Robinson S. Sawyer purchased at sheriff's sale, under an execution upon a judgment in their favor against George T. Brown, for \$160, and costs of suit recovered at the February term, 1879, of court, lot 39, in Penitentiary Plat addition to Alton, as the property of said Brown, and subsequently received a sheriff's deed therefor. On April 6, 1878, said Brown executed to Metcalfe and Bradshaw a deed of trust upon said lot 39 to secure the payment of a note from Brown to Metcalfe and Bradshaw, of even date with the deed of trust, for \$3,000, payable one year after date, with 10 per cent. interest. On July 26, 1879, Metcalfe and Bradshaw caused said lot 39 to be sold at public sale under the deed of trust for the satisfaction of said note, and at the sale the lot was struck off and sold to Bradshaw for the sum of one dollar, and he received a trustee's deed for the lot. It had previously been sold under an execution against Brown, and on June 21, 1879, Metcalfe and Bradshaw paid \$381 in redemption of the lot from the execution sale. On January 21, 1880, Bradshaw sold and conveyed the lot to one Anna S. Clark. On March 6, 1885, the Sawyers filed their bill in chancery in this case in the circuit court of Madison county to have set aside the aforesaid deed of trust, trustee's sale, and deed, and the deed to Anna S. Clark, as fraudulent and void as against cred-

itors, or, if the said Clark was found to be an innocent purchaser of the lot, that then Metcalfe and Bradshaw, account to the complainants for the value of the lot. The circuit court found the deed of trust to have been made in fraud of creditors, that Clark was an innocent purchaser, and decreed that Bradshaw should pay to the complainants \$650 as the value of the lot at the time of complainants' sheriff's deed for the same, March 8, 1881. The complainants bring this writ of error for the review of the judgment of the appellate court.

The chief reliance, as showing the deed of trust in question to be fraudulent as against creditors, is upon the fact that the note secured by the deed of trust was given for a larger amount than was due from Brown to Metcalfe and Bradshaw at the date of the note; citing *Wooley v. Fry*, 80 Ill. 163; *Upton v. Craig*, 57 Ill. 259; *Mitchell v. Sawyer*, 115 Ill. 650, 5 N. E. Rep. 109; Bump, Fraud. Conv. 470,—as in support of the position. The testimony of Metcalfe and Bradshaw is that Brown only owed them about \$1,500 or \$1,600 at the time the note and deed of trust for \$3,000 were given, on April 6, 1878, and on July 26, 1879, the day of the trustee's sale, and that the balance of the note was to secure future advances and services. The mere discrepancy between the amount of the indebtedness and that of the note and deed of trust should not, of itself, avoid the deed of trust as to creditors. The consequence, in that respect, depends upon the intent of the transaction, and upon its being calculated to mislead, to their injury, or to hinder and delay, creditors. There was a wide difference in the estimate of value by witnesses of the lot here concerned, as is usual upon questions of value; one witness placing his estimate of value as high as \$1,500. But the complainants in their bill state the value of the lot as only being from \$500 to \$800; and we think the circuit court's finding of its value as \$650 to be quite as high as there was warrant for, from all the evidence in the case. There was no question as to the actual indebtedness to Metcalfe and Bradshaw being as much as \$1,500. Under such circumstances of the value of the lot and the amount of the real indebtedness, there was nothing in the property, in any event, for other creditors; but all and more was required for the satisfaction of Metcalfe and Bradshaw, and we cannot conceive that misstating the amount of the incumbrance, calling it \$3,000, instead of \$1,500, could have had any possible effect, in respect of this property, of misleading other creditors, to their prejudice, or of hindering and delaying them in the collection of their debts. The transaction, of itself, could not denote any purpose to protect the property from other creditors, and there is no evidence in the case from which to draw the inference of such a purpose. We cannot, under the circumstances here, regard the fact of the difference between the apparent and the real amount of the incumbrance as enough to stamp the deed of trust as fraudulent as against creditors.

Brown had given the property over to one Mrs. Johnson to make from it a debt he was owing her. She had rented it at \$10 per month, and received four months' rent. She testifies that, when the rent for the fifth month came due, her tenant informed her he had received notice not to pay her any more rent; and that, on inquiring of Brown as to the cause of this, he told her he had to let Metcalfe and Bradshaw take the house to prevent Mr. Sawyer from selling it; that Sawyer claimed \$900 off him, and he was not going to pay it if he could help it. This statement of Brown is insisted upon as evidencing fraud in the making of the deed of trust. We do not regard this statement as competent evidence against Metcalfe and Bradshaw. Had the property been let by Brown to Mrs. Johnson after the sale of it under the deed of trust, and the statement been made when Brown was in possession, claiming and treating the property as his own, it might, perhaps, have been admissible. *Jones v. King*, 86 Ill. 226. But such was not the case here. The evidence shows that the property was given into possession of Mrs. Johnson by Brown in

June, 1879, which was before the sale under the trust deed, and at a time when Brown was properly in the enjoyment of the use and possession of the property. But subsequent to such sale, on July 26, 1879, Brown is not shown to have had any connection with the property further than as appears from the conversation above stated, and Mrs. Johnson's giving the key of the house to Brown. Mr. Bradshaw says that he took possession of the property as soon as he got the title under the trustee's sale. The statement of Brown, if admissible, does not point to the making of the deed of trust, but relates to the giving of possession of the property to Metcalfe and Bradshaw after the sale of it under the deed of trust.

It is said that Metcalfe and Bradshaw were holding in their names all of Brown's property, real and personal, Brown getting the benefit of it; and so a secret trust is established. All the foundation for this, aside from the matter of this deed of trust, is the insolvent condition of Brown; that Metcalfe and Bradshaw came into the possession of a lot of books and personal property once owned by Brown, which Brown afterwards had the benefit of; and that on April 8, 1878, two days after the date of the deed of trust, Brown assigned to Metcalfe and Bradshaw an anticipated decree in a suit pending, and which decree was rendered in Brown's favor on December 12, 1878, for \$1,290.60, and Brown received the benefit of it. As to the books and personal property referred to, it appears that they had been levied upon under an execution in favor of one Hambleton against Brown; and that at the execution sale, on June 17, 1877, Metcalfe and Bradshaw, at the request of Brown, bought the property for \$280.75, with their own money, and that they afterwards sold to Brown the property at what they paid for it, interest, and trouble, and delivered the property to Brown, except a writing-table, which they kept. We fail to perceive evidence of any fraud in this transaction. As to the decree assigned, Mr. Metcalfe testifies that the assignment was taken to secure their claim against Brown; that, at the time of the assignment, there was an outstanding execution of another person against Brown, the amount of which, by agreement at the time, was to come out of the decree; that the amount of the execution, \$685, was taken out of the decree, and the balance of the decree was paid to Metcalfe and Bradshaw, of which Brown got the benefit, nearly all of it going to pay debts he then owed. At the most, this is but evidence tending to show fraud towards creditors in the making of the deed of trust, and is quite insufficient, of itself, to show such fraud.

It is objected that the advertisement of sale under the trust deed was in violation of the statute, in not setting forth in the notice the correct amount due. It is sufficient to say that the bill contains no allegation in this respect. The sole ground of impeachment of the sale under the trust deed, which is set forth in the bill, is that the deed of trust was fraudulent as against creditors. We perceive no sufficient reason for disturbing the judgment of the appellate court, and it must be affirmed.

(128 Ill. 490)

RUSSELL & ALLISON DRAINAGE DIST. v. BENSON et al.

(*Supreme Court of Illinois. June 16, 1888.*)

DRAINAGE—ASSESSMENTS—RELEASE OF LAND—STATUTES—EFFECT.

Act Ill. 1888, § 48, provided that the owner of any tract of land within a drainage district might petition to release his land from an assessment where such land is not subject to overflow, provided "that said petition shall be filed within one year after the confirmation of the assessment, and not thereafter." *Held*, that the act approved June 30, 1885, in force July 1st, re-enacting act 1888, § 48, and providing that "a petition for the correction of any assessment heretofore made shall be filed in a year after this act shall take effect," does not confer the right to file a petition, May 11, 1886, to discharge lands from such an assessment, confirmed June 4, 1884, as such latter act only applied where the time prescribed by the prior statute had not fully run when it came in force.

Appeal from Lawrence county court; PHILLIP W. BARNES, Judge.

Petition by A. J. Benson, Nancy E. Benson, A. J. Hart, Catherine Gerhart, Philip Moore, B. S. Douglas, Nancy A. Lackey, M. V. Pinkstaff, John Copp, Adam Lackey, J. B. Gerhart, M. V. Organ, Peter Hale, Casandra Pinkstaff, and William Gillum to discharge their lands from any assessment levied by defendant, Russell & Allison Drainage District Judgment for plaintiffs. Defendant appeals.

Huffman & Gee, for appellant. *Bell & Green* and *William Robinson*, for appellees.

SHOPE, J. On July 23, 1883, a petition was presented to the county court of Lawrence county praying for the formation of the Russell & Allison Drainage District for the purpose of leveeing to protect certain lands from overflow from the Wabash river, as provided by the act of May 29, 1879. Starr & C. St. par. 26, p. 919. Such proceedings were had as that the district was organized, and commissioners appointed to construct the levee purposed. The assessment roll of said drainage district was duly presented to the county court for confirmation on the 4th day of June, 1884; and on that day said assessment roll, as returned by the jury, after adjustment by the court of objections thereto filed, was confirmed by the court. It is not claimed that any of the proceedings up to and including the confirmation were illegal or irregular. On the 11th day of May, 1886, appellees filed their petitions in said county court, asking to be released from the assessments for benefits of certain of their lands described in the petition, for the reason that the same had been erroneously assessed for benefits, because the same were not subject to overflow, etc. Upon hearing of such petitions the court entered its order of record, amending said assessment roll, and discharging from all assessments certain of appellees' lands in said order mentioned and described. At the date of the organization of said district, and of the return and confirmation of the assessment roll thereof, the act of 1883, in force July 1, 1883, was in force. By the forty-third section of that act it was provided that the owner of any tract of land within a drainage district might petition the county court for the release of his land from an assessment made or to be made if such lands were not subject to overflow, or had not been overflowed; and on the hearing, on issue joined, if the court found that any part of the lands named in the petition had not been overflowed by the highest water known from the stream against which the levee was being constructed, it might enter an order of record amending the assessment roll returned by the jury in conformity with the facts by it found, and discharging such lands from all assessments. But the section contained this proviso: "That said petition shall be filed within one year after the confirmation of the assessment, and not thereafter." It is manifest that as the assessment roll had, in this case, been confirmed on June 4, 1884, the right given to present such petition would, under this proviso, be barred June 4, 1885. The legislature, however, by act approved June 30, 1885, in force July 1, 1885, re-enacted the forty-third section of the act of 1883, with certain additional grounds for petitioning for the discharge of lands in drainage districts from assessment, and in which it was "provided that a petition for the correction of any assessment heretofore made shall be filed in a year after this act shall take effect, and as to assessments thereafter made such petition shall be filed within one year after the confirmation of the assessment: and provided that, where said petition shall be for the correction of an assessment heretofore made, the proceedings had thereon shall be at the cost of the petitioner." It is contended that, by virtue of this act, the right of appellees to file their petition in the county court to release and discharge their lands from said assessment was revived, and the time in which they might present such petitions extended one year from the 1st day of July, 1885, when said last act took effect; that the language of the proviso being, that a petition for the correction of any assessment theretofore made shall be filed within a year

after this act shall take effect, is sufficiently broad and comprehensive to include all assessments theretofore made, whether previously barred or not; and that, therefore, the language must be construed as removing the bar, which had become complete, under the act of 1883, before the act of 1885 came into force.

The right of the legislature to pass statutes of retroactive effect has repeatedly been sustained. As a general rule, however, statutes are intended to operate *in futuro* only, and a retrospective effect will not be given unless it clearly appears that such was the intention of the legislature, particularly if the rights of the public or individuals may be injuriously affected thereby. *Hyman v. Bayne*, 83 Ill. 256; *Thompson v. Alexander*, 11 Ill. 54; *Marsh v. Chennut*, 14 Ill. 223; *Dwar. St.* 163-169. While it must be conceded that the language employed by the legislature is sufficiently broad to cover all previous assessments made at any time since the organization of drainage districts in this state, we are not prepared to hold that the proviso manifests a clear intention on the part of the legislature to include therein assessments other than those in respect of which the right of release from the assessment existed at the time of the taking effect of this act. Ample scope is found for the application of this provision of the statute to that class of cases where the bar of the prior statute was yet incomplete. To hold that the proviso in question is applicable to the case at bar requires that such construction be put thereon as would make it applicable to the first or any subsequent act for the organization of drainage districts in this state. To do this would open wide the door to litigation long since closed, and unsettle the various drainage districts organized in pursuance of law. The intention of the legislature, that the questions arising under these acts should be speedily concluded, is evinced by the short period of limitation given by the several acts conferring the right upon the owners of land included within the assessment roll to open up the proceedings for the various purposes and reasons for which it is permitted to be done. This act of 1885 provides that all petitions to release lands from the assessment thereafter made shall be filed within one year from the confirmation of such assessment. These drainage districts are authorized by law to incur indebtedness, and may, for specified purposes, issue bonds of the district, as was here done; and the public and individuals are interested in an early determination of the question as to what lands shall be embraced in the district, and liable to assessment for the payment of its indebtedness, and of the principal and interest of its bonds. We are called upon to say, by the construction contended for, that drainage districts, whenever created or how long soever after the confirmation of the assessment upon which its indebtedness is predicated, may be dismembered, and that the most valuable portions, possibly, of the land embraced in its assessment roll, be discharged from liability, although its indebtedness may have been incurred after the bar of the statute then in force had become perfect. This we are called upon to say in construing the general language employed in this proviso. We are of opinion that it is clearly manifest, from the legislation under consideration, that the paragraph of the proviso relied upon by appellees as extending their right of petition to the county court for release of their lands from the assessment roll was intended to apply only in cases where the time prescribed by the prior statute had not fully run when the present statute, under consideration, went into force; thereby saving the right given by the former statute, and extending the time for one year from the time of taking effect of the present statute. No reason existed for the extension of the time within which to file petition, in respect to assessments theretofore confirmed, that did not exist in respect to assessments to be confirmed thereafter, except as to assessments theretofore made within less than one year before the taking effect of the act of 1885. A question might have arisen as to the right to file the petition after the last-named act should be in force; and also to provide that the full period of one year

after taking effect of the act of 1885 should be allowed in respect of all assessments to which the right of petition then existed, in which the land-owner might avail of the additional grounds upon which such petitions might be filed, as provided in the latter act. It was in view of the additional reasons or grounds upon which such petition and right of release could be based that it was provided that, where said petition should relate to an assessment theretofore made, the proceeding should be at petitioner's costs. This construction is the only one consistent with the policy indicated in the several acts of the legislature respecting the organization of drainage districts, or reasonable when considered in view of the general purpose and object of the law.

The views here expressed will render unnecessary the discussion of any other of the questions presented by counsel. The order and judgment of the county court of Lawrence county, entered upon said petitions of appellees, is reversed, and the cause remanded to that court, with instructions to dismiss said petition at petitioners' costs.

(125 Ill. 284)

PRICE v. HUDSON *et al.*

(*Supreme Court of Illinois. June 16, 1883.*)

1. DEED—DELIVERY—CONDITIONS.

The owner of land, about to enter the army, executed a deed therefor to his wife, and placed it in a trunk, with directions to the wife, if he was killed in the army, to take the deed, and have it recorded. The husband returned, and the deed remained for many years undisturbed, and was then destroyed. *Held*, that there had been no delivery of the deed.¹

2. ESTOPPEL—IN PARS—JUDGMENT—RES ADJUDICATA.

A husband, who had made, but never delivered, a deed for his land to his wife, still claiming it as his own, offered a builder, who had full knowledge of the facts, a certain sum to erect a house thereon, who asked a larger price, but agreed to accept the amount offered by the husband, and look to the wife for the difference, to be paid in board. This difference was not fully paid, and the premises were subsequently sold as the wife's, under a mechanic's lien therefor, in a proceeding against her alone. *Held*, in ejectment by the purchaser, that the husband was not estopped from denying title in his wife, and was not bound by the mechanic's lien sale.

Appeal from circuit court, Richland county; WILLIAM C. JONES, Judge.

E. McGilton, (*F. G. Cockrell*, of counsel,) for appellant. *McCauley & Montray* and *T. W. Hutchinson*, for appellees.

SHOPE, J. This was an action of ejectment by John N. Price against Phoebe Hudson and William D. Hudson to recover the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ section 3, township 3 N., range 9 E., in Richland county. The general issue was filed, and a trial by jury resulted in a verdict of not guilty. A motion for new trial, interposed by plaintiff, was overruled, and judgment entered on the verdict, from which the plaintiff below prosecutes this appeal. The record shows that the tract of land in controversy was patented by the government of the United States to the defendant William D. Hudson prior to the year 1863; that in that year said William D. and his wife and co-defendant, Phoebe Hudson, were occupying the tract of land, and the dwelling-house thereon, as a homestead, and have ever since continued to so occupy it. It appears that said William, being about to enlist in the army of the United States, in the year 1863 made and acknowledged a deed for said land, in the usual form, in which his wife was grantee; that he took the deed, and placed it in a trunk in their dwelling-house, — telling his wife that, if he got killed in the army, she should take the deed, and have it recorded. The grantor was not killed in the war, but returned in 1865, and still survives. The plaintiff claims title through said deed of 1863, from said William D. to Phoebe Hud-

¹As to what constitutes delivery, see *Flannigan v. Goggins*, (Wis.) 86 N. W. Rep. 846, and note; *Nazro v. Ware*, (Minn.) 83 N. W. Rep. 359; *Hill v. McNichol*, (Me.) 13 Atl. Rep. 888.

son, and by virtue of a master in chancery's sale and deed made in pursuance of a decree of the circuit court of Richland county in a certain mechanic's lien proceeding instituted by one Mrs. M. J. Lampport against said premises, and in which said Phoebe Hudson was alone made defendant.

The first question presented is, did the title pass to Phoebe Hudson by the deed from her husband? Waiving the question as to the right of the husband to thus convey the homestead, to render the deed operative as a conveyance an unconditional delivery was requisite; or if the delivery was conditional, or to take effect upon the happening of some event in the future, it must appear that the condition has been performed, or that the event has happened. *Skinner v. Baker*, 79 Ill. 496; *Hoig v. College*, 83 Ill. 267; *Stone v. Duxall*, 77 Ill. 475. It is not essential, however, to a delivery, that the deed should pass from the hand of the grantor to the grantee. Any disposition made of the deed by the grantor, with the intention thereby to make delivery of it, so that it shall become presently effective as a conveyance of a title, will, if accepted by the grantee, constitute a sufficient delivery. 3 Washb. Real Prop. 288-293; *Renneson v. Aiken*, 102 Ill. 284. The intention to deliver on the one hand, and of acceptance on the other, may be shown by direct evidence of the intention, or may be presumed from acts or declarations, or both acts and declarations, of the parties constituting parts of the *res gestæ*, which manifests such intention; and in like manner the presumption of a delivery may be rebutted and overcome by proof of a contrary intention, or of acts and declarations from which the contrary presumption arises. It is not competent to control the effect of the deed by parol evidence when it has once taken effect by delivery; but it is always competent to show that the deed, although in the grantee's hands, has never in fact been delivered, unless the grantor, or those claiming through him, are estopped in some way from asserting the non-delivery of the deed. In this case the deed was placed in the trunk by the grantor, to be taken by the grantee only in the event of the death of the grantor while in the army. He testifies: "I made this deed, so that if I got killed she would get the land, and my brothers and sisters would not heir it. I never intended she should have a title of the land unless I got killed in the army." The deed never was placed upon record, and remained in the trunk, where it had been deposited by the grantor, for substantially 20 years, without being taken by the grantee. The testimony shows that the grantor never saw the deed after 1863, when he placed it in the trunk; and the grantee took no manual possession of it until in 1883, about the time the mechanic's lien proceedings were instituted, when she for the first time took the deed from the trunk for the purpose of obtaining advice as to its effect; and upon being advised that it was, under the circumstances, ineffectual to convey title, destroyed it. She at no time asserted any claim under the deed, or attempted to do so. Both testify, and are substantially uncontradicted, they did not understand that the deed was ever delivered, or intended to be delivered, or that the title to the land was vested in Mrs. Hudson. An application of the principles before announced will fully justify the finding that the deed was in fact not delivered.

But it is said that the defendant should be estopped to deny title in Phoebe Hudson at the time of the furnishing of material, and of performing the labor, for which the mechanic's lien was declared by the decree in said mechanic's lien proceedings. None of the facts or circumstances relied on by counsel as creating an estoppel are shown to exist by a preponderance of the evidence. Instead of William B. Hudson standing by, and permitting the mechanic and material-man to improve the property under a contract with his wife, without objection on his part, exactly the opposite state of facts is shown by the evidence. There is little or no conflict in the evidence in respect of the facts out of which the mechanic's lien proceedings arose. Hudson and wife were residing in the dwelling-house on these premises in the spring of 1883. The

husband had \$300 in money, and for that sum Mrs. Lamport proposed to build them a new dwelling, the dimensions and plan of which were talked over and agreed upon. Mrs. Lamport went to the neighboring town of Olney to price or purchase material; and, on returning, reported to Hudson that the house could not be built for the sum of \$300. Hudson told her that \$300 was all the money he had, and if the house could not be built for that sum to let it alone. Mrs. Lamport replied that she would go on with the building; that, if it cost any more, she would arrange with Mrs. Hudson for the balance; that Mrs. Hudson could pay the excess over the \$300 by boarding the hands engaged in its construction, etc. Hudson then told her if the house cost any more than the \$300 his land should not stand good for it, but, if she would consent to look to his wife for her pay over and above the \$300, to go on. To this Mrs. Lamport assented, and the building was erected accordingly upon that understanding and agreement. Hudson paid \$300 in cash, and hands were boarded to the amount of \$8. Mrs. Lamport presented a bill for \$138 additional, which, being disputed by Mrs. Hudson, the mechanic's lien proceeding was commenced, Mrs. Hudson alone being made defendant, and a decree for \$64 was obtained, which was made a lien on the title of Mrs. Hudson in said land. That the house was built under the agreement before mentioned; that Mr. Hudson claimed the land as his own, and refused to contract for the building unless it was understood that the land was not to be liable for any excess over the \$300 cash on hand; and that the contractor so agreed, and contracted to look to Mrs. Hudson personally for the balance, if any,—is overwhelmingly proved. In no sense, in view of this evidence, can it be said that the contractor furnished material or performed labor upon the faith of the title being in Mrs. Hudson, or in reliance upon her having an interest in the land. Everything was disclosed at the time to the contractor that is now insisted upon by appellee. William D. Hudson was not a party to the mechanic's lien proceeding, and is not bound by the decree.

Finding no error in this record, the judgment of the circuit court is affirmed.

(125 Ill. 437)

BOYD v. FULLERTON.

(*Supreme Court of Illinois. June 16, 1888.*)

HOMESTEAD—SALE OF OLD AND ACQUISITION OF NEW HOMESTEAD—INTERVENING JUDGMENT.

Where the head of a family has sold his homestead, and secured another lot, and erected thereon a dwelling, with the manifest intention of making it a homestead, and moves into it within a reasonable time, an intervening judgment, followed by a judicial sale and sheriff's deed, will not bar his rights to the property under the homestead law.

Appeal from circuit court, Perry county; WILLIAM H. SNYDER, Judge.

John Boyd, pro se, and W. K. Murphy, for appellant. John Michau and R. M. Davis, for appellee.

MULKEY, J. On the 31st day of October, 1887, the appellee, James Fullerton, obtained a judgment in the circuit court of Perry county in an action of ejectment, against the appellant, John Boyd, for the recovery of lots 8 and 4, in Ozburn's Second addition to the town of Pinkneyville. The present appeal is from that judgment. The appellee claims title through a judgment by confession against one Isaac Craig, the former owner of the property, an execution sale, and sheriff's deed. The defense to the action is of a twofold character. It is claimed by appellant, in the first place, that the judgment against Craig, and upon which appellee's title depends, is void on the ground that the court had no jurisdiction over the person of the defendant at the time it was rendered. It is further claimed by appellant that the lots in question, together with the adjoining lots 1 and 2, at the time said so-called judgment

was rendered, constituted the homestead of the said Isaac Craig, and that the four lots altogether did not exceed \$1,000 in value. Conceding this to be so, of course appellee acquired no title by reason of his purchase and sheriff's deed. In the view we are inclined to take of the last question it will not be necessary to consider the first. The judgment in question was rendered on the 30th of September, 1868, the sale made on the 15th of May, 1869, and the sheriff's deed on the 2d day of February, 1871. At the time the judgment was obtained, the four lots were in the actual possession of Craig. The entire property was inclosed with a fence, and he was then engaged in building upon it a dwelling-house for himself and family, which was already far advanced towards completion, and into which he and his family moved in the month of November following, where, as head of the family, he continued to occupy the same as a homestead up to the time of his death, which occurred a few months afterwards. The evidence tends to show that, before the improvement of this property, Craig had sold his homestead, and that he and his family were occupying rented premises while the property in question was being prepared for occupancy. The evidence is somewhat conflicting as to the value of the four lots, including the improvements thereon. Some of the witnesses fix it at from eleven to thirteen hundred dollars; yet, by the decided weight of evidence, its value is shown not to have exceeded \$1,000. As the four lots were contiguous property, and did not exceed in value \$1,000, it is very clear that if Craig and family had moved into the house in course of construction even a day before the date of the judgment, the whole property would have been protected as a homestead from sale under judicial process. So far there can be no dispute. But the question is, where the head of a family has sold his homestead, and has secured another lot of ground, and erected thereon a dwelling, with the manifest intention of making it a homestead, and actually does move into it within a reasonable time, will an intervening judgment, followed by a judicial sale and sheriff's deed, cut off or bar all his rights in the property under the homestead law? In other words, is the head of a family under all circumstances bound at his peril to move his family upon the homestead premises before his rights under the homestead act will attach? We do not think so. Our conclusion upon this question is fully sustained by the following authorities: *Neal v. Coe*, 35 Iowa, 410; *Edwards v. Fry*, 9 Kan. 417; *Crawford v. Richerson*, 101 Ill. 351; *Thomp. Homest. & E.* §§ 248-252. We think the undisputed facts bring this case within the general rule here announced. Indeed, any other rule could hardly be reconciled with the various provisions of the statute. Every change of homestead which the statute expressly provides for necessarily results in the newly-acquired homestead becoming vacant and unoccupied, for a short time at least, and if the rights of homestead were not protected during that time no one financially involved could with safety make the change. The judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

(125 Ill. 393)

CENTRALIA & C. R. CO. v. BRAKE *et al.*

(Supreme Court of Illinois. June 16, 1888.)

1. EMINENT DOMAIN—ELEMENTS OF DAMAGE—LEAVING ROAD UNFENCED.

In condemnation proceedings by a railroad company, an instruction "that, by law, railroad companies are not required to fence their road for six months after it is opened for use, and the damages attending the keeping open the farm for that length of time may properly be considered as an element of damage," is correct, though objectionable as assuming that there would necessarily be "damage attending the keeping open of the farm," etc., that being a question of fact; but the judgment will not be reversed for this defect, it being apparent, on consideration of the evidence and the quantum of damages assessed, that the company was not prejudiced thereby.

2. SAME—DANGER FROM FIRES.

In proceedings to take land for railroad purposes the danger to buildings, fences, etc., from fire by the operation of the railroad, where the value of the land for sale or use will be depreciated thereby, is an element of damages.¹

Appeal from Washington county court; GEORGE VERNER, Judge.

Proceedings by the Centralia & Chester Railroad Company to condemn the lands of Maria J. Brake and Henry Meinnert for railroad purposes. From the judgment of the county court ascertaining the damages to be paid to defendants the petitioner appeals.

W. S. Forman and Daniel Hay, for appellant. *W. H. Moore and James A. Watts*, for appellees.

SHOPE, J. This was a petition in the usual form by appellant railroad company for condemnation of right of way over lands of appellees. The trial by jury resulted in awarding appellee Maria J. Brake \$400, and appellee Meinnert \$575, as compensation for land taken, and damages to land not taken. The petitioner prosecutes this appeal. Errors are assigned upon the rulings of the court in giving the fourth instruction of appellees' series, and refusing the third, fifth, and sixth instructions offered by the railroad company, and in the admission of testimony. The fourth instruction asked and given at the instance of appellees is as follows: "The court instructs you that, by law, railroad corporations are not required to fence their roads for six months after said roads are open for use, and the damages attending the keeping open of the farm for that length of time may properly be considered by you as an element of damages."

By the statutes every railroad corporation is required, within six months after any part of its line of railway is open for use, to erect and thereafter maintain fences on both sides of its right of way, so far as the railroad has been opened for use, except at certain designated places, suitable and sufficient to prevent stock from getting thereon. The failure to perform the statutory duty to fence its roadway, after the expiration of six months, renders the corporation liable, *prima facie*, for stock killed or injured by its agents, engines, or cars. *Railroad Co. v. Lynch*, 67 Ill. 149. The company may avail itself of the whole six months in which to perform the duty; and if, prior to the expiration of that time, stock gets upon the railroad, and is killed or injured, the owner cannot recover without proving negligence on the part of the company. *Railway Co. v. Barrie*, 55 Ill. 226. The company would be liable only for injuries to stock resulting from its failure to properly construct its road, or to manage and operate its locomotives and cars in a reasonable and prudent manner. If stock, from the pasture-land through which the road was operated, goes upon the railroad track, and are injured by the company's agents, engines, or cars while such engines and cars are being operated with ordinary and reasonable care, the land-owner is without remedy. If, therefore, the land-owner desires to use his pasture, he must fence the road, or submit to the hazard of injury to his stock by the ordinary operation of the road. It can readily be seen that pasture-lands, or those susceptible of pasturage, would, as a matter of fact, be depreciated for that use by the exposure of stock placed therein to such injury. It will be clearly incompetent and improper for the jury to enter upon conjecture as to the probable injury to stock, or the damages that might result therefrom. But if, in consequence of the appropriation of the land by the company as right of way, the present market value of the land through which the road is located, either for sale upon the

¹As to what elements of damage may be considered in awarding damages to the owner of land taken for a railroad, see *Railroad Co. v. Kuhn*, (Kan.) 16 Pac. Rep. 76; *Railroad Co. v. Kregelo*, (Kan.) 5 Pac. Rep. 15; *Railroad Co. v. Delaney*, (Kan.) 16 Pac. Rep. 843; *Bell v. Railway Co.*, (Iowa,) 37 N. W. Rep. 768.

market, or the value of the use of the land for the purposes to which it is appropriated by the land-owner, or to which it is adapted, is depreciated, such depreciation in value, or loss to the land-owner, is an element of damage proper to be considered by the jury in determining the compensation to be paid for land damaged, but not taken. *Railway Co. v. Teters*, 68 Ill. 144; *McReynolds v. Railway Co.*, 106 Ill. 152; *Railroad Co. v. McKinley*, 64 Ill. 238; *Railroad Co. v. Bowman*, 122 Ill. 595, 13 N. E. Rep. 814; *Railway Co. v. Moore*, 15 N. E. Rep. 764. This instruction, in all essential particulars, was before us in *Railroad Co. v. Kirby*, 104 Ill. 345, and it was there said: "The inconvenience of having a man's land temporarily thrown open in the progress and construction of the road may be a material element, and justly require compensation."

It is said, however, that this instruction is erroneous because it assumes there would be "damage attending the keeping open of the farm," etc. The instruction is clearly faulty in the respect indicated. The question of whether there would be damages attending the keeping open of the farm, and whether it would be kept open, should have been submitted to the jury as questions of fact. But it cannot be seen that appellant was injured by this assumption of the court. The appellant alone could determine when, within six months, its road should be fenced; and, if it desired to eliminate from the case this element of damage, no reason is perceived why it might not have done so by appropriate stipulation to erect its fences so as to prevent injury to the land-owner. But one recovery could be had by appellees for the land taken or damaged; and they must in this action recover, for all time, the injury to their land resulting from the appropriation by the railroad company of the right of way; and it is not unreasonable to require appellant, in the absence of any offer or stipulation showing a contrary intention, to pay all such damages as will result from its availing itself of the delay allowed it by law. The evidence introduced by appellant alone related to the value, per acre, of the land taken. The witnesses introduced by appellees vary somewhat in their estimate of the damages, ranging in respect to the land of appellee Meinnert from \$800 to \$1,000, and as to the land of appellee Brake from \$500 to \$900. If we exclude the evidence derived by the jury from their personal inspection of the premises, it is apparent the verdict is, in each case, much below the estimate of damages of any of the witnesses. There is no conflict in the evidence in respect to the location of the road, or how it would divide the farms of appellees, or what effect it would have upon the uses to which the land was appropriated, and no different effect could have been produced upon the mind of a jury by the instruction under consideration than would have resulted if the instruction had been properly guarded by requiring them to find the fact. We have so repeatedly held that an error which has produced no injury will not be ground for reversal that citation of authority is unnecessary.

The witnesses for appellee, upon cross-examination, among other reasons given for their estimate of damages, stated they included the damages from fire, etc., by reason of the operation of the railroad through these farms. Appellant objected to the evidence, which objection was overruled, and appellant excepted. No motion was made to exclude the evidence in chief of the witnesses; but instructions were asked, and refused by the court, to the effect that the increased danger and hazard to buildings, etc., from fire by reason of the operation of the road, should not be considered by the jury as an element of damage. There was no error in this ruling. If, by reason of the proximity of buildings, fences, and the like, to the track of the railroad, the market value of the farms as a whole was depreciated; or if, from the ordinary and usual manner of the operation of the road, the danger from fire had a tendency to lessen the value of the premises for sale, or for the use to which they were appropriated by the owner, or to which they were adapted,—that fact would

become an important element in fixing the just compensation to be awarded the owner for the appropriation of his land to the uses of appellant company. Authorities *supra*. Finding no error in this record, the judgment is affirmed.

(125 Ill. 247)

HALLORN *et al.* v. TRUM.

(*Supreme Court of Illinois.* June 16, 1888.)

1. CREDITORS' BILLS—PRIORITY—WHEN LIEN ATTACHES.

Where a judgment creditor files his bill in the federal court to subject certain lands fraudulently conveyed to a non-resident to his debt, and has service of process on the debtor, but not on the non-resident grantee in whom is the legal title, and a second creditor afterwards obtains a judgment, and files a bill for the same purpose in the state court, and has service on the non-resident, by publication, under the state law, and takes a decree, and sells the land before the first creditor has service on the non-resident, he thereby obtains priority of lien, and the purchaser at the sale takes title to the land as against the purchaser at a sale afterwards made under the decree of the federal court, though service by publication was not authorized in that court when the bill was filed.

2. SAME—VACATING PROCEEDINGS—EFFECT—PERSONS NOT PARTIES.

A decree vacating and setting aside proceedings by creditors' bill to enforce a judgment against land fraudulently conveyed by the debtor, under which the creditor became the purchaser, rendered in an action against him by a prior judgment creditor, does not affect the title of persons claiming under such creditor purchaser, by grant prior to the institution of the action, and who were not parties thereto.

Appeal from circuit court, Effingham county; WILLIAM C. JONES, Judge.

Ejectment by August Trum, trustee for J. & J. Slevin & Co., against Jane Hallorn and Thomas Cain. Judgment for plaintiff. Defendants appeal.

Wood Bros., for appellants. *S. F. Gilmore*, for appellee.

CRAIG, J. This was an action of ejectment brought by appellee against the appellants to recover a certain tract of land in Effingham county. Both parties claim under Anthony Veneman as a common source of title. It appears from the evidence that Anthony Veneman, on the 9th day of February, 1867, conveyed the land by deed to Joseph Veneman, which was recorded on the 16th day of same month. On the 24th day of July, 1867, Joseph executed a power of attorney to Anthony to sell the land. Both parties claim that the conveyance from Anthony to Joseph Veneman was fraudulent and void as against creditors, and each party claims title to the land under proceedings instituted in court to set aside the fraudulent conveyance, and subject the property to the payment of judgments recovered against the grantor, Joseph Veneman, and the real controversy between the parties is as to the priority of the respective titles. Slevin & Co., under whom appellee claims, obtained a judgment in the circuit court of the United States for the Southern district of Illinois against Anthony Veneman for \$1,711.12, on the 22d day of June, 1867. On the 24th day of July following they filed, in the same court, a creditors' bill against Anthony and Joseph Veneman, in which they alleged that the conveyance was fraudulent and void, and asked that they be enjoined from selling the premises, and that the deed be set aside. Process was issued against both defendants and on Anthony Veneman, August 2, 1867, and a decree *pro confesso* was entered against him January 6, 1870. No service, however, was had on Joseph Veneman. *Alias* summons issued against him October 30, 1867, which, with five others subsequently issued, were returned without service, for the reason that the defendant was a resident of Indiana. No publication was made until August 20, 1872, when due publication of notice, as required by the act of congress, was given, and a final decree was rendered in United States court March 3, 1873, setting aside the deed of Anthony to Joseph Veneman as fraudulent against Slevin & Co., and authorizing the master to sell lands embraced therein, which the master did, September 4, 1873, to John Slevin, one of the plaintiffs, for \$2,172.19. The master's deed to John Slevin under said decree to the land in controversy, and other land,

February 24, 1875, was duly recorded. The title thus acquired became vested in appellee before the commencement of this suit. The appellants relied upon title derived as follows: October 8, 1867, John B. Bruggeman recovered judgment in the circuit court of Effingham county against Anthony Veneman for \$722.18, upon which execution was issued, and returned no property found. September 8, 1871, Bruggeman filed a creditors' bill against Anthony Veneman and Joseph Veneman, to set aside the deed of February 9, 1867. Personal service on Anthony; affidavit of non-residence of other defendant filed, and first publication of notice made same day. Decree rendered April 5, 1872, that the deed was fraudulent and void, and the land embraced therein, including land in controversy, subject to Bruggeman's judgment. *Alias* execution issued on Bruggeman's judgment June 27, 1872, levied on land in controversy and other lands in said deed (excepting S. E. N. E. sec. 4-7-6) as property of Anthony Veneman. All sold to John B. Bruggeman at sheriff's sale July 25, 1872. Certificate filed and recorded. Sheriff's deed to John B. Bruggeman, November 15, 1873, and filed for record March 12, 1875. On the 21st January, 1875, Bruggeman conveyed to John F. Waschefort; deed recorded on 23d of same month. On April 3, 1884, the heirs of Waschefort conveyed to appellant Jane Hallorn.

No importance is to be attached to the fact that the judgment under which appellee claimed title was rendered prior to the rendition of the judgment under which appellant derived title. The legal title having passed from the judgment debtor before the rendition of either judgment by a valid deed as between him and his grantee, the judgments did not become liens on the lands conveyed in the order of their rendition. *Lyon v. Robbins*, 46 Ill. 277, is conclusive upon this question. The same rule, however, is laid down in *Miller v. Sherry*, 2 Wall. 248. Before the judgments were rendered, the judgment debtor, Anthony Veneman, had conveyed his lands. There was therefore no estate upon which the lien of a judgment could attach. In order, therefore, to determine the priority of lien between the two contesting creditors, we must look to the proceedings in equity instituted by them to remove the fraudulent conveyance and subject the lands to the satisfaction of these judgments. It will be observed that Slevin & Co., from whom appellee derived title, filed their bill to set aside the fraudulent conveyance on July 24, 1867; while Bruggeman, under whom appellant claims, did not file his bill until September 8, 1871. The latter, however, obtained the first service on Joseph Veneman, and also obtained the first decree setting aside the fraudulent deed. But it is insisted that Slevin & Co. were the most vigilant; that the filing of their bill, service on Anthony Veneman, one of the defendants, on August 2, 1867, issuing *alias* summons for Joseph Veneman, constituted *lis pendens*; that these acts gave them a prior equitable lien, and that the decree obtained by Bruggeman was subject to these prior liens on the premises. There is no difficulty in laying down a general rule in regard to the lien of judgments, executions, or creditors' bills. The rule is a familiar one that judgments become liens in the order in which they are rendered; executions become liens on personal property from the date of their delivery to the sheriff; while a creditors' bill, with proper and distinct averments as to the property attempted to be reached, will become a lien upon the filing of the bill and service of subpoena upon those who are proper parties defendant. A junior judgment creditor may obtain a prior lien by exhausting his remedy at law, and first invoking the aid of a court of equity by filing his bill and service of process. The trouble here is not in determining the general rules of law applicable to ordinary cases where a creditors' bill has been filed, for the general rules are well established and readily comprehended, but the only trouble we find is in adapting the well-settled rules of law to the particular facts established by the record before us. The commencement of a suit by filing a bill does not constitute *lis pendens* until summons or subpoena has been served. *Grant*

v. Bennett, 96 Ill. 513, is an authority on this question well sustained by the adjudication of other courts. In addition to the authorities cited in the Grant Case, we refer to *Boynston v. Rawson*, Clarke, Ch. (3d Ed.) 585, and the cases there cited. It is there said: "Upon filing a creditors' bill it is usual to take out both an injunction and subpoena,—an injunction to restrain the defendant from disposing of his property; a subpoena to compel him to answer the charge and discover his concealed property. By the service of process, the defendant is notified in an emphatic manner of the commencement of the suit. He is able to give notice of it to others. It would be the means of great wrong and injustice if a party could, by merely placing a bill among the mass of papers in the clerk's office, acquire a lien in this secret way to defeat subsequent *bona fide* purchasers, * * * or even subsequent creditors litigating in good faith. The filing of the bill should be followed up by service of process to acquire a lien; and its prosecution should be pursued with reasonable diligence to retain it." Here Slevin & Co. obtained service of process on Anthony Venemen before Bruggeman filed his bill, but Anthony had no interest whatever in the property he had conveyed to Joseph Veneman, and Joseph, the real party in interest, so far as the title to the land was concerned, was not brought into court until long after Bruggeman had filed his bill and obtained service upon both Anthony and Joseph Veneman. No decree could be rendered setting aside the sale until Joseph Veneman was brought into court. He held in his own name the title to the land, and we do not think the cause of Slevin & Co. could be regarded as *lis pendens* until service was had upon him. *Miller v. Sherry*, 2 Wall. 248, is a case in point. There, as here, in the bill first filed, the party to whom the lands had been fraudulently conveyed, was not brought into court, and it was held that the cause was not *lis pendens*; and the decree rendered on the second bill filed, where the person to whom the land had been conveyed was brought into court, was sustained. It is there said: "There is another reason why the bill could not operate as constructive notice: Williams, who held the legal title, was not a party. We apprehend that to affect a party as a purchaser *pendente lite* it is necessary to show that the holder of the legal title was impleaded before the purchase which is to be set aside. * * * The amended bill was undoubtedly sufficient, and it made Williams a party. But he was not served with process, and, if he had been, this bill could have operated only from the time of service. Where the question of *lis pendens* arises upon an amended bill, it is regarded as an original bill for that purpose." The fact that no act of congress provided for service by publication at the time the bill was filed is of no importance. This fact was known to Slevin & Co. when they brought the bill in the federal court, and, if they desired to obtain service and a decree in apt time, they should have brought their bill in the state court, where the law did authorize service by publication of notice.

One other question remains to be considered. On the 24th day of March, 1884, a decree was rendered in the circuit court of the United States for Southern district of Illinois, in which the proceedings in Effingham circuit court on Bruggeman's creditors' bill and his deed was vacated and set aside. Bruggeman was a party to this proceeding; but long before the suit was instituted resulting in the decree he had sold and conveyed the land, and his grantee was never made a party, although in possession of the land under proper deed of conveyance when the proceedings were instituted. Waschefort, the grantor of appellant, who purchased in 1875 of Bruggeman, was not a party to the proceeding, and, not being a party, the decree could not bind him, or affect his interest in the land, or the title of his grantee. The judgment will be reversed, and the cause remanded.

(125 Ill. 359)

HERDMAN *et ux.* v. COOPER, Sheriff, *et al.*

(Supreme Court of Illinois. June 16, 1888.)

ERROR, WRIT OF—FROM ILLINOIS SUPREME COURT—WHEN LIES—TITLE TO FREEHOLD—HOMESTEAD—REMEDIES.

In an action to determine whether land claimed as homestead is exempt from the lien of a judgment, error will not lie to the supreme court on the ground that the "freehold" is involved, within the meaning of Rev. St. Ill. c. 87, § 25, excepting such cases from the jurisdiction of the appellate courts.

Error to circuit court, Jefferson county; C. C. Boggs, Judge.

Bill by William H. Herdman and Mary A., his wife, against Samuel D. Cooper, sheriff, etc., and Joel F. Watson, to enjoin the sale of a certain lot levied on under an execution sued out on a judgment recovered by the defendant Watson against William H. Herdman. Plaintiffs claim the lot exempt as homestead. From a final decree dismissing the bill plaintiffs bring error to the supreme court. Rev. St. Ill. c. 87, § 25, provides that the appellate courts shall have jurisdiction of all appeals from the circuit courts "in any suit or proceeding at law or in chancery other than criminal cases and cases involving a franchise or freehold, or the validity of a statute."

Pollock & Pollock, for plaintiffs in error. G. B. Leonard and Albert Watson, for defendants in error.

SCOTT, J. This writ of error must be dismissed. It is very clear no freehold is involved in the present litigation, nor indeed any other question that would give this court jurisdiction in the first instance to hear and determine the cause. It should have been taken to the appellate court in the proper district. It is seen the bill was simply to enjoin the sale of a certain lot that had been levied upon by the sheriff, by virtue of an execution issued on a judgment in favor of one of defendants, and against one of complainants, on the ground it is and has been the homestead of the execution debtor. The only question made is, whether the property is subject to the lien of the judgment, and therefore liable to sale on the execution. It has been so frequently decided by this court that no freehold is directly involved in such cases, no further discussion is necessary. Previous decisions are conclusive upon the point made in this case against the jurisdiction of this court in the first instance. *Johns v. Boyd*, 117 Ill. 339, 7 N. E. Rep. 588; *Galbraith v. Plasters*, 101 Ill. 444. The parties will have leave to withdraw their respective briefs on each party paying his own costs for filing the same, and plaintiffs in error will have leave to withdraw the transcript of the record and their abstracts on paying the costs they have made in this court, if they desire to do so, for the purpose of filing the same in the appellate court for a writ of error. The writ of error will be dismissed.

(125 Ill. 313)

CLOUD v. GREASLEY *et al.*

(Supreme Court of Illinois. June 16, 1888.)

1. SPECIFIC PERFORMANCE—JURISDICTION—LAND IN ANOTHER STATE.

The courts of Illinois, where the parties have their residence, have jurisdiction to decree a specific performance of a contract whereby defendant agreed to convey to plaintiff a tract of land situated in Arkansas, in consideration of the erection by plaintiff of a house on defendant's lot in Illinois.

2. SAME—STATUTE OF FRAUDS—ORAL ACCEPTANCE OF WRITTEN PROPOSITION.

An oral acceptance of a written proposition by plaintiff to build a house for defendant, on terms therein specified, in exchange for land, is within the statute of frauds. To meet the requirements of the statute the whole of the contract must be in writing.

3. SAME—PART PERFORMANCE.

Where plaintiff agrees orally to furnish certain materials, and erect a house for defendant, for a conveyance of a tract of land, the furnishing of some materials,

and doing a small amount of work, (being willing to complete it,) and entering upon the land, which was vacant, without permission, is not such a part performance of the contract as will take it out of the statute.¹

4. SAME—PLEADING—DEMURRER.

Where it appears on the face of a bill for specific performance of a contract to convey land that the contract is not in writing, the objection that it is within the statute may be raised by demurrer.

Appeal from circuit court, Hamilton county; C. C. Boggs, Judge.

Bill for a specific performance of a contract to convey land, by C. G. Cloud against Kate Greasley and husband. The bill was dismissed on demurrer, and plaintiff appeals.

William Hamill, for appellant. *John C. Edwards* and *Leonidas Walker*, for appellees.

SCHOLFIELD, J. This is a bill for the specific performance of a contract to convey real estate lying wholly within the state of Arkansas. It is alleged in the bill, after stating the ownership of the real estate by Kate Greasley, one of the defendants, that on the 15th of March, 1887, she proposed to the complainant to convey the same to him in consideration that he should "furnish the material and carpenter work to build a frame-house for the said Kate on, [describing the lot,] in the town of McLeansborough; that complainant took the proposition under advisement, and afterwards wrote and delivered the following: "MCLEANSBOROUGH, ILL., April 12, 1887. *Mrs. Greasley*: I will furnish the oak lumber for sills, upper and lower joist, studding and rafters, (all the framing lumber,) and employ a carpenter to do all the carpenter work, in a good, workman-like manner, for a house, as specified in your diagram, for a warranty deed to the land you have in Arkansas; you to furnish abstract showing a clear title to the land. Respectfully, C. G. CLOUD." Afterwards Kate Greasley wrote the following in reply: "MCLEANSBOROUGH, ILL., April 16, 1887. *Mr. C. G. Cloud*: I find, on inquiring, that I can purchase all the hard and soft lumber and doors, for the house planned, at from \$250.00 to 260.00. I cannot accept the offer you made; but, if you can furnish all the hard and soft lumber and the doors, I shall be ready to make the deed, etc., to you. Respectfully, MRS. CATHERINE GREASLEY." On the same day, complainant wrote and delivered the following in reply to that: "MCLEANSBOROUGH, ILL., April 16, 1887. *Mrs. Greasley*: For the soft lumber and doors I would have to pay the cash. The carpenter work I can have done, paying with a claim due me. The carpenter says he will charge me \$80 to \$85 for doing the work. I will furnish the oak lumber for sills, upper and lower joists, studding and rafters, (all the framing lumber,) and employ a carpenter to do all the carpenter work, in a good, workman-like manner, for a house, as specified in your diagram, and furnish you 2,000 brick for the flues, for a warranty deed to land you have in Arkansas; you to furnish abstract showing a clear title to land. I seldom make more than one offer, but I have been at some trouble and expense in finding condition of the land, and will give you the brick,—more than I first thought I would. Respectfully, C. G. CLOUD." On the next following business day, Monday, the 18th day of April, 1887, the said Kate Greasley called at the place of business of complainant, and accepted the proposition as last above stated, and then and there contracted and agreed verbally, as she had theretofore, in her said writing dated April 16, 1887, agreed, to convey the real estate before described to complain-

¹ As to the part performance that will take a parol contract for the conveyance of land out of the statute of frauds, see *Martin v. Patterson*, (S. C.) 2 S. E. Rep. 859, and note; *Clark v. Clark*, (Ill.) 13 N. E. Rep. 553; *Gallagher v. Gallagher*, (W. Va.) 5 S. E. Rep. 297, and note; *Stub v. Grimes*, (Minn.) 37 N. W. Rep. 445; *Pitt v. Moore*, (N. C.) 5 S. E. Rep. 889; *Everett v. Dilley*, (Kau.) 17 Pac. Rep. 661; *Evans v. Miller*, (Minn.) 86 N. W. Rep. 646; *Reno v. Moss*, (Pa.) 18 Atl. Rep. 716; *Cutsinger v. Ballard*, (Ind.) 17 N. E. Rep. 206.

ant. It is then further alleged that complainant proceeded to deliver, on the lot of Kate Greasley, before described, all the hard lumber and material specified in said proposition, as aforesaid, for the building of said house specified in said written proposition of Kate Greasley; that on May 1, 1887, Thomas Greasley gave direction about making changes in the length of part of the timbers to be used in said house, and the size of the rooms thereof, and he directed a change in the cornice of the house; that at the request of said Kate and Thomas Greasley, her husband, complainant delivered the 2,000 brick mentioned in the contract,—the said Thomas going with the complainant to the brick-kiln, and making his own selection of said brick; that complainant, at different dates named, informed Kate Greasley that he was ready to proceed with the carpenter work, but she postponed the beginning of the work until the 23d day of July, 1887, when she informed complainant that she considered the contract broken; that complainant has in every particular complied with said contract and agreement; that, at the date of the agreement between complainant and Kate Greasley, the land in Arkansas, which she was to convey, was vacant and unoccupied, and in the month of July, 1887, complainant, through an agent, took possession, and that he has since been in possession; that he has requested Kate and Thomas Greasley to convey the land to him, but they refused to do so; that Kate Greasley is insolvent, and not worth above \$400 in personal property, nor above \$1,000 in real estate; and that he knows of no property belonging to Thomas Greasley except his household goods. The prayer is that Kate and Thomas Greasley be enjoined from conveying to other parties the land in Arkansas, and that they be decreed to convey the same to complainant, and for general relief. The defendant demurred to the bill, and for cause of demurrer alleged (1) "that said bill seeks to enforce a specific performance of a contract in regard to the sale and conveyance of real estate situated in the state of Arkansas. This, therefore, is a local action, and should be brought where the real estate is situated." (2) "That this is a suit upon an oral contract, and seeks to enforce such contract; the same being a contract in regard to the sale and conveyance of real estate." The court sustained the demurrer, and dismissed the bill; and this appeal is prosecuted to reverse that decree.

The first ground of demurrer is clearly not well taken. There being personal jurisdiction of the defendants, the decree acts directly upon the persons; and the defendants could therefore, if the case were in other respects made out, be compelled by decree to execute and deliver a conveyance of the Arkansas land. *Baker v. Rockabrand*, 118 Ill. 365, 8 N. E. Rep. 456; *Cooley v. Scarlett*, 38 Ill. 316; *Penn. v. Lord Baltimore*, 1 Ves. Sr. 444; *Massie v. Watts*, 6 Cranch, 148; *Brown v. Desmond*, 100 Mass. 267.

The second ground of demurrer is, however, in our opinion, well taken, and justifies the decree rendered by the court. An oral agreement for the conveyance of real estate cannot be enforced, either at law or in equity, where the objection that it is oral and not in writing is urged. The entire contract must be in writing to satisfy the statute. It will not be sufficient that the greater part of the contract is in writing; it must all be in writing. *Farwell v. Lowther*, 18 Ill. 252; *Seymour v. Belding*, 83 Ill. 222; *Weaver v. Fries*, 85 Ill. 356; *Frazer v. Howe*, 106 Ill. 574. There was here no contract until the acceptance of complainant's offer of April 16, 1887. All that preceded that was mere treaty. The bill alleges that the contract and agreement then made to convey was made verbally, though it was to convey as the defendant had theretofore in writing agreed to convey, etc. Without that verbal agreement there is no contract to convey to be enforced. The rule is, where it appears upon the face of the bill that the agreement to convey is oral, it may be taken advantage of by demurrer to the bill. *Walker v. Locke*, 5 Cush. 90; *Slack v. Black*, 109 Mass. 496; *Ahrend v. Odiorne*, 118 Mass. 268; *Farnham v. Clements*, 51 Me. 426; *Randall v. Howard*, 2 Black, 585. And, in principle,

to like effect is *Walker v. Ray*, 111 Ill. 315. The allegation of the bill shows that complainant was not put in possession of the land; but that, being vacant and unoccupied, his agent entered into possession. The mere doing of some work, and furnishing some building material, by the complainant for the defendant pursuant to the contract, is not sufficient part performance to take the case out of the statute of frauds. *Cronk v. Trumble*, 66 Ill. 428; *Padfield v. Padfield*, 92 Ill. 198; *Langston v. Bates*, 84 Ill. 524; *Pickrell v. Morss*, 97 Ill. 220; Fry, Spec. Perf. § 890. The decree is affirmed.

(125 Ill. 536)

SAMUELS *et ux.* v. DRAINAGE COMMISSIONERS.

(Supreme Court of Illinois. June 14, 1888.)

1. DRAINAGE—ASSESSMENTS—LIENS—FORECLOSURE.

Revenue Act. Ill., approved March 30, 1872, § 253, (Starr & C. St. Ill. c. 120, § 253,) providing that suits in equity may be instituted to foreclose liens for taxes on real estate, unpaid for two years, has no application to the enforcement of a judgment for drainage assessment under act Ill. approved June 27, 1885, § 72, providing for drainage for agricultural purposes, which enacts that an assessment thereunder shall be a lien on each tract if not paid on or before the annual sale of lands for taxes; the first-named act only applying to taxes and levies.

2. SAME—DRAINAGE COMMISSIONERS—RIGHT TO MAINTAIN ACTION.

Where complainants, in their corporate capacity as drainage commissioners, file a bill for the enforcement of the lien of a judgment for a drainage assessment, alleging the due organization of the drainage district, and the election of themselves as such commissioners, which is not denied, and there is such an office created by law, and complainants have assumed and exercised the powers thereof, complainants sufficiently appear to be officers *de facto*, and their official acts cannot be questioned in said cause.

3. SAME—ENFORCEMENT—DECREE—SALE BY MASTER IN CHANCERY.

Under the Illinois drainage act of June 27, 1885, § 72, which provides that any judgment for a drainage assessment recovered as therein provided, may be enforced and collected as other judgments in the same court, a decree authorizing a master in chancery to make sale of the lands assessed in the event of non-payment of the amount due is proper.

4. SAME—REMEDIES—CONSTITUTIONAL LAW—LEGISLATIVE POWERS.

Act Ill. approved June 27, 1885, § 72, concerning drainage, and providing that assessments made thereunder shall be a lien on the lands in the district, and that, if not paid before the annual sale of lands for taxes, the drainage commissioners may file a petition in the circuit court for a foreclosure of the lien, and that the commissioners may proceed in the corporate name to foreclose such lien as provided by law, is authorized by Const. Ill. art. 4, § 81, as amended by the people in 1878, which provides that the general assembly may pass laws permitting owners of land to construct drains across the lands of others for agricultural and sanitary purposes, and may provide for the organization of drainage districts, and vest the corporate authorities thereof with power to construct and maintain drains by special assessment upon the property benefited thereby.

Error to circuit court, Fulton county.

Bill to foreclose the lien of a drainage assessment, filed by the commissioners of the Central special drainage district of Mason county, Ill., against lands of James M. Samuels and Matilda Samuels. Decree for plaintiffs, from which defendants appealed. Act Ill. approved March 30, 1872, § 253, known as the "Revenue Act," (Starr & C. Ann. St. Ill. c. 120, § 255,) provides that suits in equity may be brought to foreclose liens for taxes on real estate, unpaid for two years. Const. Ill. art. 4, § 31, as amended by popular vote in 1878, provides that the general assembly may pass laws permitting owners of lands to construct drains across the lands of others for agricultural and sanitary purposes, and may provide for the organization of drainage districts, and vest the corporate authorities thereof with power to construct and maintain drains by special assessment upon the property benefited thereby.

Connolly & Mather and *Bliem & Hablit*, for plaintiffs in error. *E. A. Wallace*, for defendants in error.

SCOTT, J. The bill in this case was brought by the commissioners of the Central drainage district, in the county of Mason, against James M. Samuels and Matilda Samuels, to foreclose a lien claimed for drainage assessments against certain lands owned by defendants. The proceeding was commenced under section 72 of an act to provide for drainage for agricultural and sanitary purposes, and to repeal certain acts therein named, approved June 27, 1885. That section provides that the assessments made under said act shall be a lien on each tract assessed in the district; and, if the assessment is not paid on or before the annual sale of lands for non-payment of taxes, "the commissioners shall file a petition in the circuit court of the [proper] county for a foreclosure of such lien, and the commissioners may proceed in their corporate name and capacity to foreclose such lien as provided by law." It is conceded by counsel for defendants that the bill shows everything necessary for the creation of a lien under the section of the statute cited. It may therefore be assumed, in the brief discussion that is to follow, if the allegations of the bill are to be regarded as true, complainants are entitled to the relief asked for, unless some valid objection appears on the face of the record itself. On motion of defendants, the venue of the cause was changed from Mason county, where the suit was commenced, to Fulton county. Although a rule was laid upon defendants to answer the bill, neither of them filed any answer, but made default, and thereupon it was taken as confessed as to both of them. The cause was then referred to the master in chancery to take and report proofs, and it is then recited in the decree that the cause came on for "final hearing on bill, exhibits, and the default of" defendants, "and the bill taken for confessed against them; the report of the master in chancery, the documentary and oral proofs." It appears the court by its decree found that every material allegation of the bill was true, and decreed a foreclosure of the lien alleged to exist against the lands of defendants.

Only such errors are insisted upon as are thought to appear on the face of the record. It is said the bill shows the levy in the aggregate was \$113,862, and that the decree finds the aggregate to be a much less sum, and it is submitted that the decree is so uncertain and contradictory in this respect it should not be allowed to stand. The amended transcript of the record filed in this court shows the alleged error in this respect does not exist, and this suggestion of error need not be further considered.

It is also made a point against the present decree that the lien claimed is not foreclosed in the manner provided by law. The argument seems to be the proceedings to foreclose the lien for drainage assessments should be the same as provided by law for the foreclosure of tax liens on lands under section 253 of the revenue act. It is a sufficient answer to the position taken to say that section 253 of the revenue law has exclusive reference to the foreclosure of liens for taxes under the revenue law, and the consequent penalties, interest, and costs. It was never intended to apply to the foreclosure of liens for drainage assessments, which are quite a different thing from the ordinary revenue of the state. Section 72 of the drainage act provides a special proceeding for the foreclosure of the lien for drainage assessments, independent in itself; and that has been pursued in this case. It is expressly provided that the remedy given by that section "shall be taken and held as an additional means to enforce payment of such delinquent assessment." This view of the remedy provided by section 72 for the collection of drainage assessments renders it unnecessary to remark upon the constitutional objections insisted upon. The mode provided by section 72 for foreclosing the lien in such cases is clearly within section 31 of article 4 of the constitution, as amended by the popular vote in 1878. That section of the constitution would seem to confer upon the general assembly all necessary power in such matters, both as to levying and collecting special assessments upon property benefited and lying within the drainage districts organized under its provisions. As was said by this court

in *Huston v. Clark*, 112 Ill. 344: "The special amendment of the constitution adopted in 1878, so far as it invades the former limitations of the constitution, must prevail, and such limitations are not applicable to the subject-matter of this special assessment." There is nothing in the objection. The master in chancery is directed to make sale of the property in default of payment of the decree. Section 72 declares: "Any judgment so recovered may be enforced and collected as other judgments in the same court." That is sufficient authority for appointing the master in chancery to execute the judgment or decree of the court.

Lastly, it is said the assessment in question was made by persons having no authority either *de jure* or *de facto*, and is therefore void. It is not perceived how this question can arise on this record. But, if it does, it is not one that can prevail in this case. Whether the provision of the statute providing for the election of drainage commissioners is valid or not is a question that need not now be discussed. The legislature, by statute, has created, under constitutional authority, such an officer as commissioner of drainage districts. It is alleged the Central special drainage district, in Mason county, was duly organized under the act of the general assembly in force July 1, 1885, and that afterwards petitioners were elected commissioners, and that they entered upon their duties as such, and are now acting. The default of defendants admits these allegations of the bill, and the court found from the evidence such was the fact. There being such an office, and petitioners having assumed the duties of such office, and now acting commissioners of the drainage district, they are *de facto* officers; and their official acts will be held to be valid until their right to exercise the duties of such office is called in question by *quo warranto*, and they shall be dispossessed of all power under the statute. The judgment of the circuit court will be affirmed.

(147 Mass. 309)

JAYNES v. GOEPPER *et al.*

(Supreme Judicial Court of Massachusetts. Suffolk. June 21, 1888.)

EQUITY—PLEADING—BILL—MULTIFARIOUSNESS—LACHES.

A bill in equity alleged that plaintiff and the testator were in partnership,—plaintiff managing the business in St. Louis, and testator in Massachusetts; that testator represented that the business in Massachusetts was unprofitable, and worth less than \$20,000, whereas it was really worth \$200,000, and was very profitable, and thereby procured a dissolution of partnership, but that the plaintiff did not discover the fraud till after the testator's death, four years later. The bill was brought as soon thereafter as the law allows suits against executors. It further alleged that the testator had purchased property with partnership funds, and conveyed it without consideration, and prayed to have the dissolution set aside, for discovery, an accounting, and a conveyance of so much of the property conveyed without consideration as he might be found entitled to. The executors, heirs, devisees, and aforesaid grantees were made defendants. *Held*, that the bill was not multifarious, or demurrable on the ground of laches or otherwise.

Reserved case from supreme judicial court, Suffolk county; DEVENS, Judge. Bill in equity by Daniel W. Jaynes against Gustavus Geopper and Solon Bancroft, executors of one James H. Eames and Osgood A. Carter and others, devisees under the will of said Eames. The bill, as amended, was as follows: "First. In 1868 a copartnership was formed in St. Louis, Mo., between Daniel W. Jaynes, the plaintiff, and James H. Eames, under the firm name of Jaynes & Co., to carry on the business of cooperage, and manufacturing and selling barrels. The capital, at the outset, did not exceed \$500. The terms of the partnership were that the net profits of the business should be shared equally between said Jaynes and Eames. Second. In 1873 the firm extended its business, and established a factory in Cambridge, Mass., and of this branch of the business Eames took personal charge, while the St. Louis business was in charge of said Jaynes. The partnership agreement embraced both branches of business. Third. For the purpose of obtaining staves and

other materials to be used in the part of the business carried on at Cambridge, said Eames, as the plaintiff is informed and believes, and therefore alleges, afterwards purchased with said firm's money certain real estate and other property, or interests therein, the nature of which the plaintiff cannot more particularly state, being ignorant thereof, situated near Toledo, Ohio, and elsewhere, but where the plaintiff is unable to state, being ignorant thereof; and whether said Eames took the title to the same in the name of said firm or in his own name the plaintiff is ignorant and unable to state. *Fourth.* From 1873 to 1881, and especially from 1876 to 1881, said Jaynes was seldom in said Cambridge, and, when there, the arrangements made by said Eames were such that Jaynes had little opportunity to learn the actual state of that portion of the firm's business conducted there, except from the statements and representations of Eames. In 1876 said Eames represented to said Jaynes that the part of the business conducted at Cambridge had become a losing business, and that all the profits thereof had become absorbed by bad debts and other losses, and that the business was running behindhand, and he continued frequently to make the same representations to said Jaynes between the years 1876 and 1881; whereas, in truth and in fact, said business, during the time of these representations, was not a losing one, but was very profitable, and resulted in large profits and gains; and said representations by said Eames to said Jaynes were false and fraudulent, and made with intent to deceive and mislead the said Jaynes, and resulted in deceiving and misleading him as to the real condition of the business, and the amount of the partnership property, so far as the part thereof under the charge of said Eames, and connected with said Cambridge, was concerned; and said Eames fraudulently contrived to prevent said Jaynes from learning the real condition of the same, and to put him off his guard as to the same, and succeeded in so doing. During the same time the said Eames was frequently at St. Louis, and was familiar with the part of the business of the firm carried on there, and with its condition, and the value of the partnership property there, as well as with that at said Cambridge, and connected therewith, and with all the property and business of said firm. *Fifth.* On or about March, 1881, said Eames came to St. Louis, and proposed to said Jaynes that said partnership should be dissolved, and the partnership property divided; and the said Eames, as an inducement to the said Jaynes to consent to such dissolution and division, falsely and fraudulently, and with intent to deceive the said Jaynes, represented to him that all the property and assets of said firm which were connected with the part of the business theretofore under said Eames' charge at said Cambridge, including the property or interests therein purchased near Toledo or elsewhere, and including all notes, bills receivable, or other amounts due said firm for and on account of said portion of the business, amounted, after paying all debts or liabilities incurred for and on account of said part of the business, to less than \$20,000; and said Eames proposed that the said Jaynes should take, as his share of the partnership property, upon division, that portion thereof which belonged to or was connected with the business of the firm theretofore carried on in said St. Louis under the charge of said Jaynes, together with the notes, bills receivable, or other debts due to said firm for or on account of said portion of said business, which amounted, and which the said Eames knew amounted, after paying all debts, to about the sum of \$20,000; and that he, the said Eames, should take as his share, upon division, that portion thereof which belonged to or was connected with the business of said firm theretofore carried on at said Cambridge under the charge of the said Eames, including the property or interests therein so as aforesaid purchased near Toledo or elsewhere, together with the notes, bills receivable, or other debts due to said firm for or on account of said portion of said business. And the said Eames falsely and fraudulently, and with intent to deceive, repeatedly assured the said Jaynes that such proposed division was an equal one, and would transfer to said Jaynes as large a por-

tion of the partnership assets and property as would be received by him, said Eames; all of which statements and representations the said Eames knew to be false. And the said Jaynes, relying upon said representations, and believing them to be true, and trusting to the said Eames' supposed honesty in making them, agreed to the said Eames proposition for a dissolution of said partnership, and division of the assets and property thereof in the manner proposed by said Eames; and thereupon a certain instrument or instruments in writing, the purport of which was to dissolve said partnership according to the proposals of said Eames, were drawn up and signed, as the plaintiff believes, by the said Eames and the said Jaynes, as by the contents of said instrument or instruments, when produced, will more fully appear; and the plaintiff is unable to set forth in detail the terms or provisions of said instrument or instruments, because the copy thereof received by him has been destroyed by an accidental fire; and the plaintiff believes that the date of said pretended dissolution, and of said instrument or instruments, was March 17, 1881. *Sixth.* And the plaintiff says that the statements, representations, and assurances above set forth, made by the said Eames to him, and upon the faith of which said pretended dissolution and division of property were made, were without foundation, and wholly false and fraudulent; that, at the time they were made, the property and assets of said firm connected with that portion of the business under the charge of said Eames, and in said pretended dissolution and division conveyed to him, amounted in value to about \$200,000, and that this was well known to the said Eames at the time he made said statements, representations, and assurances. *Seventh.* The plaintiff did not know, or in any manner learn, that the statements, representations, and assurances aforesaid, made to him by the said Eames, were false, but believed the same to be true until about the middle of June, 1885, when he was informed that they were false and untrue, and that the property, and assets connected with the business in Cambridge, and conveyed to said Eames in pretended dissolution and division, amounted, at the time of said conveyance, to much more than \$20,000, to-wit, to the sum of about \$200,000. *Eighth.* And the plaintiff is informed and believes, and therefore alleges, that through the fraud of the said James H. Eames, and without the knowledge or assent of the plaintiff, certain money belonging to the said partnership was taken, in violation of said plaintiff's right, and was invested in real estate in Sycamore, in the county of De Kalb, and state of Illinois, which said real estate was given by said James H. Eames to his wife, Elizabeth B. Eames, one of the defendants, and is now held by her, although she has never paid any consideration therefor, and the same belongs in equity to said plaintiff as part of his share of the partnership property." The bill then contained further allegations that the said Eames had invested certain sums, in violation of the plaintiff's rights, in real and personal property which had been conveyed, without consideration, to certain of the defendants named. The plaintiff also averred that he was unable to state the dates of the transactions last mentioned, or the amounts of money withdrawn from the partnership assets, but that he believed the amounts to be large, and the dates and amounts were upon the books and papers in the hands of the said executors. The bill also alleged said Eames died June 17, 1885; that the defendants Bancroft and Goepfer were the executors of the said Eames, being appointed on March 3, 1886, and that on April, 17, 1886, plaintiff brought his bill in equity; that the defendant's executors demurred to the bill on the ground that it was prematurely brought, under the statute of this commonwealth limiting actions against executors and administrators; and the plaintiff, being advised that said demurrer was well taken in law, discontinued said bill, and, after the lapse of time limited by said statute, brought the present bill. The bill alleged, further, that the property which said Eames undertook to dispose of by will was the property of the partnership, and had never been accounted for

by said Eames with said Jaynes, and that all the books and papers relating to the property of the firm are in the hands of the executors, and that there are no debts of said partnership outstanding. The plaintiff prayed "that the court will declare said agreement for dissolution of partnership to be void, and decree that said Bancroft and Goepper produce the same, together with the other instruments, if any, executed in pursuance of said agreement, and deliver them up to be canceled; that the defendants Bancroft and Goepper set forth a list of all books, papers, etc., in any way relating to the partnership; that an account may be taken between the defendant's executors and the plaintiff of all dealings and transactions between the said Eames and said Jaynes in matters relating to said partnership or covered by said partnership agreements, and of all the business transactions and property of said firm of Jaynes & Co. from the formation of the partnership, in 1868, to the attempted dissolution of the same, in 1881, and of all the profits, accretions, and accumulations thereof. The plaintiff also prayed that the other defendants be decreed to convey to the plaintiff the property received by them from said Eames, or as the latter's devisees, or so much of the same as should, on accounting, be found due the plaintiff. The defendants demurred to the bill, assigning in their several demurrers various grounds of demurrer, including want of equity and laches. At the hearing in the supreme judicial court before DEVENS, J., the demurrers were all overruled, and the case reserved for the full court.

S. Bancroft, for certain defendants.

Upon the allegations made in the plaintiff's bill, it cannot be maintained as a bill for discovery, inasmuch as it only seeks the disclosure of matters which, during a long course of dealings between the plaintiff and the deceased, James H. Eames, were constantly open to the inspection of the plaintiff equally with the said Eames. Where one partner is intrusted with the management of the partnership concern, as, in the case presented, was the fact with each as to the business of his location, even if the managing partner withdraws moneys for his separate use, which he duly and openly enters upon the partnership books, as is alleged in the plaintiff's bill in this suit, it has been constantly held there is no fraud which will give the joint estate any claim against the estate of the partner. See *Ex parte Smith*, 6 Mad. 2, which lays down the principle which has been subsequently followed. The defendant Emory B. Eames, while asking the court to consider the various points suggested by the other defendants, so far as they may be applicable to the case presented against him, submits that he is not a devisee under the will of James H. Eames, and that the action cannot be maintained against him, but, if against any one, on account of any interest which may accrue to his benefit from said James' estate, it should be against the trustee to whom the property is devised. The defendants Osgood A. Carter, Sarah A. Mason, Arthur Mason, Addie E. Carter, Harriet E. Sands, and John Sands submit to the court, while relying upon the several points raised by the other defendants so far as the same are applicable to the case stated against them, that, as devisees of real estate, they are entitled to all the rents and profits of the real estate devised to them, unless and until the said real estate shall be required to be disposed of by the executors, under direction of the proper court, for the payment of liabilities of the estate of the deceased; and that, under the general and universally understood laws of this commonwealth relating to the settlement of estates, the plaintiff cannot maintain his bill for the purpose of obtaining the relief prayed for in the last clause of the sixth prayer of his bill.

Charles J. McIntire, for defendant Marks.

The plaintiff has stated no case which will entitle him to relief or discovery. *Pasley v. Freeman*, 3 Term. R. 51. If a person does not avail himself of the

knowledge or means of knowledge, open to himself, he cannot be heard to say that he was deceived by representations made to him after the manner of traders' talk and representations of value. *Attwood v. Small*, 6 Clark & F. 233; *Dillman v. Nadlehoffer*, (Ill.) 7 N. E. Rep. 90; *Stephens v. Orman*, 10 Fla. 9; *Hoitt v. Holcomb*, 32 N. H. 185, 202, 205; *Veasey v. Doton*, 3 Allen, 380; *Mooney v. Miller*, 102 Mass. 217, 220; *Brown v. Castles*, 11 Cush. 348; *Dickinson v. Lee*, 106 Mass. 557; *Poland v. Brownell*, 131 Mass. 138; 2 Kent, Comm. 484, 485; *Wissler v. Craig*, 80 Va. 22; *Burwell v. Fauber*, 21 Grat. 446; *Cordova v. Hood*, 17 Wall. 1, 8; *Hencken v. Insurance Co.*, 11 Daly, 282. His remedy is not in equity. Story, Partn. (7th Ed.) §§ 269, 284, 275; 3 Kent, Comm. 53; *Peacock v. Peacock*, 16 Ves. 49, 56; *Skinner v. Dayton*, 19 Johns. 536; *Marston v. Gould*, 69 N. Y. 220; *Heath v. Sansom*, 4 Barn. & Adol. 172; *Miles v. Thomas*, 9 Sim. 606; *Nerot v. Burnand*, 4 Russ. 271, 260; *Carlton v. Cummins* 51 Ind. 478. It is only when the partnership is for a definite period that partners are obliged to seek a court of equity for a dissolution. *Smith v. Everett*, 126 Mass. 304. "It would be a dangerous precedent; it would endanger the estates of the dead; it would render the rights of the living uncertain and insecure; it would open the door for the introduction of stale claims, which it has well been said have often more of cruelty than justice in them,"—to favor this bill. *Wright v. Paine*, 34 Amer. Rep. 30, 62 Ala. 340; *McGivney v. McGivney*, 142 Mass. 156, 7 N. E. Rep. 721; *Nudd v. Powers*, 136 Mass. 273; *Bank v. Railroad Co.*, 125 Mass. 490, 494, 495; *Harrison v. Gibson*, 23 Grat. 213; *Mooers v. White*, 6 Johns. Ch. 360, 368. A decree for an account should be denied in every case where it appears that plaintiff's laches has rendered impossible for the court to do full justice to all parties, whether the infirmity consists of the death of a party, loss of evidence, or other cause. *Stout v. Seabrook*, 30 N. J. Eq. 190; *Peabody v. Flint*, 6 Allen, 52; *Maxwell v. Kennedy*, 8 How. 222; *Tash v. Adams*, 10 Cush. 252; *Fuller v. Melrose*, 1 Allen, 166. The bill is multifarious and uncertain. A bill embracing distinct matters, affecting distinct parties, who have no common interest in the distinct matters, is multifarious. *Metcalf v. Cady*, 8 Allen, 587; *Pope v. Leonard*, 115 Mass. 288; *Water-Works v. Bleaching Co.*, 14 Gray, 193. The several defendants ought not to be subjected to disadvantage and expense of meeting and answering charges of fraud against the others, with whom they have no connection. *Sanborn v. Duinell*, 135 Mass. 236.

A. E. Pillsbury, for defendants Elizabeth B. Eames and Ida L. Nelson.

It does not appear that any specific thing which was ever the property of the partnership has ever passed into or is in the hands or possession of any of the defendants. The plaintiff has therefore no claim to possession of it, *in specie*, as surviving partner or otherwise. *Johnson v. Ames*, 11 Pick. 173, 180; *Trecothick v. Austin*, 4 Mason, 29, cited and approved in *Andrews v. Bank*, 3 Allen, 314; *Attorney General v. Brigham*, 142 Mass. 248, 7 N. E. Rep. 851, and cases cited. The plaintiff does not appear to claim the specific property in the hands of the various defendants in the capacity of surviving partner, and such a claim could not be maintained, even if the property appeared to have been partnership property. The reason of the rule which allows a surviving partner to take and administer the partnership assets is wanting. The partnership was dissolved by Eames' act, independently of Jaynes' assent. Pars. Partn. 401, 405. This leaves no foundation for the prayer that the dissolution be decreed void. The allegation that the purchases were made "through the fraud of said Eames" does not cure the difficulty. It is too indefinite. And this may be said of the allegations of fraud generally throughout the bill. *Nichols v. Rogers*, 139 Mass. 146, 150; 1 Daniell, Ch. Pl. 324; Story, Eq. Pl. 251. It is at most a conclusion. The facts disclosed, not only fail to support it, but they are consistent with the honesty and propriety of

the whole transaction. General allegations will be taken to refer to the particular facts disclosed. *Munday v. Knight*, 3 Hare, 497; *Evon v. Avon*, 29 Beav. 144. The means of knowledge is equivalent to the knowledge itself. *Farnam v. Brooks*, 9 Pick. 244; *Nudd v. Hamblin*, 8 Allen, 130; *Cole v. McGlathry*, 9 Greenl. 131. The plaintiff cannot, in any view, reach the property said to have been conveyed by Eames to the defendants in his life-time. See *Locke v. Lewis*, 124 Mass. 1, and cases cited. A merely voluntary conveyance is good as against subsequent creditors. *Thacher v. Phinney*, 7 Allen, 146; *Winchester v. Charter*, 12 Allen, 606. It is well settled in Massachusetts that no trust resulted to Eames from the conveyances alleged. *Gould v. Lynde*, 114 Mass. 366; *Keyes v. Carleton*, 141 Mass. 45, 6 N. E. Rep. 524. Nor even if it is assumed that the money with which Eames purchased the property in question belonged in part to Jaynes, which is assuming more than the bill shows, is there any trust resulting to Jaynes from the transaction. *McGowan v. McGowan*, 14 Gray, 119; *Buok v. Warren*, Id. 122; *Fickett v. Durham*, 109 Mass. 419; *Peirce v. Colcord*, 113 Mass. 372; *Snow v. Paine*, 114 Mass. 520, 526; *Bresnihan v. Sheehan*, 125 Mass. 11, 13. The transaction, viewed most favorably to the plaintiff, was no more than a misappropriation of firm money by Eames to his own uses. It does not come within the doctrine of the leading case of *Dyer v. Clark*, 5 Metc. 562, as to partnership trusts. The bill cannot be maintained as under Pub. St. c. 151, § 3. The claim even against the executors is not a "debt" in the sense of the statute; the property in the hands of the executors was never "fraudulently conveyed" by Eames; and there is no allegation that the property said to have been conveyed by him in his life-time to other defendants was so conveyed "with intent to defeat, delay, or defraud creditors." If the plaintiff is not entitled to the relief sought, he cannot maintain the bill for discovery. *Walker v. Brooks*, 125 Mass. 241, 243, and cases cited; *Emery v. Bidwell*, 140 Mass. 271, 275, 3 N. E. Rep. 24. The plaintiff's delay in asserting his pretended claims is, under the circumstances, inexcusable, and ought to defeat his bill. *Farnam v. Brooks*, 9 Pick. 212, 245. The means of discovering a fraud are equivalent to discovery and knowledge. *Farnam v. Brooks*, *ubi supra*; *Nudd v. Hamblin*, 8 Allen, 130, and cases cited; *Learned v. Foster*, 117 Mass. 365. The doctrine of laches is in principle analogous to that of estoppel *in pais*. If the plaintiff has lain by until the situation is changed, or until, by lapse of time or the operation of natural causes or otherwise, the means of defending are lost or materially impaired, equity will refuse relief, and remit him to his legal rights, such as they may be. *Codman v. Rogers*, 10 Pick. 112; *Bank v. Railroad Co.*, 125 Mass. 490, and cases cited; *Bronon v. County of Buena Vista*, 95 U. S. 157, 161. Laches is not measured by the period of statutory limitation. A claim may be bad for laches, though not barred by any statute. *Codman v. Rogers*, *ubi supra*; *Phillips v. Rogers*, 12 Metc. 405, 410; *Evans v. Bacon*, 99 Mass. 213. In *Railroad Co. v. Bartlett*, 10 Gray, 384, a delay of three years, during which there was an increase in the value of the land, was held to defeat a bill for specific performance. In *Peabody v. Flint*, 6 Allen, 52, a mere delay of three years and a half was held to defeat a bill by stockholders of a corporation to set aside certain contracts fraudulently made by the directors. See, also, *Plymouth v. Russell Mills*, 7 Allen, 438, 444; *Codman v. Rogers*, *ubi supra*. The application of the doctrine of laches being, to a certain extent, discretionary, it is proper for the court to consider the fact that the plaintiff still retains a remedy at law against the executors if this bill is dismissed. Pub. St. c. 136, § 12; Id. c. 197, §§ 13, 14. If the plaintiff has not stated a case which would have entitled him to maintain a bill in equity prior to St. 1883, c. 223, that statute (section 17) will not enable him to maintain this bill as a bill in equity. If the statute aids him at all, it can be only to the extent of enabling him to formally amend the bill into an action at law. This, if asked, ought not to

be allowed at this stage, especially as he can commence an action at law at any time upon dismissal of this bill. Pub. St. c. 136, § 12; Id. c. 197, §§ 13, 14. See, also, *Gove v. Learoyd*, 140 Mass. 524, 5 N. E. Rep. 499; *Sherman v. Galbraith*, 141 Mass. 440, 5 N. E. Rep. 858. Nor will St. 1887, c. 383, enable the bill to be maintained as a bill in equity. No statute, though merely remedial, is to affect cases pending at its passage, unless its terms or character indicate that it was so intended. *Hill v. Duncan*, 110 Mass. 238; *Fickett v. Durham*, 119 Mass. 159; *Bucher v. Railroad Co.*, 131 Mass. 156, and cases cited. The terms of the statute, prescribing how actions may be commenced, etc., indicate that it was not designed to apply to actions commenced before its passage; *i. e.*, before it took effect. All its terms can be satisfied by this construction.

Bishop & Wigglesworth, for plaintiff.

That the objects of the bill are properly sought by a suit in equity is shown by the following cases: *Smith v. Everett*, 126 Mass. 304; *Maddeford v. Austwick*, 1 Sim. 89; *Chase v. Garvin*, 19 Me. 211; *King v. Leighton*, 22 Hun, 419; *Plestown v. Johnson*, 1 Smale & G. 20; *Pomeroy v. Benton*, 57 Mo. 531. That there has been no laches in the present case is sufficiently shown by the authorities cited above. Besides the authorities cited above, see *Vernon v. Vaudry*, 2 Atk. 119, in which relief was granted 20 years after the fraud was committed, and long after the death of the defendant. The bill is not multifarious. *McCabe v. Bellows*, 1 Allen, 269; *Lenz v. Prescott*, 144 Mass. 505, 513, 11 N. E. Rep. 923; *Hagan v. Walker*, 14 How. 29, 34, 35; *Gaines v. Chew*, 2 How. 619; *Inman v. Wearing*, 3 De Gex & S. 729, 732; *Hamp v. Robinson*, 3 De Gex, J. & S. 97, 108; *Salvidge v. Hyde*, 5 Madd. 138; *Webb v. Helion*, 3 Rob. (N. Y.) 625; *Wade v. Rusher*, 4 Bosw. 537; *Monroe v. Hamilton*, 47 Ala. 217; *Dilworth v. Mayfield*, 36 Miss. 40; *Cannon v. Copeland*, 43 Ala. 201. See, also, *Sears v. Carrier*, 4 Allen, 339, 341; *Turner v. Robinson*, 1 Sim. & S. 313; *Parr v. Attorney General*, 8 Clark & F. 409. The bill distinctly alleges that there are no outstanding debts of the partnership; for, if there were, Mr. Jaynes could not claim any of the firm property for himself till the debts of the firm were paid. *Williamson v. Haycock*, 11 Iowa, 40; *Sears v. Hardy*, 120 Mass. 524. Notes on cases cited by the various defendants at the previous argument: *Johnson v. Ames*, 11 Pick. 173, is entirely different from the present case, where the plaintiff knew nothing of the fraud practiced on him, and never assented to what the defendant did in the matter. *Andrews v. Bank*, 3 Allen, 314, is simply to the same effect, but in that case it was held that the property could be traced, and it was therefore subject to the trust. In *Farnam v. Brooks* there was no fraud. The case of *Nudd v. Hamblin* is one in which, as the court say on page 132, there was no concealment by false representations, and there was no judiciary relation between the parties. It was a case of trespass on land, and the defense was the statute of limitations. *Cole v. McGlathry* was a case where the defendant received money from the plaintiff to pay to a third party, and falsely stated that he had done so. *Nichols v. Rogers*, 139 Mass. 146, 150, cited by the defendants, is simply a case in which the court say that it does not appear that the acts charged in the amended bill were done before the filing of the bill. *Gould v. Lynde*, 114 Mass. 366, and *Keyes v. Carleton*, 141 Mass. 45, 6 N. E. Rep. 524, are authorities that a voluntary conveyance or settlement may be binding on the grantor; but the rule has no application to Jaynes, who never joined in any such conveyances. *McGowan v. McGowan*, 14 Gray, 119, and *Buck v. Warren*, Id. 122, note, were cases in which the plaintiffs paid a portion of the purchase money for some real estate, and did not stipulate that the money so supplied by them should be applied to the purchase of any particular portion of the land, and it was held that there was no resulting trust. In the present case, however, all the money devoted to the pur-

chase of the property which was given away by Eames was partnership money, and these purchases were made by Eames without any knowledge or consent on the part of Jaynes. *Fickett v. Durham*, 109 Mass. 419, was simply a promise to discharge an indebtedness by giving an interest in land. There was no question of resulting trust involved. *Pierce v. Colcord*, 113 Mass. 372, has no application to the present case. In *Codman v. Rogers*, 10 Pick. 112, and in *Phillips v. Rogers*, 12 Metc. 405, the plaintiff knew of his rights, and he might have enforced them by asking for a decree for distribution. In *Bank v. Railroad Co.*, 125 Mass. 490, 494, it is said: "The right of a party injured to rescind a fraudulent transaction remains only for a reasonable time after the discovery of the fraud." In *Railroad Co. v. Bartlett*, 10 Gray, 384, no steps had been taken by the plaintiff to enforce the agreement, and never could the plaintiff itself have been forced to take the land, for it had not signed any agreement. *Nudd v. Powers*, 136 Mass. 273, is cited by defendants, but it is a very good authority for the plaintiff. See pages 277, 278. *Plymouth v. Russell Mills*, 7 Allen, 438, decides that an unexplained delay of more than four years after the discovery of new and material evidence is such laches as will defeat a bill in equity to set aside an award on that ground. In *Stout v. Seabrook*, 30 N. J. Eq. 190, 191, it is said that "every fact now known to the complainant was known to him in 1867. The bill was filed May 20, 1874." This was held to be laches. In *Wright v. Paine*, 34 Amer. Rep. 30, 62 Ala. 340, and in *McGioney v. McGioney*, 142 Mass. 156, 7 N. E. Rep. 721, the plaintiff knew of his rights, and did nothing for 20 years, whereby an innocent third party was led to abandon a remedy which he had. The objection of multifariousness was not taken by all the defendants, but was by some of them. Only two authorities were cited, viz., *Metcalf v. Cady*, 8 Allen, 589, and *Sanborn v. Dwinell*, 135 Mass. 236. The following authorities were cited, also, as to the want of equity: 2 Kent, Comm. 485, relates simply to *caveat emptor*, and has no application to a case of partnership where one partner, by means of superior knowledge, has defrauded the other. *Hoitt v. Holcomb*, 32 N. H. 202, 205, was a case in which it was held that *caveat emptor* had no application, although a sheriff who was deceived as to his deputy's neglect, and for that reason released the surety on the deputy's bond, had made no inquiries whatsoever as to what his deputy had done, from the persons for whom he had been acting. In *Attwood v. Small*, 6 Clark & F. 233, the purchasers employed experts to examine the mine, and left one of their number for a time on the premises to make further examinations and to report. Then they took the mine, and worked it for six months, to its damage, and then brought their bill. The case itself, and the cases cited in the notes, have many statements favorable to the plaintiff in the present suit. In *Poland v. Brownell*, 131 Mass. 138, it was held that the seller's statements were not actionable where the plaintiff had full opportunity to inspect the goods, and examine the books, and did so. *Pasley v. Freeman*, 3 Term R. 51. Action at law may be brought in cases analogous to deceit. *Dillman v. Nadleffer*, 7 N. E. Rep. 90: "Where the contracting parties for any cause are not on equal terms, and such representations are gross exaggerations, resulting in an unconscionable bargain, equity will not hesitate to interpose in favor of the injured party."

C. ALLEN, J. We are of the opinion that the averments of the plaintiff's bill are sufficient. The criticisms of the defendants are, in substance, that the bill does not sufficiently show that the plaintiff was entitled to one-half of the assets of the firm, or that, by the settlement as made, he did not get one-half of the assets, or that he was induced to make the settlement by false and fraudulent representations by Eames. But, taking the whole bill together, it sufficiently avers a fraud, which, if proven, will entitle the plaintiff to have the settlement of the partnership opened. If the plaintiff was fraudulently

induced to make a division of the partnership property, by which he got less than he was entitled to, as alleged, no laches appears from the facts stated in the bill which should defeat his equitable right. The bill contains full averments that the various defendants, other than the executors and devisees of Eames, took their gifts from him without consideration; and that the money used to purchase said gifts, as well as all the property left by Eames, was property belonging to the partnership. The bill is not multifarious. The demurrers were properly overruled.

(147 Mass. 348)

MINOT v. BAKER *et al.*

(Supreme Judicial Court of Massachusetts. Norfolk. July 10, 1888.)

1. CHARITIES—BEQUEST TO CHARITABLE USES—JURISDICTION OF EQUITY.

A testator left the residue of his estate to a trustee "to be disposed of by him for such charitable purposes as he shall think proper." The trustee died, having rendered no account to the probate court, and having disposed of only a small portion of the residuary estate in his hands for charitable purposes. *Held*, that the gift was unconditional, and should be applied to charitable purposes according to a scheme under the direction of the court.

2. SAME—CONSTRUCTION.

A testator deposited a certain sum with a trustee to pay the annual interest to a beneficiary, unless it was added to the principal sum, and, after the death of the beneficiary, to pay the amount of the principal sum to the testator, his executors or administrators. The beneficiary was allowed, by the terms of the deposit, to have the interest added to the principal in order to increase it, and this was done for several years, and until the death of the beneficiary. The testator in his will gave the residue of his estate to charitable purposes. *Held*, upon the death of the beneficiary after the death of the testator, that the amount deposited as above, together with the additions of interest, went to form the residue of the testator's estate, and was to be devoted to charitable purposes.

Reported case from supreme judicial court; DEVENS, Judge.

Bill in equity for instructions, brought by William Minot, Jr., administrator *de bonis non* with the will annexed of Capt. John Percival, against Sarah B. Baker and others, next of kin of the testator. The attorney general appeared, and filed an answer, claiming that the will of the testator established a lawful and valid trust for charitable uses, and that the equitable jurisdiction of the court was sufficient to establish such charity, and determine a scheme to regulate the investment and distribution of such charity. The case was heard in the supreme judicial court before DEVENS, J., and reported to the full court.

Stephen H. Phillips, for the Commonwealth.

I am requested by the attorney general to confine my argument in his name chiefly to suggesting, that indeterminate charities can be maintained by the peculiar agencies of a court of chancery through the intervention of a trustee. This court need not be reminded that recently, and in this very controversy, it has emphasized the sufficiency of such agencies, and has indicated the practicableness of giving force and direction to manifestations of charitable purposes exceptionally vague. *White v. Ditson*, 140 Mass. 353, 4 N. E. Rep. 606. See, also, *Loring v. Marsh*, 2 Cliff. 469, 6 Wall. 337; *Marsh v. Renton*, 99 Mass. 132; *Bliss v. Society*, 2 Allen, 334; *Washburn v. Sewall*, 9 Metc. 280; *Tud. Char. Trusts*, 212. By the residuary clause of the will, a trust for charitable uses is created, which, although indeterminate, a court of chancery is competent to administer. *Saltonstall v. Sanders*, 11 Allen, 453; *Tud. Char. Trusts*, 212; *Const. Mass. c. 6, art. 6*; *Jackson v. Phillips*, 14 Allen, 567. By the law of England, as set forth in Lord HARDWICKE's decisions, there is no doubt that "where testators have not any particular person in their contemplation, but leave it to the discretion of a trustee to choose out the objects, though such person is private, and each particular object may be said to be private, yet, in the extensiveness of the benefit accruing from them, they may

very properly be called public charities." *Attorney General v. Gleg*, 1 Atk. 356; *Attorney General v. Pearce*, 2 Atk. 87; *Cook v. Duckenfield*, Id. 567; *Jemmit v. Verril*, Amb. 585; *Attorney General v. Johnson*, Id. 190; *Attorney General v. Bucknall*, 2 Atk. 328. And this is the general doctrine of a long line of English cases. The same doctrines have been sustained in the subsequent cases of *Attorney General v. Whitechurch*, 3 Ves. 144; *Bishop v. Adams*, 7 Ves. 324; *Howse v. Chapman*, 4 Ves. 542; *Paice v. Archbishop of Canterbury*, 14 Ves. 364; *Powell v. Attorney General*, 3 Mer. 48; *Curtis v. Hutton*, 14 Ves. 539; *Attorney General v. Price*, 17 Ves. 371; *Isaac v. De Friez*, Id. 373, note; *Waldo v. Caley*, 16 Ves. 206; *Attorney General v. London*, 3 Brown, Ch. 171, 1 Ves. Jr. 243; *Mills v. Farmer*, 19 Ves. 483; *Legge v. Asgill*, Turn. & R. 265, note; *Moggridge v. Thackwell*, 7 Ves. 36; *Attorney General v. Lonsdale*, 1 Sim. 105; *Mills v. Farmer*, 1 Mer. 94; *Sorresby v. Hollins*, 9 Mod. 221; *Horde v. Earl of Suffolk*, 2 Mylne & K. 59; *Baker v. Sutton*, 1 Keen, 224; *Attorney General v. Comber*, 2 Sim. & S. 93; *Mitford v. Reynolds*, 1 Phil. Ch. 192; *Nash v. Morley*, 5 Beav. 177; *Attorney General v. Gladstone*, 13 Sim. 7; *Edwards v. Hall*, 6 De Gex, M. & G. 79; *Attorney General v. Stepney*, 10 Ves. 22; *College v. Attorney General*, 6 H. L. Cas. 205; *Kirkbank v. Hudson*, 7 Price, 213; *Hill v. Burns*, 2 Wils. & S. 80; *Crichton v. Grierson*, 3 Bligh, (N. S.) 434; *Mayor v. Ryder*, 5 De Gex, M. & G. 353; *Powerscourt v. Powerscourt*, 1 Moll. 616; *Whicker v. Hume*, 14 Beav. 511; *Philpott v. Hospital*, 6 H. L. Cas. 338. No American lawyer can thoroughly investigate the law of charities without observing the *Smithsonian Case*, cited in *Whicker v. Hume*, 7 H. L. Cas. 124. The general English rule is that a "bequest is not void if by law it can possibly be made good." *Sorresby v. Hollins*, 9 Mod. 221; *Curtis v. Hutton*, 14 Ves. 539; *Mayor v. Ryder*, 5 De Gex, M. & G. 353; *Edwards v. Hall*, 11 Hare, 12; *Whicker v. Hume*, 7 H. L. Cas. 154. There is some criticism in English cases as to the use of the word "benevolent," as distinguished from "charitable." *Williams v. Ker-shaw*, cited in 5 Clark & F. 111; *James v. Allern*, 3 Mer. 17; *Ommanney v. Butcher*, Turn. & R. 260; *Morice v. Bishop*, 10 Ves. 521; *Nash v. Morley*, 5 Beav. 183; *Ellis v. Selby*, 1 Mylne & C. 286; *Kendall v. Granger*, 5 Beav. 300. But none of these difficulties can be suggested where the word "charitable" is also employed, for courts will save the charity if possible; and, where the charitable intent clearly appears, if the terms are broad enough to include a lawful and unlawful use, the courts will hold it valid, and restrict it to a lawful use. *Sorresby v. Hollins*, *supra*; *Attorney General v. Whitechurch*, 3 Ves. 144; *Philpott v. Hospital*, 6 H. L. Cas. 338; *Dent v. Allcroft*, 30 Beav. 340. The English law of charities, therefore, is in force as part of an inherent equity jurisdiction. It is older and much more comprehensive than the redoubtable statute of 43 Eliz. c. 4, and obtains whenever the common law prevails, except in five or six states, in all of which it is admitted that, but for special legislation, it would now be recognized. *Association v. Hart*, 4 Wheat. 1. In this case, held in *Wheeler v. Smith*, 9 How. 55, to have been anomalous, decided under peculiar Virginia law, Chief Justice MARSHALL remarks: "That such a legacy would be sustained in England is admitted." See, also, *Inglis v. Trustees*, 3 Pet. 129; *Shotwell v. Mott*, 2 Sandf. Ch. 46; *Williams v. Williams*, 8 N. Y. 525; *Wright v. Church*, 1 Hoff. Ch. 202; *Rose Will Case*, 4 Abb. Dec. 108; *Pover v. Cassidy*, 54 How. Pr. 9; *Heiss v. Murphy*, 40 Wis. 293; *Ruth v. Oberbrunner*, Id. 238, 257; *Gallego's Ex'rs v. Attorney General*, 8 Leigh, 450; *Com. v. Levy*, 23 Grat. 21; *Dashiell v. Attorney General*, 5 Har. & J. 392, 6 Har. & J. 1; *Society v. Pendleton*, 7 W. Va. 87; *Carpenter v. Miller*, 3 W. Va. 174; *Venable v. Coffman*, 2 W. Va. 310; *Gass v. Wilhite*, 2 Dana, 170; *Church v. Church*, 18 B. Mon. 635. To recur to Massachusetts law, adopted from England in all its purity and vigor, introduced into our constitutional design, never modified, qualified, or limited in any way, illustrated by a long series of learned and interesting decisions, none of which are

inconsistent with Judge GRAY's proposition in *Saltonstall v. Sanders*, but many of which recognize it. *Odell v. Odell*, 10 Allen, 6; *Saltonstall v. Sanders*, 11 Allen, 446; *Jackson v. Phillips*, 14 Allen, 550. "There is a wide distinction between a gift to charity and a gift to a trustee to be by him applied to charity. In the first case the court has only to give the fund to charitable institutions, which is a ministerial and prerogative act; in the second case the court has jurisdiction over the trustee, as it has over all trustees, to see that he does not commit a breach of his trust, or apply the funds in bad faith, or to purposes that are not charitable." 2 Perry, Trusts, § 719; *Estate of Hinckley*, 58 Cal. 457; *Saltonstall v. Sanders*, *ut supra*; *Milford v. Reynolds*, 1 Phil. Ch. 185; *Nightingale v. Goulburn*, 5 Hare, 484; *Goins v. Emery*, 16 Pick. 107; *Wells v. Doane*, 3 Gray, 201; *Paschal v. Acklin*, 27 Tex. 197; *Derby v. Derby*, 4 R. I. 414; *Fontain v. Ravenel*, 17 How. 392; *Lorings v. Marsh*, 6 Wall. 337; *Witman v. Lee*, 17 Serg. & R. 89; *Griffin v. Graham*, 1 Hawks, 96; *Miller v. Atkinson*, 68 N. C. 537; *Attorney General v. Jolly*, 1 Rich. Eq. 99; 2 Perry, Trusts, § 731, and cases cited. Nothing in the legacy to Mrs. Gasset is inconsistent with the residuary clause, and no residuary interest accrues to the heirs by force thereof, or any part thereof. *Ward v. Railway Co.*, 108 Mass. 332; *Reed v. Reed*, 114 Mass. 372; *Montgomery v. Pickering*, 116 Mass. 227; *Newton v. Baker*, 125 Mass. 30. The only question of law involved is whether an alleged adopted daughter, who came of age before the recent legislation, has any rights, as an omitted or forced heir, under Pub. St. c. 127, § 21, which no lawyer will assert for a moment. *Davies v. Boylston*, 9 Mass. 352; *Hutchins v. Bank*, 12 Mete. 425; Pub. St. c. 135, § 8; 2 Perry, Trusts, § 731. The intention of a testator is to be gathered from a whole will. *Hawley v. Northampton*, 8 Mass. 3; *Gifford v. Choate*, 100 Mass. 343; *Barrett v. Marsh*, 126 Mass. 215. A clearly indicated charity, especially in a residuary clause, cannot be defeated by the addition of equivocal clauses, or words of uncertain meaning. *Williams v. Bradley*, 3 Allen, 270. Finally, all wills are to be construed to avoid intestacy, if possible, (*Paice v. Archbishop*, 14 Ves. 371;) especially where a clear intent appears in the residuary clause to divest all interest of the heirs, (*Moggridge v. Thackwell*, 7 Ves. 36;) and, where a charitable trust seeks enforcement, the courts will never assume the discretion of a particular trustee to be of the essence of the gift, (*Inglis v. Trustees*, 3 Pet. 99; *Walsh v. Gladstone*, 1 Phil. Ch. 290; *Hayter v. Trevo*, 5 Russ. 113.) The great question is, "Has a charitable use been established by any authoritative dedication?" If it has once vested, all unlawful conditions, limitations, trusts, or restraints in relation thereto, not of the essence of the gift, fall away, and become void, leaving the estate to be managed in a legal manner for the purposes of the charity. *Williams v. Williams*, 8 N. Y. 538; *Philadelphia v. Girard*, 45 Pa. St. 1; *Nourse v. Merriam*, 8 Cush. 11; *Hawley v. James*, 5 Paige, 458. If this trust be too imperfect for execution by ordinary proceedings in chancery, it is a universal charity, more comprehensive than a general charity,—certainly much more than a specific charity,—whose administration pertains to the *parens patriæ*, the paternal authority of the state, which, perhaps, in this commonwealth, is wielded by the legislature, (*Sohier v. Hospital*, 3 Cush. 497,) although such a function, being part of the prerogative of grace, may pertain to the governor and council. Under a monarchy it would have been an attribute of kingly power. At any rate it does not concern the heirs. *Girard v. Philadelphia*, 7 Wall. 14.

E. H. Bennett, for Mary Percival Townsend and Fanny A. Percival Safford.

The clause in the will is: "All the rest and residue of my property and estate, real, personal, and mixed, of which I shall die seized, or to which I may be entitled at the time of my decease, I give, devise, and bequeath to the said John P. Healy, to be disposed of by him for such charitable purposes as he shall think proper." Mr. Healy never was appointed by the probate court as

trustee, or qualified as such, but the funds remained in his hands as executor at his death. He died January 4, 1882, never having "thought proper" to dispose of such rest and residue for any charitable purpose whatever. The question now is, shall the fund go to some unknown and unborn charities, or to the known living heirs at law or the deceased? Probably in England it would not go to the heirs. A fund once duly set apart for a legally charitable purpose is there never allowed to reach the heirs. The lord chancellor always seizes it; and, if he cannot apply it to the charitable purposes named by the testator, finds some other worthy objects on which to bestow it. (1) Of course, if it be the clear and settled usage and practice of English courts of equity to administer this fund under their ordinary powers as such, this court has jurisdiction to do so, under our statute, whether some other states, which have not so fully adopted the English law of charities, would or would not do the same. (2) Conversely, if it be clear that the English courts would now act only under the royal prerogative, this court will not take jurisdiction, as was distinctly affirmed in *Jackson v. Phillips*, 14 Allen, 575. (3) But if, upon consideration of all the cases, it shall appear extremely doubtful whether the English courts would act, in this exact case, under their mere judicial powers, is it too much to hope that this court will not follow any doubtful precedent across the water, especially if it be in direct conflict with all the American courts on this subject, including the highest tribunal in our land? *First*. When, then, does an English court administer a fund not as a court of equity, but solely through the authority of the crown? In four well-marked classes of cases: (1) Where the gift is illegal; (2) where the legatee is not in existence, or declines the bequest; (3) where the gift is wholly indefinite, and no trustee is authorized, or other means designated, to make a selection; (4) where the gift is in its terms wholly indefinite, but a trustee is authorized to select, but dies or resigns without doing so. 1. Where the gift is for some illegal object. This is illustrated in the following cases: *Rea v. Lady Portington*, 1 Salk. 162; *Da Costa v. De Pas*, 1 Amb. 228, 2 Swanst. 487, notes, 1 Dick. 258, 2 Amb. 712; *Isaac v. Gompertz*, cited in 7 Ves. 61, and 1 Amb. 228; *De Garcin v. Lawson*, 4 Ves. 433; *Cary v. Ibbot*, 7 Ves. 490; *Attorney General v. Todd*, 1 Keen, 803; *Sims v. Quinlan*, 16 Ir. Ch. 191. 2. Where the legacy is to some charitable institution by name, but no such institution exists, or, if so, declines the bequest. See *Simon v. Barber*, Fam. 14; *Denyer v. Druce*, Id. 32; *Sanford v. Gibbons*, 3 Hare, 195; *Thorley v. Byrne*, Id. *Loscombe v. Wintringham*, 13 Beav. 87. 3. Where the gift is wholly indefinite, no specific object or even class of objects being pointed out, as, for instance, to "charitable purposes," and no means provided, by trustee's discretion or otherwise, for selecting the objects. See *Attorney General v. Matthews*, 2 Lev. 167; *Attorney General v. Peacock*, Finch, 245; *Clifford v. Francis*, Freem. 330; *Baxter's Case*, 1 Vern. 247; *Attorney General v. Herriek*, 2 Amb. 712; *Ommanney v. Butcher*, Turn. & R. 260; *Ware v. Attorney General*, 3 Hare, 194; *Kane v. Cosgrave*, 10 Ir. Eq. 211. 4. Where the gift is in its terms general and indefinite, as "to charitable purposes" generally, but provides some mode of selecting some particular objects, as by after-appointment by the testator, or by a trustee named in the will, and such specific mode of electing fails, as when the testator afterwards dies without appointing, or the trustee declines to accept the office, or, having accepted, dies without making the selection. Here, also, courts of equity do not interfere, but the crown alone disposes of the fund. Courts of equity cannot appoint another trustee, or refer the case to a master for a scheme, and so dispose of the fund directly. The sole mode provided by the testator for curing the general indefiniteness having failed, it is the same as if none had been provided in the first instance. See *Attorney General v. Syderfen*, 1 Vern. 224; *Attorney General v. Berryman*, 1 Dick. 168. In such cases the trust and confidence is personal, and cannot be exercised by any others. *Hibbard v. Lamb*,

1 Amb. 309; *Attorney General v. Fletcher*, 5 Law J. Ch. 75; *Re Dickason*, 8 Hare, 195; *Felan v. Russell*, 4 Ir. Eq. 701, Longf. & T. 674; *Moggridge v. Thackwell*, 7 Ves. 88. Suppose this legacy was "to John P. Healy for charitable purposes," no more being said. No one contends that this could be administered, even in England, "by a scheme;" but, if all the sentence becomes inoperative and ineffectual, why is it not the same as if never written? *Lorings v. Marsh*, 6 Wall. 337; *Paice v. Archbishop*, 14 Ves. 364. Language could hardly be used more strongly indicating a strict personal trust and confidence than this testator has used. Had this will said, in so many words, "to be disposed of by J. P. H. for such charitable purposes as he may think proper, and, if he does not think proper, then I do not give it to charity," unquestionably this court could not dispose of the fund by a scheme, nor even in England would the crown do so. It would go to the heirs. *De Themmies v. De Bonneval*, 5 Russ. 288. But does it not now mean that? Another test may be suggested. Suppose Mr. Healy had died before the testator, what would become of the legacy then? *Chamberlayn v. Brockett*, 41 Law J. Ch. 789, answers that question. 5. There must be not only a trustee named, but also some enumeration or indication of objects, or at least some classes of objects, by the testator himself, as to which the discretion of the trustee is to be exercised. See *Moggridge v. Thackwell*, 7 Ves. 36, 3 Brown, Ch. 528; *Attorney General v. Hickman*, 2 Eq. Cas. Abr. 193, W. Kel. 34, pl. 24; *White v. White*, 1 Brown, Ch. 12; *Mills v. Farmer*, 19 Ves. 483, 1 Mer. 55; *Attorney General v. Gludstone*, 13 Sim. 7; *Reeve v. Attorney General*, 8 Hare, 191; *Hayter v. Trego*, 5 Russ. 113; *Martin v. Margham*, 14 Sim. 230; *Coptinger v. Crehane*, 11 Ir. Eq. 429; *Gillan v. Gillan*, 1 L. R. Ir. 114; *In re Schouler*, 134 Mass. 426; O'Leary, Char. Uses, 182, 183; 2 Perry, Trusts, § 729; *Fontain v. Ravenel*, 17 How. 369; *Grimes v. Harmon*, 35 Ind. 198; *Beekman v. Bonsor*, 23 N. Y. 298; *Lepage v. McNamara*, 5 Iowa, 124; *Zeisweiss v. James*, 63 Pa. St. 465; *Bristol v. Bristol*, 53 Conn. 242, 5 Atl. Rep. 687; *Jackson v. Phillips*, 14 Allen, 576; Bogle, Char. 238, 239; *Attorney General v. Syderfen*, 1 Vern. 224, 1 Eq. Cas. Apr. 96; *Attorney General v. Fletcher*, 5 Law J. Ch. 75. No doubt if Mr. Healy had accepted the trust, and were still living, this court could compel him to execute it, and make a selection, and would not allow him to keep it himself. *Bartlett v. Nye*, 4 Metc. 378; *Tainter v. Clark*, 5 Allen, 66. They could order him to report a scheme, as in *Cook v. Duckenfield*, 2 Atk. 562; *Pocock v. Attorney General*, 3 Ch. Div. 342; but they could not remove him, and appoint another trustee to do it, nor do it themselves, upon a scheme by the attorney general. It is elementary law in this commonwealth that a power or trust which is purely personal cannot be exercised by another. *Tainter v. Clark*, *supra*; *Down v. Worrall*, 1 Mylne & K. 561. If no will had been made, there would be no executor or trustee, and that deposit never could go to any charities. How can it now? But suppose the whole fund must be distributed to some charitable purposes, it does not necessarily mean public charities; and we ask that a moiety of the fund shall be given to the testator's heirs at law, who are all worthy and needy objects of his bounty.

G. P. Tucker, for executor of Maria W. Gassett.

The design of the donor in depositing the funds in the Massachusetts Hospital Life Insurance Company was to benefit the beneficiary, and not the estate of John Percival. The beneficiary was unmarried when the annuities were purchased. The gift was complete. The successive dividends of interest vested in the beneficiary. The instrument declares that both principal and interest are inalienable. The beneficiary probably never knew of the annuity until after the death of John Percival. There is no evidence that she ever gave directions to the company to add the interest to the principal. The burden of proof is on the claimants under the will. The law of estoppel does

not apply. There was no acquiescence. The company held the funds in a fiduciary capacity, and the death of Mrs. Gassett naturally fixed the period for a determination of the rights of all concerned. There is no application of the statute of limitations. There is no agreement upon the part of the company to pay any accumulations of interest to John Percival. If the gift confers a vested interest, the addition of equivocal expressions of a contrary tendency will not suspend it, or prevent it from taking effect absolutely. *Williams v. Bradley*, 3 Allen, 270, 282; 1 Jarm. Wills, 769; *Dodson v. Hay*, 3 Brown, Ch. 404, 409; *Montgomerie v. Woodley*, 5 Ves. 522. It is only where there is an absolute addition of income that the latter follows the principal. *Minot v. Tappan*, 127 Mass. 333, 337. This case is similar to those in which a discretion is lodged with the trustees as to the application of income. All income uncalled for, or not absolutely added to the principal, belongs to the beneficiary, or his personal representative. *Re Rouse's Estate*, 9 Hare, 649; *Harvey v. Harvey*, 2 P. Wms. 21; *Webb v. Kelly*, 9 Sim. 469; *Beetor v. Partridge*, 11 Sim. 229; *Chaworth v. Hooper*, 1 Brown, Ch. 82; *Re Peek's Trust*, L. R. 16 Eq. 221; *Shepherd v. Ingram*, 2 Amb. 448, 450; *Studholme v. Hodgson*, 3 P. Wms. 300, note 2; *Re Bowden*, 6 Law J. Ch. 146; *Carver v. Burgess*, 24 Law J. Ch. 401; *Weld v. Barnes*, 9 Allen 145.

Charles M. Reed, for next of kin of John Percival, in relation to the disposition of the fund received from the Massachusetts Hospital Life Insurance Company.

Two questions are presented in reference to this fund, viz.: (1) Whether the whole, or any portion of it, is to be disposed of under the residuary clause of Capt. Percival's will, or as intestate estate; (2) whether the accumulations of interest became a part of the capital of the respective policies, and as such were properly paid to Capt. Percival's administrator, to be disposed of as a part of his estate, or remained the property of Mrs. Gassett, and passed, under her will, to her executor. The language of the residuary clause shows that the testator reposed a peculiar confidence in Mr. Healy, as he makes the trust a personal one, giving him unlimited discretion as to the disposition of the fund; and there is nothing in the will to indicate any intention that this power and discretion should be exercised by any one else. It would seem to have occurred to the testator that Mr. Healy would probably not live to dispose of this insurance money if it were left to him under the residuary clause of the will, and, not knowing whom to substitute in his place, and evidently having no definite object to which to apply the money, he decided to leave it to his next of kin, whoever they might be, as though no will had been made. The language used was well adapted to carry such an intention into effect, and such, we submit, is its true construction. As to the accumulations of interest, we contend that the interest reserved, and added to the principal, became a part of the principal to all intents and purposes; and on Mrs. Gassett's death passed, with the original capital, to Capt. Percival's administrator as a portion of his estate. See *In re Curtiss' Trusts*, L. R. 14 Eq. 217. We submit that, under the true construction of the policies, the fund in question should be disposed of by plaintiff as a part of Capt. Percival's estate.

HOLMES, J. This is a bill for instructions, brought by the administrator *de bonis non* with the will annexed of Capt. Percival. The will appointed John P. Healy executor, and gave the residue to Healy, "to be disposed of by him for such charitable purposes as he shall think proper." Healy died, having disposed of only a small portion of the residuary estate in his hands for charitable purposes. The first question raised by the report is "whether the sum of \$14,503.75, received by the plaintiff from the suit upon the bond of Healy, as executor of Percival's estate, and from the suit against Healy's administrator, should be paid to the next of kin of John Percival, by reason

of the failure of said Healy to dispose of the fund in his life-time for the purposes specified in the residuary clause of the will of said Percival, or should be applied to charitable purposes, according to a scheme under the direction of the court." It is settled that the gift to Healy was a good charitable trust, *White v. Ditson*, 140 Mass. 351, 353, 4 N. E. Rep. 606; *In re Schouler*, 134 Mass. 426; *Saltonstall v. Sanders*, 11 Allen, 446, 453; *Wells v. Doane*, 3 Gray, 201; *Everett v. Carr*, 59 Me. 325; *Pocock v. Attorney General*, 3 Ch. Div. 342. There was no resulting trust on account of the vagueness of the objects, as where they are not confined to charities. *Nichols v. Allen*, 130 Mass. 211. The first point to be determined, therefore, is a matter of construction, whether the limitation to charities was conditional upon Healey's making an appointment, or whether it should be construed as a gift to charitable uses out and out, with a superadded power to Healey to specify them if he saw fit; and on this part of the question we are of opinion that the gift is an unconditional gift to charitable purposes. There can be little doubt that such would be the construction adopted by the English courts, (*Attorney General v. Fletcher*, 5 L. J. Ch. 75, 78; *Pocock v. Attorney General*, *ubi supra*; *Moggridge v. Thackwell*, 7 Ves. 36, 13 Ves. 416; *Mills v. Farmer*, 1 Mer. 55, 100; *White v. White*, 1 Brown, Ch. 12; *Baylis v. Attorney General*, 2 Atk. 239; *Attorney General v. Hickman*, 2 Eq. Cas. Abr. 193; *Doyley v. Attorney General*, Id. 194; *Anon.*, Freem. Ch. 261, case 330b; *Copinger v. Crehane*, 11 Ir. Eq. 429.) although a different opinion has been intimated in some American cases, at least where there is a naked power not coupled with a trust, (*Fontain v. Ravenel*, 17 How. 369, 388, 399, explained and limited by *Russell v. Allen*, 107 U. S. 163, 169, 2 Sup. Ct. Rep. 327.) The question must be kept distinct from other questions which do not bear upon the meaning of the words, such as whether a trust for charity generally is valid, or whether a court of equity can and will exercise so general a discretion as is necessary to carry out the trust, etc. If the meaning of the words alone is considered, it appears to be tolerably plain that the English construction is right. The nature of the gift shows that an application of the funds to charity is the dominant object, and the selection by the trustee is subordinate, or means to an end. It is not like a gift to a particular charity which fails. There the specific object of bounty or end of the trust well may have furnished the main motive of the testator for giving to charity at all. But to give a power of selection to a party who takes no interest in the fund cannot be supposed to be the main motive of such a trust as we are considering; and the motive of charity goes no further than charity generally, because the testator leaves the rest to his trustee. The testator, in such a case, says, in effect: "I give the fund in trust for charitable purposes; and, to save application to the court, I authorize the trustee to determine the scheme." In the ordinary case of trusts for such persons of a class as the trustee shall select, when a duty to select is imposed upon the trustee by implication, a general intention to benefit the class is recognized, and the trust will not fail if the trustee accepts it, and then fails to make a selection. *Brown v. Higgs*, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; *Burrough v. Philcox*, 5 Mylne & C. 72; *Penny v. Turner*, 2 Phil. Ch. 498; *Harding v. Glyn*, 1 Atk. 469; *Mahon v. Savage*, 1 Schowles & L. 111; *Spring v. Blies*, Id. 118, 1 Term R. 435; *Salisbury v. Denton*, 8 Kay & J. 529; *Nichols v. Allen*, 130 Mass. 211, 219; *Drew v. Wakefield*, 54 Me. 291. Here there is a trust,—not a mere power; and it was recognized in *White v. Ditson*, that a duty was imposed upon Healey to act which is a strong circumstance in favor of the construction that the benefit is not intended to be made dependent upon his acting. *Brown v. Higgs*, 8 Ves. 561, 571, 574; *Cole v. Wade*, 16 Ves. 27; *Moggridge v. Thackwell*, 7 Ves. 36, 82. And it being settled that in some cases you can separate the general intent from the mode of execution, the nature of the gift, in the particulars to which we have adverted already, seems to us to make the case a stronger one for

doing so than where the selection is to be made from relations, or the like, as in the decisions cited. At all events, this case is nearer to those than to a gift to such persons as A. may appoint. *Mills v. Farmer, ubi supra*. For there the limitation is as wide as the world; and, if A. does not take the beneficial interest, it is impossible to suppose that a gift is intended unless he exercises the power confided to him. But charitable purposes constitute a well-defined class, to which it is entirely conceivable that a testator should make a gift. We shall consider the validity of such a gift in a moment.

The construction of the will being what we have declared, the question arises whether a trust originally valid is to fail for want of a trustee, contrary to the general doctrine of equity. There is no doubt that if there were a very slight indication of the direction which the testator meant his bounty to take, a court of equity would find itself able to carry out the will. In *Re Schouler, ubi supra*, the gift was for "charitable purposes, masses, etc.," and the court appointed a new trustee. See, also, *Copinger v. Crehane*, 11 Ir. Eq. 429. But it is argued that when the gift originally is, or, through the failure of the first trustee to exercise his discretion, afterwards becomes, a gift to charitable uses *simpliciter*, then the disposition of the fund in England was in the king as *parens patriæ*, by the sign-manual, and that a court of equity, as such, has no jurisdiction. It is to be observed that the objections to the exercise of the power to frame a scheme in the case supposed, are not at all similar to those which apply to a diversion, by the sign-manual, to wholly different uses, of property devoted to a specific purpose which fails because contrary to the policy of the law; for instance, as in the well-known case of *Da Costa v. De Pas*, 1 Amb. 228, 2 Swanst. 487, where a legacy to establish a Jesuba, or assembly for reading the law and instructing people in the Jewish religion, was devoted to the Foundling Hospital for the instruction of the children in the Christian religion. In such a case there is no pretense, or only a pretense, of carrying out the directions of the testator. His will is arbitrarily overridden. *Moggridge v. Thackwell*, 7 Ves. 81. But in a case like the present, whether the machinery used is the sign-manual, or a scheme prepared under the direction of the court, the testator's wishes are carried out as he has expressed them,—just as they might be by the appointment of a trustee, or by the framing of a scheme in those cases where the jurisdiction of the court is admitted. The only objection, on the ground of policy, to the court's entertaining jurisdiction, which has occurred to us, is that it must choose from too wide a field when there is nothing more specific to guide it than a general direction to apply the fund to charitable purposes. If the objection in this general form were sound, a trust for charitable purposes generally ought to have been held void; whereas all the English cases imply, and express decisions establish, that it is valid. *Nichols v. Allen*, 130 Mass. 211, 221; *Moggridge v. Thackwell*, 7 Ves. 36, 80; *Paice v. Archbishop*, 14 Ves. 364; *Legge v. Asgill*, Turn. & R. 265; *Dolan v. Macdermot*, L. R. 3 Ch. 676; *Pocock v. Attorney General*, 3 Ch. Div. 342; *Anon., supra*. It has been said that "the court never, in trusts or powers, exercises a discretion." *Felan v. Russell*, 4 Ir. Eq. 701, 704. But the court has never hesitated to frame a scheme, or to make a choice of the individual beneficiary, when the species of charity was indicated, (*Baylis v. Attorney General*, 2 Atk. 239; *White v. White*, 1 Brown, Ch. 12; *Mills v. Farmer*, 1 Mer. 55, 19 Ves. 483; *Attorney General v. Gladstone*, 13 Sim. 7; *Gillan v. Gillan*, 1 L. R. 1. 114; and, as is pointed out by Mr. Justice GRAY in *Jackson v. Phillips*, 14 Allen, 539, 580, a charity, being a trust in which the public is interested, and which is allowed by the law to be perpetual, "deserves and often requires the exercise of a larger discretion by the court of chancery than a mere private trust; for, without a large discretionary power, in carrying out the general intent of the donor, to vary the details of administration, and even the mode of application, many charities would fail by change of circumstances," etc. Bearing these considerations in mind, and

also that, under the English practice, there would have been no difference in the execution of the trust, whether by the court or by the sign-manual, (*Moggridge v. Thackwell*, 7 Ves. 87,) we think that the court would find no insuperable difficulty in selecting the species as well as the particular object of the charity.

If this be so, the objections remaining to the jurisdiction are purely historical; that it was not exercised in England, and therefore cannot be exercised here; that although in England there was a remedy existing along-side of the ordinary jurisdiction of the chancellor, and practically reaching similar results, yet, since this court has not the powers exercised by the sign-manual, a trust must fail, and a will be defeated, which this court, but for tradition, is perfectly competent to carry into effect by machinery which it would have no hesitation in using were the case a hair's breadth different. If it is possible to avoid such a result, it is desirable to do so; and the historical tradition must be very clear, and the limit of jurisdiction very well defined, to make it necessary that this court should decline, for such arbitrary reasons, to enforce a trust which it recognizes as valid. It might be hard to escape from the authorities if no trust was interposed, (*Jackson v. Phillips*, 14 Allen, 539, 576;) and it is not to be denied that some courts of authority would probably require a specification of the charity, whether there was a trust or not, (*Bristol v. Bristol*, 53 Conn. 242, 256, 5 Atl. Rep. 687; *Felan v. Russell*, 4 Ir. Eq. 701, Longf. & T. 674; *Clifford v. Francis*, Freem. Ch. 330, case 26; O'Leary, Chai. Uses, 183. On the other hand, in *Moggridge v. Thackwell*, 7 Ves. 86, although there were some words of recommendation in the will, not amounting, however, to a limitation of the generality of the trust, (Id. 85, 86,) and although the circumstance that some objects were pointed out was adverted to in the discussion, Lord ELDON did sanction the opinion that, if there is or ever has been a trustee, that is enough to warrant the court in framing a scheme, irrespective of the question whether the testator has pointed out any species of charity or not. In that case Lord ELDON said that he doubted whether if, the decree, upon the principles attached to charitable uses, must have called upon the trustees, it could be said that because the trustee is dead, the court is not to make a decree ordering such direction; for no such order could be given to the king executing by sign-manual. And, again, in *Paice v. Archbishop*, 14 Ves. 364, 372, he laid it down, generally, that, when the bequest is to trustees for charitable purposes, the disposition must be the subject of a scheme before the master; but that, when the object is charity without a trust interposed, it must be by sign-manual. See *Down v. Worrall*, 1 Mylne & K. 561, 563; *Reeve v. Attorney General*, 8 Hare, 191, 197; *Cook v. Duckenfield*, 2 Atk. 562, 567, decree stated; *Moggridge v. Thackwell*, 7 Ves. 83, 84; Boyle, Char. 239. In the anonymous case, *supra*, "it was said, and not denied, that if a man deviseth a sum of money to such charitable uses as he shall direct by a codicil to be annexed to his will, or by a note in writing, and afterwards leaves no direction, neither by note nor codicil, the court of chancery hath power to dispose of it to such charitable uses as the court shall think fit." *Mills v. Farmer*, 1 Mer. 55, 59, 95. We do not propose to inquire very curiously whether Lord ELDON's view in the latter case before him is historically accurate or not. It is a view which certainly goes no further than some of the earliest cases, and which it is necessary to adopt in this country to prevent a failure of justice. If we acted with less sanction, we should be conforming to the substantive principles of equity by framing an equitable remedy where we recognize an equitable right. We are of opinion that the above-mentioned sum of \$14,503.75 should be applied to charitable purposes, according to a scheme under the direction of the court.

During his life, the testator made certain deposits in the Hospital Life Office through William Sturgis. The life office issued policies, promising to pay Maria Gassett interest, "unless added to the principal sum as provided

below;" and, after her death, to pay the amount of the principal sum to John Percival, his executors or administrators. The provision in the policy referred to allowed Mrs. Gassett to have the annual "payments added to the principal sum, in order to increase said principal sum," giving the company 60 days' notice. Interest was capitalized annually by the company in these policies from their dates, through January 1, 1883, and the amount of the interest and the former capital added, and indorsed on the policy under the head: "New Capital; being the Principal Sum, with the Successive Accumulations of Interest." It is alleged, and admitted in the pleadings, that this was done at Mrs. Gassett's election, and in pursuance of the agreement in the policies. An express direction on her part was not proved, but it appears that Mrs. Gassett received interest on the new capital for over 20 years, until her death, and never objected to the addition, or demanded the interest which had been capitalized. Mr. Percival, by his will, stated that he had made provision for Mrs. Gassett, and proceeded: "It is not my wish that any investment which I have made, or hereafter may make, for her, should be disturbed or changed by this will; but I direct that the sum shall remain and be disposed of, according to the conditions thereof, in the same way as though this will had not been made." Mrs. Gassett died in 1887. The plaintiff has collected the amount due on the policies; and the further questions are raised whether these amounts are to go to the next of kin as if the will had not been made, or go to charity as part of the residue, and also whether Mrs. Gassett's executor is entitled to a portion of the sums collected equal to the amount of interest added to the original capital, as we have described. On the former question it is argued that the testator meant, by the language which we have quoted, to withdraw the whole investment in the Hospital Life Office from the operation of his will. If that was not his intention, the clause has no effect, since, of course, Capt. Percival could not disturb by his will Mrs. Gassett's vested life-interest under the policies. But the words used apply to "any investment" which the testator may make in the future, as well as to those which he has made in the past; and they apply only to investments "for her," and to nothing else. We cannot limit their meaning to a specific reference to the investments in the Hospital Life Office as a whole, nor extend it beyond Mrs. Gassett's interest, whatever it may turn out to be in this or that particular fund. We are constrained to hold that Capt. Percival's interest in the policies is not excepted from the operation of his will, but is a part of the estate disposed of by it, and must be applied to charitable purposes. On the last question, as the pleadings stand, and apart from the pleadings in view of Mrs. Gassett's course of conduct while alive, we must assume that the additions of interest to capital were made with her consent, as recommended by Capt. Percival in his will, and we must take the additions to have been made absolutely, and for all purposes, so that her executor has no claim; but the principal fund, as increased, goes, under the policies, to the administrator of Capt. Percival, to whom the company paid it. See *In re Curtis' Trusts*, L. R. 14 Eq. 217. Decree accordingly.

(125 Ill. 273)

COOK v. PEOPLE.

(*Supreme Court of Illinois*. June 16, 1888.)

1. DRUGGISTS—REGULATION OF PRACTICE OF PHARMACY—ACTION FOR PENALTY BEFORE JUSTICE—COMPLAINT.

A formal complaint is not necessary in a prosecution before a justice to recover the penalty prescribed for a violation of the act of 1881, "to regulate the practice of pharmacy in this state," (Laws 1881, p. 120,) formal pleadings not being required in justices' courts, and the provision in section 15 of the act, that the state's attorney shall prosecute all persons violating its provisions "upon proper complaint being made," being only a mandatory direction as to the duty of that officer.

2. SAME—CONSTRUCTION OF ACT—DOMESTIC REMEDIES—QUININE.

Quinine is not a "domestic remedy" within the meaning of the proviso to section 12 of the act of 1881, "to regulate the practice of pharmacy," (Starr & C. St. c. 91, § 29,) that the act shall not interfere with "the sale of the usual domestic remedies by retail dealers," etc.

Appeal from circuit court, Jefferson county; C. C. Boggs, Judge.

Suit against Charles D. Cook, in the name of the people, to recover the penalty prescribed for violation of the pharmacy laws, begun in the justice's court. The case having been appealed by the people to the circuit court, a judgment of conviction was there had, from which the defendant appeals to this court.

C. H. Burton, for appellant. W. H. Green, State's Atty., for the People.

SHELDON, C. J. This was an action brought before a justice of the peace under section 12 of "An act to regulate the practice of pharmacy in the state of Illinois," (Laws 1881, p. 120,) for the recovery of the penalty of \$50 prescribed for a violation of the provisions of said section. There was judgment in favor of the defendant before the justice of the peace, but on appeal to the circuit court the defendant was found guilty, and the penalty of \$50 recovered, and the defendant appealed to this court.

It is objected that there was no complaint made before the prosecution was begun. This objection is founded on section 15 of the act, which provides that "all suits for the recovery of the several penalties prescribed in this act shall be prosecuted in the name of the people of the state of Illinois, in any court having jurisdiction, and it shall be the duty of the state's attorney of the county where such offense is committed to prosecute all persons violating the provisions of this act, upon proper complaint being made." This making of complaint is not a prerequisite to the bringing of suit, but a mandatory provision with respect to the state's attorney, making it his duty to prosecute upon proper complaint being made. Section 12 gives the penalty. Section 15 in its first clause provides that all suits for the recovery of the penalties prescribed shall be prosecuted in the name of the people, etc., in any court having jurisdiction, and then follows the clause as to the state's attorney's duty. The penalty being \$50, a justice of the peace had jurisdiction; and as there are no written pleadings before a justice of the peace, it is not a sufficient objection that it does not appear that a formal complaint was made.

It is insisted the evidence does not sustain the verdict, in that the article sold here—for the selling of which as being in violation of the provisions of the statute the suit is brought—was quinine, and that is one of the usual domestic remedies which, by the proviso to said section 12, are withdrawn from the application of the act. The proviso is as follows: "Provided, that nothing in this act shall apply to, nor in any manner interfere with, the business of any physician, or prevent him from supplying to his patients such articles as may seem to him proper; nor with the making or vending of patent or proprietary medicines, or medicines placed in sealed packages with the name of the contents and of the pharmacist or physician by whom prepared or compounded; nor with the sale of the usual domestic remedies by retail dealers;

v.17N.E.nos.8-15-54

nor with the exclusively wholesale business of any dealers, except as herein-after provided." We think the jury were fully warranted in finding from the evidence that quinine was not one of the usual domestic remedies referred to in said proviso. We find no error in the giving of instructions. The judgment must be affirmed.

(125 Ill. 468)

JANSSEN v. GRIMSHAW.

(*Supreme Court of Illinois*. June 15, 1888.)

1. JUDGMENT—VACATION—AFTER TERM—REMOVAL OF CAUSES—EFFECT.

Where a judgment is entered by default against two joint defendants, and at the same time the cause is removed to the federal court, on motion of a third defendant, after it is determined that the removal was erroneous, and the cause is sent back to the state court, the latter court has the power, at the first term thereafter, on plaintiff's motion, to strike off the judgment, though a term had intervened after it was entered; the rule that a judgment may be set aside or amended at the same or next term after entry not applying while the cause is pending in the federal court.

2. NEGOTIABLE INSTRUMENTS—RENEWAL—ACTION ON RENEWED NOTE—PARTNERSHIP—RETIRING PARTNER.

Where a note is given by a firm in renewal of a former note, and the declaration in a suit thereon contains also a count on the original note, it is not error to admit in evidence such original note, though one member of the firm had retired before the making of the second note, without the payee's knowledge; the question of whether the first note was paid or released depending upon the proof.

3. TRIAL—ARGUMENT OF COUNSEL—READING TO JURY PROPOSITIONS TO BE SUBMITTED TO COURT.

A judgment will not be reversed because the attorney for the prevailing party is permitted to read to the jury, in his argument, the instructions which he proposed to ask the court to give to the jury, though the practice is not favored.

4. SAME—REFUSAL OF INSTRUCTION.

Where the trial court gives, in the instructions to the jury, all the law involved in the case, and there is nothing calculated to mislead, it is not ground for reversal because some instructions asked for were refused, and others modified.

Appeal from appellate court, Third district.

Carter & Goyert, for appellant.

A judgment against one member of a firm for a debt due from the firm constitutes a bar to a recovery against the other members. *Wann v. McNulty*, 2 Gilman, 355; *Thompson v. Emmert*, 15 Ill. 415; *Gray v. Gillilan*, Id. 453; *King v. Hoare*, 13 Mees. & W. 494; *Peters v. Sanford*, 1 Denio, 224; *Smith v. Black*, 9 Serg. & R. 142; *Downey v. Bank*, 13 Serg. & R. 288; *Sloo v. Lea*, 18 Ohio, 279; *Robertson v. Smith*, 18 Johns. 459, 9 Amer. Dec. 227; *Ward v. Johnson*, 13 Mass. 148; *Moale v. Hollins*, 11 Gill & J. 11; *Taylor v. Claypool*, 5 Blackf. 558; *Mason v. Eldred*, 6 Wall. 231; *Mitchell v. Brewster*, 28 Ill. 163. And it is held that the entry of a *nolle prosequi* as to a defendant who pleads the general issue, in an action *ex contractu* against several, discharges all. *Tolman v. Spaulding*, 3 Scam. 13. Judgment must be taken against all who are served or none. The cause of action is merged in the judgment; those not included in it are released, and the judgment is a complete bar to any further recovery. *Gribbin v. Thompson*, 28 Ill. 61; *Kimmel v. Shultz*, Breese, 169; *Russell v. Hogan*, 1 Scam. 552; *Hoxey v. Maccupin Co.*, 2 Scam. 36; *McConnel v. Swailes*, Id. 571; *Tolman v. Spaulding*, 3 Scam. 13; *Frink v. Jones*, 4 Scam. 170; *Wight v. Meredith*, Id. 360; *Wight v. Hoffman*, Id. 362; *Moale v. Hollins*, 33 Amer. Dec. 684; *Loney v. Bailey*, 43 Md. 18; *Schuler v. Israel*, 27 Fed. Rep. 851; *People v. Harrison*, 82 Ill. 84; *Byers v. Bank*, 85 Ill. 423; *Felsenthal v. Durand*, 86 Ill. 230; *Faulk v. Kelums*, 54 Ill. 188; *Goodale v. Cooper*, 6 Bradw. 81; *Kimball v. Tanner*, 63 Ill. 519. Even where the obligation is both joint and several, if the defendants are sued jointly, the rule as to joint contracts will govern, and separate judgments cannot be rendered. *Gould v. Sternburg*, 69 Ill. 531. The court had no power to set aside the judgment after the term at which it was ren-

dered. Therefore the motion of plaintiff to vacate and set aside said judgment should have been overruled, and defendant's cross-motion to strike the cause from the docket should have been sustained. *Garner v. Crenshaw*, 1 Scam. 143; *Ryder v. Twiss*, 3 Scam. 4; *Cook v. Wood*, 24 Ill. 295; *Cox v. Brackett*, 41 Ill. 222; *Messervoy v. Beckwith*, Id. 452; *McKindley v. Buck*, 43 Ill. 488; *Knox v. Bank*, 57 Ill. 330; *Lill v. Stookey*, 72 Ill. 495; *Coursen v. Hixon*, 78 Ill. 339; *Becker v. Sauter*, 89 Ill. 596; *Blake v. Miller*, 8 N. E. Rep. 828; *Baptist v. Transportation Co.*, 29 Fed. Rep. 180. A former judgment rendered for the same cause of action may be given in evidence under the general issue, and when thus given will bar further record. Judgment will be held conclusive evidence under the general issue. Where a new note is given in lieu of an old one, and the old one is surrendered and canceled, the old note is no longer in force for any purpose, and will be regarded as paid. *Wickenkamp v. Wickenkamp*, 77 Ill. 96; *Wilkinson v. Stewart*, 30 Ill. 48; *Yates v. Valentine*, 71 Ill. 643; *Tucker v. Conwell*, 67 Ill. 552; *Morrison v. Smith*, 81 Ill. 221; *Fridley v. Bowen*, 5 Bradw. 191.

John H. Williams, for appellee.

The giving of a promissory note in lieu of another, unless intended and understood by the parties as a payment, is no payment and does not discharge the maker from liability on the first note. *Hill v. Marcy*, 49 N. H. 268; *Thompson v. Briggs*, 28 N. H. 40; *Yates v. Valentine*, 71 Ill. 643. A retiring partner is liable for debts contracted by the firm after his retirement with those who have had prior dealings with the firm, unless they have had actual notice of his retirement. *Warren v. Ball*, 37 Ill. 80; *Meyer v. Krohn*, 114 Ill. 580, 2 N. E. Rep. 495. A party cannot allege errors which relate exclusively to other parties, who are not complaining and who are not before the court. *Clark v. Marfield*, 77 Ill. 258; *Henrickson v. Van Winkle*, 21 Ill. 274; *Horner v. Zimmerman*, 45 Ill. 14; *Cromine v. Tharp*, 42 Ill. 121; *Richards v. Greene*, 78 Ill. 526. When a state court has ordered a removal of a cause to the federal court, although erroneously, its jurisdiction is at an end until restored by action of the federal court; and in such case, on the order of the federal court remanding the case, the jurisdiction of the latter court reattaches and it may proceed therewith. *Dill. Rem. Causes*, (3d Ed.) 406, § 87; *Thacher v. McWilliams*, 47 Ga. 306; *Insurance Co. v. Francis*, 52 Miss. 457.

CRAIG, C. J. This was an action of *assumpsit* brought by Cornelia B. Grimshaw against Albert W. Jansen, Frederick G. Jansen, and Charles C. Jansen, to recover the amount of a promissory note, executed by the defendants under the firm name of F. W. Jansen & Son, on the 1st day of February, 1881. The three defendants, who were brothers, were engaged in business in Quincy, under the firm name of F. W. Jansen & Son, and on that day they borrowed from the plaintiff, Cornelia B. Grimshaw, \$2,000, and executed and delivered her a promissory note, signed, "F. W. JANSEN & SON," for the amount due in two years, with interest at the rate of 7 per cent. per annum. In November, 1881, Albert W. Jansen withdrew from the firm, and notice of his withdrawal was published in a newspaper published in Quincy, but the plaintiff never saw the notice, and the evidence tends to show that she had no knowledge of any change in the firm. After Albert W. Jansen withdrew from the firm, the business was continued by Charles C. and Frederick G. Jansen, under the same firm name, F. W. Jansen & Son, until February, 1886, when they made an assignment. When the note became due the interest was paid, and a new note executed, bearing the date February 1, 1883, due in two years, for \$2,000, with interest at 8 per cent. per annum, signed, as was the old one, "F. W. JANSEN & SON." When the new note was received, the old one was

surrendered. The interest seems to have been regularly paid until the firm failed and assigned, as stated before, in February, 1886. The declaration contained one count on the old note, and also a count on the new note, and the common counts. The defendant Albert W. Jansen pleaded the general issue and several special pleas, in which he denied the execution of the note dated February 1, 1883, upon which issue was joined. He also denied that he was a member of the firm when the note was executed. To this it was replied that Albert W. Jansen had, previous to the execution of the note, been a partner in the firm of F. W. Jansen & Son, and that while he was such partner plaintiff had given credit to the firm, and at the time the note of February 1, 1883, was executed and delivered she had no notice of his withdrawal from the firm, and that she accepted the note believing that he was still a member of the firm. The defendant Albert W. Jansen also interposed a plea, which in substance declared that plaintiff accepted and received the promissory note of February 1, 1883, from Charles C. and Frederick G. Jansen in full satisfaction of all indebtedness sued for, except the note of February 1, 1883. To this the plaintiff in substance replied that she did not accept the second note in full satisfaction of such indebtedness alleged in the plea. The other two defendants filed pleas to the declaration; but as they were subsequently withdrawn, it will not be necessary to notice them here. The issues having been made up, and the cause being ready for trial, when it should be reached on a call of the docket, on the 5th day of April, 1886, the defendant Albert W. Jansen, being a non-resident of the state, filed a petition for the removal of the cause to the federal court. Two days later, on April 7th, the other defendants, Charles C. and Frederick G. Jansen, withdrew their pleas. Judgment by default was therefore rendered against them, and, on motion of the plaintiff, her damages were assessed, and judgment entered for \$2,029.74, and costs. At the same time an order was entered sustaining the motion of defendant Albert W. Jansen to remove the cause to the federal court, and an order was entered that "this cause be removed to the circuit court of the United States for the Southern district of Illinois." On the 15th day of May, following, court adjourned for the term. On the 7th day of June a transcript of the cause was filed in the circuit court of the United States. On the 21st of June, 1886, the circuit court of Adams county again convened, and adjourned for the term on the 2d day of July. On the 15th day of October, 1886, the circuit court of the United States, on motion of plaintiff, remanded the cause to the circuit court of Adams county. On the 25th day of October, which was the first day of the October term of the Adams circuit court, plaintiff entered a motion to vacate the judgment rendered against Frederick G. and Charles C. Jansen at the previous March term, and the three defendants entered a cross-motion to strike the cause from the docket. The court sustained plaintiff's motion to vacate the judgment, and overruled defendant's cross-motion. Afterwards the defendants Charles C. and Frederick G. Jansen, by leave of court, filed a plea of former recovery, setting up the judgment recovered at the March term as a bar to this plea. Plaintiff replied there was no such judgment remaining in full force and effect, and prayed that the same may be inquired of by the court by inspection of the record, upon which issue was joined. On the 12th day of November, 1886, a trial was had before a jury, resulting in a verdict and judgment against all the defendants for \$2,125.75. On the appeal of Albert W. Jansen alone, the judgment was affirmed in the appellate court. To reverse the judgment of the appellate court, he has appealed to this court.

It is first contended by appellant that the circuit court erred in sustaining the motion of plaintiff made at the October term, 1886, to vacate the judgment rendered against appellant's co-defendants in this cause at the previous March term, and in overruling the cross-motion of appellant and his co-defendants to strike the cause from the docket. This action was brought against

the three defendants as partners, as joint promisors; and when an action is brought upon a liability of that character, the law is well settled that a judgment against one or two of the joint promisors will be a bar to a future recovery against one or all of the remaining joint contractors. *Wann v. McNulty*, 2 Gilman, 355; *Thompson v. Emmert*, 15 Ill. 415; *Mitchell v. Brewster*, 28 Ill. 167; *Peters v. Sanford*, 1 Denio, 224; *Ward v. Johnson*, 13 Mass. 148. The action of the court, therefore, in vacating the judgment, when it was vacated, materially affected the rights of appellant, because no recovery could be had against him, so long as the judgment remained in full force against the other two defendants. It becomes important, therefore, to determine whether the court had the power to set aside the judgment at the October term, 1886. It will be remembered that the judgment had been rendered against the two defendants at the March term, and that a June term had intervened, no steps having been taken at the March or June terms to vacate the judgment. The general rule is that where a judgment has been rendered at a term of court, and the court adjourns for the term, the court may at a second term, on notice, amend the judgment in a mere formal respect; but after the term closes, the court has no power to vacate or set aside a judgment. *Cook v. Wood*, 24 Ill. 295. There are cases where it has been held, where the motion to vacate a judgment is made at the same term at which it is rendered, and the motion is continued until a subsequent term, the court has power at such subsequent term to allow the motion, and vacate the judgment. *Hibbard v. Mueller*, 86 Ill. 256, and *Hearson v. Graudine*, 87 Ill. 115, so held. But the doctrine of the cases has no application here, as no motion to vacate was entered at the term when the judgment was entered. When the two defendants at the March term withdrew their pleas, the court might properly have entered their default; but the court had no authority to render a judgment against them until the cause was disposed of as to the third defendant, and there can be no doubt but the judgment was erroneous. There is, however, one consideration, which in our judgment has a material bearing on the question. Albert W. Jansen, one of the defendants, on April 5, 1886, entered a motion to remove the cause to the United States circuit court for the Southern district of Illinois. In connection with the motion, a petition, bond, and affidavit was filed. No further steps were taken in the case until the 7th day of April. Two days later, when the other defendants, Frederick G. Jansen and Charles C. Jansen, withdrew their pleas and appearance, their default was entered, and judgment entered against them for the amount of the note and interest, upon which the action was brought. At the same time, and as a part of the order wherein judgment was entered against the two defendants, the court entered an order as follows: "And this cause now coming on to be heard, upon the motion of the defendant Albert W. Jansen to remove this cause to the circuit court of the United States for the Southern district of Illinois, heretofore entered herein, and the court * * * doth order that said motion be sustained; and it is further ordered by the court that this cause be removed to the circuit court of the United States for the Southern district of Illinois." It thus appears that by one order the court rendered a judgment against two of the defendants; and at the same time removed the cause to the federal court. The cause was not removed as to the defendant Albert W. Jansen alone, but the entire cause, the action as originally commenced, was transferred to the federal court. It is true the order of removal was erroneous, as held in *Fraser v. Jennison*, 106 U. S. 191, 1 Sup. Ct. Rep. 171, but that does not affect the question involved. After the order of removal had been entered, the jurisdiction of the circuit court in the cause was suspended. That court thereafter, and while the cause was pending in the federal court, had no power to enter any order or judgment in the cause. Had a motion been made at the March term to vacate the judgment against the two defendants, the court would have been powerless to entertain it, (Dill. Rem. Causes,

§ 87,) because the cause had been transferred to the federal court, and was pending in that court. The order of removal suspended all power of jurisdiction over the cause until such time as the cause should be transferred from the federal back to the circuit court. This occurred on October 15th, when the cause was remanded to the circuit court. On October 25th, the first day of the October term of the circuit court, the plaintiff entered her motion to vacate the judgment rendered against the two defendants at the March term of court. This was the first time after judgment was rendered that the circuit court could entertain jurisdiction to hear and determine the application to vacate the judgment, and we think the motion under the facts in this case was in apt time. When the cause was remanded the court assumed the same jurisdiction over the cause that it had at the time of removal, and could then entertain any motion which would have been proper before removal. In conclusion we are of opinion that the court did not err in vacating the judgment. From what has been said it follows that the ruling of the court in the admission of evidence and the instructions to the jury on this branch of the case was correct.

It is also contended that the court erred in admitting in evidence the note of February 1, 1881, which had been surrendered when the new note was given in renewal. The giving of one promissory note in lieu of another does not necessarily operate as payment. In order to have that effect it must be so understood and intended by the parties. *Yates v. Valentine*, 71 Ill. 644; *Thompson v. Briggs*, 28 N. H. 40; *Hill v. Marcy*, 49 N. H. 268. In the last case cited, where the facts are quite similar to the facts in this case, it is said: "In the case of the dissolution of a firm by the retirement of some of the members, and a continuance of the business by the others in the same name, the giving and receiving of a note by the new firm for a debt of the old firm will not be payment, unless it was so agreed by the parties." We think the court was right in deciding that the note was competent evidence for the jury. Whether it was paid or not was a question to be determined from all the evidence. Several other questions have been raised in regard to the admission and exclusion of evidence, but they are all of a technical character, and have no direct bearing on the merits of the case, and it will serve no useful purpose to consume time in a discussion of them here. On the whole, the ruling of the court in the admission and exclusion of evidence, we think, was substantially correct.

It is also claimed that the court erred in permitting counsel for plaintiff to read to the jury in his argument the instructions which he proposed to ask the court to give to the jury, and in making comments thereon. We are not aware that the course pursued in the argument has been practiced to any extent in any part of the state, and we are not inclined to favor it, but at the same time we cannot say that what counsel did was error for which the judgment should be reversed. Much latitude is always allowed in the argument of causes before a jury. Counsel have the right to state to the jury the propositions of law involved in the case upon which they rely, and predicate the argument upon such propositions. If this may be done, upon the same principle we see no good reason why counsel in the argument may not read to the jury the instructions which they intend to ask, and insist before the jury that such instructions contain the law involved in the case. Where this course is pursued, the attorney takes the risk of having his argument condemned by the refusal of the court to give the instructions.

The decision of the court in giving, refusing, and modifying instructions is relied upon as error. After careful consideration of the instructions and the questions raised by counsel, without entering upon a critical review of objections urged to the decision of the court, we deem it sufficient to say that we find no substantial error in the ruling of the court in this regard. All the law involved in the case was fully given to the jury, and we see nothing in

the instructions calculated to mislead; and although slight errors might have been committed, nothing of such a magnitude occurred as to authorize a reversal of the judgment. The judgment of the appellate court will be affirmed.

(115 Ind. 64)

BOARD OF COMMISSIONERS *et al.* v. STATE *ex rel.* COTTINGHAM *et al.*

(*Supreme Court of Indiana.* July 10, 1888.)

1. RAILROAD COMPANIES—MUNICIPAL AID—VOTE OF SUBSCRIPTION NOT A DONATION.
Where the people of a township have voted to aid a railway company by taking stock therein, the company has no right under the Indiana statutes to demand the money as a donation.
2. SAME—SALE ON FORECLOSURE—RIGHT OF PURCHASING COMPANY.
Under Acts Ind. 1869, Sp. Sess., p. 92, § 14, authorizing townships to vote aid to a railroad company by taking stock therein, and providing that "said board of commissioners may after the assessment herein provided for, or any part thereof shall have been collected, take stock in such railroad company, from time to time, in the name of the proper * * * township, * * * and pay therefor when the same is taken out, the money to be collected as aforesaid," etc., the simple voting of the aid by the township is not a subscription to the stock of the company; and where the property of such company is sold on foreclosure, and bought in by a new company having no power to issue stock of the old company, such new company cannot, by *mandamus*, compel the levy and collection of a tax for the purpose of paying them the amount voted to be paid for stock in the original company.
3. SAME.
Rev. St. Ind. 1881, § 8945, providing that in case of a sale of any railroad on foreclosure of any mortgage thereon the purchasers thereof may form a corporation with power to operate the railroad, etc., and section 8947, providing that such corporations shall possess all the rights and privileges in respect to said railroad which were possessed by the corporation formerly owning it, and shall have power to assume any debts and liabilities of such former corporation, and to make such adjustment and settlement with any stockholder or creditor of such former corporation as may be deemed expedient, provided, that all subscribers to the original stock of the company shall, by the acceptance of this act by the purchasers of any such railroad, be released from all their unpaid subscriptions, etc., although enacted before any law was in existence authorizing townships to vote aid to railroad companies, applies to a township subscribing to the stock of a railroad company, and releases such township from liability on its unpaid subscription upon the happening of the contingency provided for.

Appeal from circuit court, Hamilton county.

Elmer Cottingham and the Midland Railway Company, as relators, filed their complaint against the board of commissioners of Hamilton county, and James W. Crooks, as the auditor of that county, asking that by a writ of mandate said Crooks be compelled to place the amount of an appropriation voted in aid of the Anderson, Lebanon & St. Louis Railroad Company, whose successor the Midland Railroad Company was, upon the tax duplicate for collection, and that the county board should be compelled to make an order for its collection. An alternative writ of mandate was issued and served, and to that writ appellants made return. A demurrer was sustained to the return, and a peremptory writ ordered. Defendants appeal. On petition for rehearing. For former opinion see 4 N. E. Rep. 589.

Shirts, Shirts & Fertig, for appellants.

Kane & Davis and *Henry Crawford*, for appellees.

Neither insolvency nor the creation of a mortgage on the property of a railroad company releases a township from liability on a subscription to its capital stock. *Wilson v. Board, etc.*, 68 Ind. 507; *City of Mount Vernon v. Hoey*, 52 Ind. 563; *People v. Logan Co.*, 63 Ill. 386. A corporation is not dissolved by the sale of its tangible property for the payment of its debts, and the temporary suspension of its business. *Ang. & A. Corp.* § 773; *State v. Rives*, 5 Ired. 309. The only way in which a corporation can become dissolved is by forfeiture judicially declared. 2 Redf. R. R. p. 547; *Logan v. Railroad Co.*, 90 Ind. 552; *Jussen v. Board, etc.*, 95 Ind. 568; *State v. University*, 5 Ind. 79; *Turnpike Co. v. McCarty*, 8 Ind. 392; *Stoops v. Plank-Road Co.*, 10 Ind. 49;

University v. Hamilton, 34 Ind. 506; Rev. St. Ind. § 3006. A corporation does not by a mortgage transfer its franchise to exist as a corporation. *Meyer v. Johnston*, 53 Ala. 237; *Coe v. Railroad Co.*, 10 Ohio St. 372; *Wright v. Railroad Co.*, 25 Wis. 53. A vote of a township to subscribe for stock in a railroad company creates an obligation which may be aliened, and the statutory conditions having been performed, payment may be enforced by the new company. The only distinction between stock aid and donation aid is that in the former case there is the added obligation on the part of the railroad company to issue shares to the amount of the tax; but this has no application until the tax is paid. *Board, etc., v. State*, 86 Ind. 8; *Wilson v. Board, etc.*, 68 Ind. 507; *Jussen v. Board, etc.*, 95 Ind. 568; *Railroad Co. v. Smith*, 62 Ill. 277; *Board, etc., v. Pinckney*, 74 Ill. 279; *Redf. R. R. p. 183*, § 12; *State v. Railroad Co.*, 92 Ind. 499; *City of Mount Vernon v. Hovey*, 52 Ind. 563; *Railroad Co. v. Barnett*, 85 Ill. 313; *Wilson v. Sala*, 99 U. S. 504; *County of Scotland v. Thomas*, 94 U. S. 693; *County of Ray v. Vansycle*, 96 U. S. 675; *Lynch v. Railroad Co.*, 57 Wis. 490, 15 N. W. 2d 825; *County of Henry v. Nicolay*, 95 U. S. 626; *Thomas v. Morgan & Supervisors*, 19 Marion Co. v. Center Tp., 2 N. E. Rep. 368; *Nugent v. Henry v. Railroad Co.*, 17 Ohio, 187; *Railroad Co. v. McCormick*, 10 Ind. 499.

ZOLLARS, J. Counsel for appellee contend with vigor and ability that in this state, as elsewhere, there is no difference between an appropriation of a railway municipality by way of a donation and by way of taking stock in the railway company to which aid is voted. That our statutes clearly recognize and create such a distinction is, in our judgment, so plain as to leave no reasonable ground for controversy. The first section of the act of 1869, (Acts Sp. Sess. 1869, p. 92 *et seq.*) as stated in the principal opinion, provided that where a petition was presented to the county board asking that a township should make an appropriation by taking stock in, or donating money to, a railway company, etc., it should be the duty of the board, etc. The fourteenth section of the act provided that after any part of the assessment should be collected, the board of commissioners might take stock in the railway company from time to time in the name of the proper township, and pay therefor when the same was taken, etc. The title of the act was "An act to authorize aid to the construction of railroads, by counties and townships taking stock in and making donations to railroad companies." Section 1 of the act of 1872, which seems to be in force yet, (Rev. St. 1881, § 4065,) provides that in all cases where a township has been levied and collected under the act of 1869, which authorizes townships, by taking stock in or making donations to railway companies, to aid in their construction, and the right to the tax has been forfeited, the money shall revert, etc. Another act of 1872 (Rev. St. 1881, § 4070) had relation solely to stock in railroad companies issued for aid voted by counties and townships. Section 6 of the act (section 4075, Rev. St. 1881) clothes the township trustee with authority to vote the stock held by the township in all meetings of the stockholders of the railway companies by which the stock may be issued. And still another act of 1872 (Acts Sp. Sess. 1872, p. 49; Rev. St. 1881, § 4077 *et seq.*) has relation alone to stock in railroad companies issued for aid voted by municipalities. The title of the act of 1873 was "An act supplemental to an act to authorize aid * * * by townships taking stock in and making donations to railroad companies," etc. Acts 1873, p. 184. The first section of the act provides (Rev. St. 1881, § 4068) that no tax shall be placed upon the duplicate of any county for the purpose of taking stock or making donations to railroad companies, etc., until the railroad shall be permanently located in the township, etc. The second section of the act provided that where stock was taken or donations made by any

township, the collection of the tax should be suspended until the railway company had expended in the township, in the construction of its road, an amount equal to the amount of money to be donated or stock taken. The same distinction between taking stock in, and making donations to, railway companies by municipalities is made in the amendatory act of 1875. Acts 1875, p. 121; Rev. St. 1881, § 4069. And so in the act of 1877. Acts Reg. Sess. 1877, p. 111. The act of 1879 also provided that townships might vote aid to railway companies by taking stock in and donating money to such companies, etc. Acts 1879, p. 46. Section 3 of the act provides that no township which shall become the owner or holder of any stock in any railroad company shall become liable for any debt or claim for work, labor, or material incurred in the building of the road, etc. Rev. St. 1881, § 4064. We have thus extended our references to the several and various statutes, not for the purpose of placing a construction upon them generally, nor of determining which or what portion of each is now in force, but for the purpose of showing, by quoting some of the language of each, in substance, that they all not only very clearly recognize, but as clearly establish, a difference between aid to railway companies by municipalities by way of taking stock and by way of donation. To say that they do not recognize and establish such a distinction would be to convict the legislature of the most useless and meaningless tautology.

Our cases have always recognized and enforced the distinction thus established by the statutes. For example, in the case of *Faris v. Reynolds*, 70 Ind. 359, cited in the principal opinion, the petition by the tax-payers to the county board was that a tax might be levied upon the property of the township to be collected and invested in the stock of the railway company. It was held that under the statutes the tax-payers of the township might determine by their petition and by their votes whether the aid voted should be by way of taking stock in the railway company or by way of donation. Among other things it was said: "The people of a township who vote this tax upon themselves should have the right, and, as we think, have the right, under the law, to determine by their vote the manner in which the money shall be used, whether by donation of the money or by taking stock in the company." In the case of *Bittinger v. Bell*, 65 Ind. 445, (458), cited in the principal opinion, the difference between aid to a railway company by way of a donation and by way of taking stock therein is fully recognized and asserted. And so, in the case of *Railway Co. v. City of Attica*, 56 Ind. 476, which arose under a statute similar to those involved here, so far as concerns the point under discussion, it was held that there is a clear and material difference between aid to railway companies by municipalities by way of a donation and by way of taking stock in such company. In the case of *Board, etc., v. Railway Co.*, 89 Ind. 101, it was held that the difference between an appropriation to a railway company under the statute above referred to, by way of a donation and by way of taking stock, is so marked that section 18 of the act of 1869, providing for a forfeiture of the right to an appropriation voted, applied only to donations, and not to cases where the appropriation was by way of taking stock in the company. We held in the principal opinion that the people to be taxed have a right to determine in advance, by their petition to the county board and by their votes, that the appropriation shall be by way of taking stock in the railway company, and that when they have thus determined, the amount cannot be recovered as a donation by the railway company, nor by its successor, by whatever means or method there may be a successor. To that conclusion we adhere, with much confidence in its correctness. We yield our assent to the proposition that where an appropriation has been lawfully made and completed, and a subscription for stock has been made in the manner provided by the statutes, such an appropriation and subscription become a binding obligation upon the township. But it will not do to say that the township can be bound by an obligation which it has in no legal way assumed. In other

words, the township cannot be compelled to make a donation of the amount voted where, as here, it has been voted upon the condition that the township shall receive therefor an equal amount of stock in the railway company. The township will be held to the terms of the appropriation as expressed by the petition to the county board by the vote of the people and by the final order of the board, and so, also, will the railway company. The railway company must accept the appropriation as tendered by such petition, vote, and order, or not at all. If the people have thus declared that the appropriation shall be by way of taking stock in the railway company, they have a right to the stock in return for the appropriation, and the railway company can no more coerce the payment of the money without the stock than can the township demand the stock without the payment of the money. To hold otherwise would be to abolish all distinction between an appropriation by way of donation and by way of taking stock, which is so clearly established and recognized by our statutes and the cases, and to hold that, while the township may prescribe conditions, it is powerless to have them respected by the railway company. In short, it would be to hold, as before stated, that the township may be held by an obligation which it has in no way assumed. There is no reason why an appropriation by a township, by way of taking stock in a railway company, when within the authority given by the statutes and when the subscription is made, should not be considered a contract, just as a subscription for stock in such company by an individual is a contract. And clearly the township is entitled to all the protection that will be awarded to a private subscriber. The protection is not to be less because the people in the aggregate are concerned. *Cook, Stocks*, § 99; *Shipley v. City of Terre Haute*, 74 Ind. 297; *City of Buffalo v. Bettinger*, 76 N. Y. 396; *Gray v. State*, 72 Ind. 567, (580); *People v. Dutcher*, 56 Ill. 144. Mr. Cook, in his work above referred to, states the following, which is sustained by reason and by the cases: "Under the same circumstances and conditions and to the same extent as any other subscriber a municipal corporation may compel a railway or other corporation to deliver to it stock to which the subscribers in general are entitled. It is entitled, like any other subscriber, to whatever it has subscribed for and paid for. Whatever would prevent an individual subscriber from enforcing such delivery will equally prevent a municipality in a like case. So, it is said that a municipal corporation, or a subscriber, is in no better position than an individual subscriber in this respect. The cases plainly make no distinction as to the right to enforce delivery of stock between classes of subscribers, and the municipal subscriber has no more and no less right in respect thereto than other subscribers." To the same effect see 1 Wood, Ry. Law, § 118. The foregoing is doubtless the general rule applicable in all cases, unless in some way varied or modified by the statutes authorizing the municipal aid. It is not modified or varied by our statutes.

It may be conceded, as contended by counsel for appellee, that it is not shown by the record that the Anderson, Lebanon & St. Louis Railroad Company has not been dissolved by a decree of a court. It may be, therefore, that that corporation still has a legal existence; but while the pleadings are not very definite upon that subject, we think that it is made evident by the record that abundant causes for such a forfeiture exist, and that all that is necessary to end the existence of the practically defunct corporation is the judgment of a court. See 3 Wood, Ry. Law, p. 1711 *et seq.*; Rev. St. 1881, § 3930. Undoubtedly, the purpose of the people of the township in voting the appropriation by way of taking stock instead of by way of a donation was to acquire such an interest in the corporate property as shares of stock represent, and such an interest and voice in the management of that property and the company's affairs as appertain to stockholders in such corporations. Stock in a railway company is property which a municipality may sell. *Shannon v. O'Boyle*, 51 Ind. 565; *O'Boyle v. Shannon*, 80 Ind. 159.

After the appropriation was voted and after one-half of the amount had been collected and paid to the railway company for a like amount of its stock, and before the remaining one-half had been collected or placed upon the tax duplicate for collection, the Anderson, Lebanon & St. Louis Railroad Company abandoned the enterprise by an indirect alienation of all of its franchises, privileges, rights, and property of every description, and since the sale under the decree of foreclosure has owned nothing of value to be represented by shares in stock. For all practical and beneficial purposes, so far as concerns Noblesville township, that railroad company ceased to exist with the sale of all its franchises, privileges, rights, and property. Possibly that company still has such an existence that if there is no statute in the way it might collect unpaid subscriptions for stock for the purpose of paying its debts, if it owes any which are yet binding obligations. Possibly a receiver might be appointed for it who, if there is no statute in the way, would have power to collect enough of the unpaid subscriptions for stock to pay its debts, if it owes any which are still binding obligations. Possibly, too, for the payment of the debts of that corporation, if it owes any which are yet binding obligations, and if there is no statute in the way, the collection of the tax in question here might in some way be coerced. These are questions which we need not and do not decide, because they are not before us for decision. This is not an action by the Anderson, Lebanon & St. Louis Railroad Company, nor is it an action by a receiver appointed to close up its affairs, nor is it an action by any one for the purpose of collecting assets with which to pay the debts of that company. Although it is alleged that Cottingham, joined with the Midland Railway Company as a relator, is a tax-payer of the township, the purpose of the action is very plain. It is in no sense an action by, in behalf of, or for the benefit of the Anderson, Lebanon & St. Louis Railroad Company, or its general creditors. The action is the first step by the Midland Railway Company in its endeavor to compel the placing of the tax upon the duplicate, to compel the collection of the tax and the payment of the amount collected over to it, and leave the township and the tax-payers to hunt up and deal with the Anderson, Lebanon & St. Louis Railroad Company, and protect themselves as best they can.

It is averred in the return to the alternative writ, as stated in the principal opinion, that the mortgage which finally swept away all of the property of that company was executed in 1875. It is further shown in that return that after the execution of the mortgage that company abandoned all work upon the road, and the property passed into the hands of a receiver. Since then that company has had no property, nor interest so far as shown, which would require it to keep up its directory, or elect officers, or which would, in any way, interest it in doing so. So far as shown, it has no office in this state for the transaction of business, nor for any other purpose. It may yet have a bare legal existence, but it is evident that it would require more than an ordinarily skillful officer to find any representative of that company upon whom a writ might be properly served. To say that the township or the tax-payers must first pay to the Midland Railway Company and then look to the old company for its stock is for all practical purposes to say that the money must be paid without the stock for which it was voted. It must be apparent that if the Midland Railway Company shall succeed in its purpose to have the money collected and paid over to it, the township and the tax-payers will be left without anything in return for the amount paid, and without any sort of protection. Such a result is not to be allowed, unless imperatively required by settled rules of the law. Clearly, prior rulings will not be extended for the purpose of accomplishing such a result. On the contrary, those rulings should be and will be limited to the cases before the court in which they were made. As we have stated, one-half of the amount voted was placed upon the duplicate and collected, and the amount paid over to the Anderson, Lebanon & St. Louis Railroad Company in return for a like amount of its stock. While the

county treasurer was engaged in the collection of that portion of the tax thus upon the duplicate, Wilson and others, tax-payers of the township, brought an action to enjoin the collection of the portion assessed against them. The case was brought here on appeal. It was in the decision of that case that this court said that the alleged insolvency of the railway company, and its alleged inability to complete the road, did not render the tax invalid, or afford to the plaintiffs in the case sufficient ground for enjoining its collection. *Wilson v. Board, etc.*, 68 Ind.-507. The question and the facts involved in that case were different from those involved in the case before us. At the time that action was commenced, the Anderson, Lebanon & St. Louis Railroad Company not only had a legal existence, but also, so to speak, a practical existence. And, although it was alleged that the company was insolvent, it was in possession, as owner, of the road and all its corporate property. The tax, when collected, was to go, as it did, to the railway company, which the tax-payers intended to aid in return for an equal amount of its stock. The shares of stock, as issued, represented so much of the corporate property, and in the proportion that it bore to the whole amount of the stock entitled the township to a voice in the management of the property and affairs of the company. As applied to the case before the court, we adhere to the ruling in the case above, but do not think that it should be so applied or extended as to turn the case in hand in favor of the Midland Railway Company.

The only question involved in the case of *Board, etc., v. State*, 86 Ind. 8, was whether or not the board of county commissioners had authority to make a third levy of taxes to raise the balance of the amount voted by the township in aid of the railroad company; the two prior levies having failed to produce the full amount by reason of shrinkage in the value of the property in the township. It was held that the board had such authority; that it was their duty to exercise it, and that it could be compelled by mandate to perform that duty, and that, as the matter was one of public concern, any citizen of the township interested in the execution of the law might be the relator. It was in that case that it was said that when an appropriation of not exceeding 2 per centum of the taxable property of the preceding year has been lawfully made, such an appropriation becomes a binding obligation upon the township, from which it is not discharged by any subsequent shrinkage in the value or destruction of any part of its taxable property. When an appropriation is once fully completed by all the steps required by the aid laws, and the subscription for stock is made by the county board, as required by those laws, it does become a binding obligation upon the township. And, in the sense that for the purpose of fulfilling the requirements of those laws and subserving the public interest, the county board may in a case like that last above be compelled to levy a tax to meet an appropriation voted by the township. That vote and the preliminary steps leading to it may be said to create a binding obligation upon the township. In the case last cited it was not necessary to decide whether or not a simple vote of an appropriation by a township for the purpose of taking stock in a railway company creates an obligation which the railway company can enforce by any sort of an action against the township, or creates such a right in the railway company as it may assign or mortgage. Those questions were not decided. What was there said must be limited to the exact case before the court. It should again be observed that in that case the railway company, to aid which the appropriation was voted, owned the road and the corporate property, and that the taxes, when collected, would go to it in return for its stock.

The case of *Faris v. Reynolds*, 70 Ind. 359, is cited by counsel for appellees in support of their contention that by the mortgage its foreclosure and the sale under the decree the purchasers became the owners of the uncollected portion of the amount voted by the township. That question is not decided in that case. That was an action by tax-payers of the township to enjoin the

collection of a tax levied for the purpose of aiding a railroad company by taking stock. In their petition to the county board the petitioners asked that the amount appropriated should be paid to the railroad company or its assigns. One of the grounds upon which they asked that the collection of the tax should be enjoined was that the railway company had transferred its interest in the tax to other parties. In disposing of that question it was said: "It is not seen that any one is injured by the assignment of the claim. If the township gets the stock, which it is entitled to do either before or concurrently with the payment of the money, whether paid to the railroad company or its assigns, it cannot be material whether the money is paid to the railroad company or its assigns. If the assignment is valid, the tax-payer is not injured. If invalid, it harms no one, and furnishes no reason why the tax should not be collected." It will be observed that the validity or invalidity of the assignment was not decided, and that no question as to the right of the assignees to enforce payment to them was involved.

The case of *State v. Board, etc.*, 92 Ind. 499, cited by counsel for appellees, is in every essential particular different from the case in hearing. In the first place, the railroad company, to aid which the appropriation was voted, owned the road, and hence, as already stated, stock in that company would represent the property, and entitle the township to a voice in the management of the affairs of the company. In the second place, the tax had been collected, and was in the county treasury at the time the company assigned a portion of the amount which it claimed was due to it. In the third place, the county board approved of the assignment. And in the fourth place, before the action to compel the payment by mandate was brought the railway company tendered the proper amount of certificates of its stock. It was held that, in connection with the standing order that the amount collected should be invested in the stock of the company, the payment of previous amounts to the company and the approval of the assignment of the portion to the bank constituted a subscription to the stock of the railroad company within the meaning of the statutes. The case was not one of an attempted assignment by a railroad company of an uncollected tax, or of an amount voted, but neither collected nor placed upon the tax duplicate, as is the case before us, but was one of an assignment after the tax had been collected and after a subscription to the stock of the railroad company had been made by the county board, as the statute required. Neither is the case of *Board, etc., v. Center Tp.*, 105 Ind. 422, 2 N. E. Rep. 368, and 7 N. E. Rep. 189, either like or conclusive of the case before us. In that case the appropriation was voted as a cash donation, and not by way of taking stock in the railway company. The amount had been collected and was in the county treasury. The trust deed specifically named the donation voted by the township and then in the treasury as included within its terms. That the amount had been properly donated to the railway company was not questioned by counsel upon either side of the case. It was conceded in argument that the railway company claiming the money had succeeded to all of the rights of the old company in and to the donations.

The case before us must be disposed of and the rights of the parties settled upon the facts as developed by the record and under the statutes in force at the time the mortgage was executed in 1875, as the Midland Railway Company can claim no rights except through that mortgage. The statute then in force, so far as material here, was the act of 1869. Acts Sp. Sess. 1869, p. 92. So far as material here, the fourteenth section of that act was as follows: "Said board of commissioners may, after the assessment herein provided for, or any part thereof, shall have been collected, take stock in such railroad company, from time to time, in the name of the proper * * * township, * * * and pay therefor when the same is taken out, the money to be collected as aforesaid," etc. It is very plain from this section and the whole act that the simple voting of the aid by the township is not a

subscription to the stock of the railroad company. That subscription is to be made by the county board, which for that purpose acts as the agent of the township. Until they execute that power and authority there is no perfected subscription to the stock of the company. It is just as necessary that the board should act in that regard in order to make a perfected subscription to the stock of the railway company as that they should act upon the petition provided for by the first section of the act, in order that there may be a valid vote by the township. When the subscription is thus made, and not before, the township becomes the owner of the stock. And although certificates of the stock thus subscribed for may not be essential to the ownership of the stock by the township, yet we think that in case of such subscription by the county boards for townships such certificates may be demanded as a condition to the payment of the money. That conclusion seems to be sanctioned by the case of *Faris v. Reynolds*, 70 Ind. 359, (364.)

The case of *City of Mount Vernon v. Hovey*, 52 Ind. 563, cited by counsel for appellee, is not authority in support of the contention that the vote of the township constituted a subscription to the stock of the railroad company. In that case the common council acted for the city, as the county board was authorized to act for the township by the fourteenth section, *supra*, of the act of 1869. In that case the common council made a donation to the railway company in behalf of the city, and issued the bonds of the city which had passed into the hands of innocent holders. When a subscription was made by the county board under the act of 1869, the township was brought into contractual relations with the railway company, and it thus acquired rights which it could enforce by action and which it could assign. While the ownership of the stock subscribed for by the county board under that act passed to the township in return for the money paid, it seems not to have been essential that the payment of the money should accompany the subscription for the stock in order that the township should become the owner of such stock. The seventeenth section of the act provided as follows: "After the money authorized by this act to be appropriated shall have been levied and collected as aforesaid, and the subscription shall have been made on behalf of the * * * township, * * * the railroad company, for whose aid the same shall have been levied and collected, having fully constructed the railroad, * * * shall have the right to demand and have said money paid over according to the intent and meaning of this act," etc.

In the case of *Bittinger v. Bell*, 65 Ind. 445, (453,) already cited, in speaking of the rights of railway companies under the above statutes involved here, it was said: "It has been repeatedly decided by this court * * * that until the tax was levied and collected, and a legal and valid subscription had been made on behalf of the township, the railroad company did not have, and could not acquire, any legal right to, or interest in, the tax, which it could enforce by legal process." In support of the statement thus made were cited *Board, etc., v. Railway Co.*, 39 Ind. 192; *Sankey v. Railroad Co.*, 42 Ind. 402; *Petty v. Myers*, 49 Ind. 1; *Jager v. Doherty*, 61 Ind. 528. Those cases all fully support what was stated as above quoted. So, too, does the case of *Hilton v. Mason*, 92 Ind. 157. Until the railway company occupies a position which will enable it to enforce in some way whatever right or interest it may have in an appropriation voted, such voted appropriation is not a chose in action in its favor which it can assign or mortgage. A chose in action has been defined to be a thing which a man has not the actual possession of, but which he has a right to demand by action. *Ramsey v. Gould*, 57 Barb. 408.

In the case of *Dial v. Gary*, 14 S. C. 573, it was said that a chose in action embraced two ideas: *First*, a visible, tangible thing; and, *second*, the right to sue for and recover that thing. That a railway company has no right in or to an appropriation voted for the purpose of taking stock in such company

which it can enforce by an action or assign or in any way transfer to another until the subscription for stock shall have been properly made by the county board, is recognized in the case of *City of Mount Vernon v. Hovey*, *supra*, and broadly asserted and ruled in the case of *Harshman v. Bates Co.*, 3 Dill. 150, 92 U. S. 569. In that case an appropriation had been voted by a township under a Missouri statute for the purpose of taking stock in a designated railroad company. The county court, as was the board of county commissioners under the act of 1869, *supra*, was authorized to make the subscription to the stock of the railroad company in behalf of the township and in pursuance of the vote. After the vote, but before the subscription by the county court, the designated railroad company was consolidated with another railroad company. After the consolidation, and without a further vote, the county court made a subscription to the stock of the consolidated company. It was held that a vote of the people to take stock in the designated company did not authorize the county court to subscribe to the stock of the consolidated company, and that, therefore, the subscription to that company did not entitle it to the appropriation voted, and did not impose any obligation upon the township. The decision was placed upon the ground that the township had a right to insist upon stock in the railroad company for which the appropriation had been voted, and that they could not be compelled to accept stock in any other company. In a note to the case by DILLON, J., and in distinguishing it from the case of *Nugent v. Supervisors*, 19 Wall. 241, it was said: "That case differs from the one above reported in this: there the subscription to one of the constituent companies was before the consolidation; here it was afterwards. In this case there was nothing but a bare vote before the consolidation, and that, without more, creates no contract between the municipality and the railroad company," etc. The decision by DILLON, J., as also his reasoning, as far as we have stated it, were approved by the supreme court of the United States upon the appeal. See, also, *City of Mount Vernon v. Hovey*, 52 Ind. 572. That case is also distinguishable from a class of cases cited by counsel for appellee, where county officers or courts authorized to subscribe for stock in behalf of townships have subscribed to the stock of a consolidated company instead of to the stock of the company to which the aid was voted by the township, and where bonds have been issued in payment for the stock which, without showing upon their face any informality or infirmity, have passed into the hands of *bona fide* holders. In the case before us, as we have seen, the tax has not been collected, nor has it been placed upon the duplicate for collection. There has been no subscription for stock made by the county board, nor in any other way. The case is, therefore, materially different from some of the cases above noticed, and in this regard materially different from other cases cited by counsel for appellees, where it was held that after a subscription for stock has been made, such subscription is a chose in action in favor of the railway company, which it may assign and alienate. When a subscription is made in the manner required by the statute, the township is brought into contractual relations with the railway company, just as is an individual by a subscription for stock.

We do not think it necessary to extend this opinion to comment much more at length upon the cases of *Scott v. Hansheer*, 94 Ind. 1, and *Jussen v. Board*, etc., 95 Ind. 567. As stated in the principal opinion, those cases involved appropriations by way of donations, and not by way of taking stock in the railway company. They did not involve the right of a railway company to assign an uncollected aid voted for the purpose of taking stock in such company. Those were cases where the railway companies to which the aid had been voted had been consolidated with other railway companies, and rest upon principles and rules of law and statutes peculiar to such cases. If it should be conceded that by the simple vote of the township a subscription to the stock of the Anderson, Lebanon & St. Louis Railroad Company was made, the Mid-

land Railway Company would be in no better position to demand the money. Upon such a concession we should be led to a consideration of a statute discussed by counsel on both sides of the case upon the original hearing, and again pressed for consideration by counsel for appellants in their brief resisting the petition for a rehearing. It was not thought necessary to extend the opinion in the decision of the case in a consideration of that statute, and we give it attention now because of the earnestness with which counsel for appellees urge their petition for a rehearing, and because counsel for appellants again insist that it is conclusive of the real question involved in the case. In 1865, (Acts Reg. Sess. 1865, p. 66; Rev. St. 1881, § 3945 *et seq.*) an act was passed, entitled "An act to authorize, regulate, and confirm the sale of railroads, to enable purchasers of the same to form corporations and to exercise corporate powers," etc. The act provides that in case of a sale of any railroad by virtue of any mortgage by foreclosure, etc., the purchasers thereof, etc., may form a corporation, etc., with power to operate the railroad, etc. The third section of the act (section 3947, Rev. St. 1881) provides that "such corporations shall possess all the powers, rights, privileges, immunities, and franchises in respect to said railroad * * * purchased * * * which were possessed or enjoyed by the corporation that owned or held the said railroad previous to such sale, * * * and it shall have power, at any time after the formation of the corporation as aforesaid, to assume any debts and liabilities of the former corporation, and to make such adjustment and settlement with any stockholder * * * or creditor * * * of such former corporation as may be deemed expedient: * * * provided, that all subscribers to the original stock of said railroad company, their heirs, executors, and administrators, shall (by the acceptance or adoption of this act by any purchaser or purchasers of any such railroad as above provided) be released and discharged from all their unpaid subscriptions, which shall not have been previously settled or arranged by agreement or compromise," etc. Recognizing the fact that stock in an insolvent railway company, the property of which has been sold in a foreclosure or other judicial proceeding, is worthless, this statute was intended to protect subscribers by canceling all obligations to pay unpaid subscriptions to such stock in all cases where there shall not have been an adjustment by agreement or compromise. In other words, the statute was intended to enact into a law the rule of fair dealing, that no one should be required to pay something for nothing. In answer to one of appellees' contentions, it is enough to say that in our judgment it sufficiently appears from the record that the Midland Railway Company was incorporated under the above act, and by virtue of the sale and such incorporation became the owner of the property of the old company.

It is further contended on the part of appellees that the statute is not applicable here because it was enacted four years before any law was in existence authorizing townships to vote aid to railway companies, and that, therefore, the proviso in the section quoted could not have been intended to apply to a case like this. The title of the act, as to its various sections, shows that it was not intended to subserve any mere temporary purpose. Its terms are general and applicable to all cases arising subsequent to its passage. The proviso was intended to and does protect all subscribers to stock in railway companies. That at the time of its passage there was no law authorizing municipal corporations to vote aid and become stockholders in railway companies does not change the matter. They may now, and at the time Noblesville township voted the aid they had authority to, thus become stockholders. If it be conceded that by the petition to the county board and by the vote of the people Noblesville township became a subscriber to the stock of the Anderson, Lebanon & St. Louis Railroad Company, it thus came within the terms of the above statute, and became entitled to its protection as any other subscriber to stock in that company. To hold that the proviso protects only such of the subscribers to stock as may have signed the articles of incorporation of the

old company, or that it protects only individuals and not municipal subscribers to such stock, would be to give to the act such a construction as to make it work inequality and injustice as between subscribers to stock. Such a construction is not required, but, on the other hand, is forbidden, both by the spirit and letter of the act. In support of our conclusion that the act is applicable to subscribers who may become such under subsequent statutes, see *State v. Chapin*, 110 Ind. 272, 11 N. E. Rep. 317. If we are correct in our construction of the above act and the proviso in the third section,—and that we are, we have no doubt,—Noblesville township was released and discharged from the unpaid subscription for stock in the Anderson, Lebanon & St. Louis Railroad Company by the sale of all its property under the decree of foreclosure and the subsequent incorporation of the purchasers, as the Midland Railway Company, there having been no settlement with the township, as provided by the statute under consideration. Such statutes ought to be given a fair construction, and at the same time such a construction as will protect the tax-payers. This is shown by the Iowa and other cases. There was a statute in Iowa which, for aught we know, is in force yet, which provided that in the giving of aid to railway companies the tax-payers were entitled to receive stock in the corporation constructing the railroad in the amount of taxes paid by each, etc. Under that statute aid was voted to a railway company by the people of a township. After the aid had been voted, the company to which the aid had been so voted, and before it had completed its road, sold and conveyed its unfinished railroad to another company. In an action by a tax-payer to enjoin the collection of the tax, (*Manning v. Mathews*, 66 Iowa, 675, 24 N. W. Rep. 271,) the supreme court said: "The statute, in providing for the enforced contributions by taxation to aid the construction of railroads, contemplates that the tax-payer may become a stockholder, upon the ground, doubtless, that he ought not to be compelled to make contribution to a private enterprise producing public benefits, wholly without compensation; and that, as the railroad is a thing of public nature, producing benefits in which the tax-payer shares, he ought to be in the position, as a stockholder, to have a voice and influence in preserving its existence and controlling its use, so as to secure the public benefits for which it was built. The object of the statute was not, primarily, that the tax-payer should receive money or any other thing upon payment of his tax, but that he should receive the stock in the corporation building the road, to the end that he should have an interest in the road built. His stock, if separated from the railroad, would be to him as any other property. It cannot be that the statute intended that he should be taxed to aid in the building of the railroad, and that, before his tax is collectible, the road could be alienated, and in its place the corporation could acquire bonds or other property to be held for the benefit of the stockholders. The statute does not contemplate that the tax-payer shall hold an interest as a stockholder in any property other than the railroad. * * * It cannot, therefore, be that the statute will permit taxes to be collected when it becomes certain that the tax-payer can have no interest in the railroad, the very thing for which he was taxed. It is plain from the provisions of the statute making the directors liable in double the par value of the stock in case the road is incumbered beyond the prescribed limit that it is the purpose of the statute to preserve the existence of the road in the corporation building it, and thus preserve the tax-payer's interest therein." The tax was held uncollectible. To the same effect are the cases of *Blunt v. Carpenter*, 68 Iowa, 265, 26 N. W. Rep. 438; *Cantillon v. Railroad Co.*, 35 N. W. Rep. 620.

We think that it may reasonably be said of our statutes authorizing townships to aid railway companies by way of taking stock therein that they contemplate that the township, by becoming a stockholder, may have such an interest in the property of the corporation as shares of stock usually represent, and such an influence in the management of the affairs of the corporation as

any other holder of a like amount of stock usually has. And that the act of 1865, last above referred to, was enacted upon the theory that when a railway company no longer owns the railroad, by reason of a judicial sale as provided in that act, an unpaid subscription to its stock ought not to be coerced because the subscriber cannot acquire an interest in the railway nor have a voice in its management. We are aware, of course, that these aid laws have been upheld as against constitutional objection urged against them, upon the theory that the railroad in aid of which the money is to be appropriated is a work of public utility to be constructed for the public good. So far as the constitutionality of the law is concerned, it may be said, as is said in some of the cases cited by counsel for appellees, that there is no difference between an appropriation by way of a donation and by way of taking stock in the railroad company. But it does not follow by any means that there is no difference in any respect between aid by a township by way of a donation and by way of taking stock. As we have seen, our statutes and our cases clearly create and recognize a distinction, and both secure to the township rights, when the aid is by way of a subscription for stock, which it does not have when the aid is by way of a donation; and both good morals and public policy sanction the extension of such protection to the township and tax-payers.

We repeat again that this action is in no sense by the Anderson, Lebanon & St. Louis Railroad Company, nor by any one in its behalf for its benefit or for the benefit of its creditors. The Midland Railway Company has and can have no right to the money should it be collected, for the reason that it claims and must claim through the mortgage, and that neither carried nor conveyed any interest in the aid voted which can be enforced in favor of that company, and for the further reason that the act of 1865, *supra*, is in the way of an assertion of such right by that company. And while, as before stated, the record does not show that the Anderson, Lebanon & St. Louis Railroad Company has been dissolved by a judicial decree, we again state, as stated in the principal opinion, that it does not appear by anything shown in the record that there is any person or railroad company entitled to demand and receive the money upon the terms upon which it was voted, should it be collected. We have examined with much care all the cases cited by counsel for appellees and find nothing in any of them in conflict with what we here decide. It would extend this opinion to an undue length to go into an examination and analysis of those cases. This is the only reason for not doing so. After a patient and laborious examination of the questions presented by the record, we are convinced that the conclusion reached in the principal opinion is correct, and that a rehearing should not be granted. The petition is therefore overruled. We suggest that if the parties desire to remodel the pleadings, either by changes or by making them more specific, they ought to have leave to do so.

(110 N. Y. 628)

CAMPBELL v. MANDEVILLE et al.¹

(Court of Appeals of New York. June 12, 1888.)

1. APPEAL—AMOUNT IN CONTROVERSY.

In an action for foreclosure of a mechanic's lien plaintiff testified as to the value of the brick furnished and labor performed, computing it at \$588.96. On behalf of defendants several witnesses testified that plaintiff's claim was excessive. A counter-claim for about \$100 was also interposed on account of defective workmanship. Judgment was rendered reducing plaintiff's claim to \$495.59, which, with interest added, amounted to \$511.66. Defendants appealed, offering to allow judgment against themselves for \$240.54. *Held*, that the amount in controversy was less than \$500, and therefore the appeal would be dismissed.

2. SAME—DETERMINATION OF AMOUNT.

To determine the amount in controversy resort may be had to the proceedings and evidence.

¹Affirming 46 Hun, 681, *mem.*

Appeal from supreme court, general term, Second department.

This is an action by John C. Campbell against Henry Mandeville and others for the foreclosure of a mechanic's lien for certain brick furnished by plaintiff and labor performed by him as a mason. A written contract was originally entered into by the parties which was subsequently waived. Plaintiff testified as to the amount of brick furnished, concrete laid, and labor performed, computing the balance still due him at \$588.96. On behalf of defendants, an architect and several master masons testified that a less number of brick than estimated by plaintiff was used, he having made no deduction for openings in his computation, and the wall having been laid five inches higher than called for by the plans; and also estimated the value of the concrete laid and labor performed at a less sum than plaintiff's estimate. Defendants also interposed a counter-claim for about \$100, for defective workmanship. Plaintiff's claim was reduced from \$588.96 to \$495.39, which, with interest added, amounted to \$511.66. From the judgment defendants appealed, offering to allow judgment against themselves for \$240.54.

Edward W. Thornhall, for appellants. *Joseph F. Daly*, for respondent.

PER CURIAM. Although the answer is a denial of indebtedness, and contains a counter-claim for defective work of plaintiff, an examination of the evidence before the trial court shows that what was in controversy between the parties was not the right of plaintiff to recover at all, but simply the number of brick furnished by him to the buildings in question, the amount of concrete done, and the amount of excavation, with the values of the work and materials. Such resort to the proceedings and evidence is authorized in *Knapp v. Deyo*, decided by this court February term, 1888. 108 N. Y. 518, 15 N. E. Rep. 540. The right of plaintiff to recover the market value for work done and material furnished by him does not seem to have been the subject of controversy upon the trial. The proof as to the counter-claim interposed by defendants was an offset to plaintiff's recovery. The trial court reduced the plaintiff's claim from \$588.96 to \$495.39, which, with interest added, amounted to \$511.66. Taking the evidence adduced on defendants' behalf as to the items of brick, cement, and excavation, it is clear that they conceded sufficient to be due to the plaintiff from them as to leave the amount in dispute, with the \$100 counter-claim added, under the sum of \$500. Considering this result of our examination of the evidence, in connection with defendants' offer to allow judgment for the sum of \$240.54, we think the appeal should be dismissed with costs, as the amount in controversy was under \$500. Appeal dismissed, with costs to the defendants.

All concur.

ROBINSON v. NEW YORK, L. E. & W. R. Co.

(Court of Appeals of New York. June 5, 1888.)

J. A. Buchanan, for appellant. *Henry L. Burnett*, for respondent.

No opinion. Order affirmed, with costs. All concur. See 48 Hun, 614, *mem.*

HIER v. NEW YORK, W. S. & B. R. Co. et al.

(Court of Appeals of New York. June 5, 1888.)

Hunt & Everson, for appellant. *Walters & McLennan*, for respondents.

No opinion. Judgment affirmed on opinion below, with costs. All concur. See 40 Hun, 310.

COSTELLO v. COSTELLO.

(Court of Appeals of New York. June 5, 1888.)

John T. Barnard, for appellant. *Edward J. Dooley*, for respondent.

No opinion. Judgment affirmed, with costs. All concur. See 39 Hun, 656, *mem.*

GUNDLICH v. HENSLEY.

(Court of Appeals of New York. June 5, 1888.)

Saml. Untermeyer, for appellant. *John H. Bird*, for respondent.

No opinion. Appeal dismissed, for want of stipulation in notice of appeal for judgment absolute. All concur. See 38 Hun, 644, *mem.*

MEAD v. JENKINS et al.

(Court of Appeals of New York. June 5, 1888.)

M. L. Cobb and *Stephen S. Marshall*, for appellants. *S. Sergeant*, for respondent.

No opinion. Judgment affirmed, with costs, on opinion below. All concur. See 38 Hun, 340.

JACKSON et al. v. SUYDAM et al.

(Court of Appeals of New York. June 5, 1888.)

O. J. Wells, for appellants. *Edward M. Shepard*, for respondents.

No opinion. Order affirmed, with costs. All concur.

In re Will of SOULE.

(Court of Appeals of New York. June 5, 1888.)

M. A. Knapp, for appellant. *M. M. Waters*, for respondent.

No opinion. Order affirmed, with costs. All concur. See 46 Hun, 661.

BYRNE v. MATTHEWS.

(Court of Appeals of New York. June 5, 1888.)

John C. Milburn, for appellant. *Baker & Schwartz*, for respondent.

No opinion. Judgment affirmed, with costs. All concur.

HANOVER FIRE INS. CO. v. GERMANIA FIRE INS. CO. et al., (STODDARD, Appellant.)

(Court of Appeals of New York. June 5, 1888.)

Joseph S. Auerbach, for appellant. *Wm. G. Wilson*, for respondent.

No opinion. Appeal dismissed, with costs. All concur. See 33 Hun, 539.

PLATT v. PLATT et al.

(Court of Appeals of New York. June 5, 1888.)

E. S. Clinch, for appellant De Grauw. *Wm. G. Wilson*, for respondent.

No opinion. Order affirmed on opinion below, with costs. All concur. See 42 Hun, 659, *mem.*

GROSVENOR *et al.* v. SICKLE.

(Court of Appeals of New York. June 5, 1888.)

Moses R. Crow, for appellants. Blumenstiel & Hirsch, for respondent.
No opinion. Appeal dismissed, with costs. All concur. See 47 Hun, 634, *mem.*

CORNELL v. DONOVAN *et al.*

(Court of Appeals of New York. June 5, 1888.)

Horace Secor, Jr., for appellant. N. C. Moak, for respondents.
No opinion. Order affirmed, with costs. All concur.

TAYLOR v. TAYLOR.

(Court of Appeals of New York. June 5, 1888.)

Benj. Estes, for appellant. Hubbard & Rushmore and John D. Pray, for respondent.
No opinion. Judgment affirmed, with costs. All concur. See 38 Hun, 642, *mem.*

McCABE v. EMMONS *et al.*

(Court of Appeals of New York. June 5, 1888.)

Geo. F. Betts, for appellant. Jas. C. Carter, for respondents.
No opinion. Judgment affirmed, with costs. All concur. See 51 N. Y. Super. Ct. 219.

McLEAN v. PRENTICE *et al.*

(Court of Appeals of New York. June 5, 1888.)

C. Bainbridge Smith, for appellant. E. W. Paige, for respondents.
No opinion. Judgment affirmed, with costs. All concur. See 36 Hun, 643, *mem.*

JENKINS *et al.* v. DOUGLASS.

(Court of Appeals of New York. June 5, 1888.)

Frederic A. Ward, for appellant. Geo. V. Brower, for respondents.
No opinion. Judgment affirmed, with costs. All concur.

DENISON v. TAYLOR.

(Court of Appeals of New York. June 5, 1888.)

R. A. Parmenter, for appellant. Edgar L. Fursman, for respondent.
No opinion. Judgment affirmed and judgment absolute ordered against the defendant on the stipulation, with costs. All concur. See 38 Hun, 641, *mem.*

DE GRAFF v. WYCKOFF.

(Court of Appeals of New York. June 5, 1888.)

Jas. R. Marvin, for appellant. Cephas Brainerd, for respondent.
No opinion. Judgment affirmed, with costs. All concur. See 41 Hun, 646, *mem.*

MACK v. MILLS et al.

(Court of Appeals of New York. June 5, 1888.)

Benj. H. Williams, for appellants. *Adelbert Moot*, for respondent.

No opinion. Judgment affirmed, with costs. All concur. See 40 Hun, 682, *mem.*

MILLIMAN v. CHRISTGAU.

(Court of Appeals of New York. June 5, 1888.)

F. Brundage, for appellant. *Jacob A. Driess*, for respondent.

No opinion. Order affirmed, and judgment absolute ordered for the defendant, with costs. All concur. See 38 Hun, 636, *mem.*

COLWELL et al. v. BELL et al.

(Court of Appeals of New York. June 5, 1888.)

Chas. Blandy, for appellants. *M. J. Earley*, for respondent.

No opinion. Judgment affirmed, with costs. All concur.

KING et al. v. POST et al.

SAME v. BARNES.

(Court of Appeals of New York. June 12, 1888.)

Noah Davis, for appellants. *Albert B. Boardman*, for respondents.

No opinion. Orders affirmed, with costs. All concur. See 46 Hun, 680, *mem.*

CHILDS et al. v. SEABURY et al.

(Court of Appeals of New York. June 12, 1888.)

Roger A. Pryor, for appellant. *Wm. G. Choate*, for respondents.

No opinion. Judgment affirmed, with costs. All concur, except *RUGER*, *C. J.* and *EARL, J.*, dissenting, and *ANDREWS, J.*, taking no part. See 35 Hun, 548.

MCDUGALL v. STATE.

(Court of Appeals of New York. June 12, 1888.)

Geo. W. Cothran, for appellant. *Chas. F. Tabor*, Atty. Gen., for respondent.

No opinion. Motion for reargument denied, with costs. See 16 N. E. Rep. 78.

LUDLOW v. MEAD.

(Court of Appeals of New York. June 12, 1888.)

S. Sergeant, for appellant. *Spink & Martin*, for respondent.

No opinion. Motion for reargument denied, with costs. See 16 N. E. Rep. 682, *mem.*

GOLDSCHMIDT v. UNION MUT. LIFE INS. CO.

(Court of Appeals of New York. June 12, 1888.)

No opinion. Motion to dismiss granted, with costs. See 41 Hun, 641.

ADAMS v. BABCOCK.

(Court of Appeals of New York. June 12, 1888.)

No opinion. Motion to dismiss granted, with costs.

WEAVER *et al.* v. CITY OF ROCHESTER.

(Court of Appeals of New York. June 19, 1888.)

Theo. Bacon, for *Weaver et al.* *Chas. B. Ernst*, for City of Rochester.No opinion. Order of general term affirmed, without costs. All concur. See 46 Hun, 675, *mem.*BRYSON v. JAMES *et al.*

(Court of Appeals of New York. June 19, 1888.)

Isaac L. Egbert, for appellants. *Eugene H. Lewis*, for respondent.

No opinion. Appeal dismissed, with costs. All concur.

PEOPLE *ex rel.* GILL v. WALSH *et al.*

(Court of Appeals of New York. June 19, 1888.)

Louis F. Post, for appellant. *John D. Lindsay*, for respondents.

No opinion. Order affirmed, with costs. All concur.

SMITH v. NELSON.

(Court of Appeals of New York. June 26, 1888.)

Ansley & Davie, for appellant. *C. D. Murray*, for respondent.No opinion. Judgment affirmed, with costs. All concur. See 37 Hun, 642, *mem.*

WINGATE v. HASKINS.

(Court of Appeals of New York. June 26, 1888.)

Geo. Bowen, for appellant. *L. N. Bangs*, for respondent.No opinion. Judgment affirmed, with costs. All concur. See 35 Hun, 666, *mem.*

KROLL v. WOOD.

(Court of Appeals of New York. June 26, 1888.)

Edward P. Wilder, for appellant. *Carlisle Norwood, Jr.*, for respondent.

No opinion. Judgment affirmed, with costs. All concur. See 43 Hun, 828.

HILLYER v. VANDEWATER et al.*(Court of Appeals of New York. June 26, 1888.)*

No opinion. Motion to put on calendar denied, without costs. See 48 Hun, 614, *mem.*

TURNER v. CONANT et al.*(Court of Appeals of New York. June 26, 1888.)*

No opinion. Motion to dismiss granted, without costs of the appeal or the motion.

In re BURNETT.*(Court of Appeals of New York. June 26, 1888.)*

No opinion. Motion to dismiss granted, with costs. See 47 Hun, 639, *mem.*

WHITE v. WHITE et al.*(Court of Appeals of New York. June 26, 1888.)*

Albert Stickney, for motion. *A. H. Holmes*, opposed.

No opinion. Motion to dismiss granted, with costs. See 47 N. Y. Super. Ct. 551, *mem.*

BROWN v. PURDY.*(Court of Appeals of New York. June 26, 1888.)*

Motion to dismiss.

No opinion. Ordered that appellant have leave to withdraw his appeal on payment of \$30 costs and such disbursements as respondents may show they have incurred in this court in connection with the appeal within 20 days of the notice of the entry of this order; otherwise, in default of such payment, the defendants may take an order affirming the order appealed from and directing the entry of judgment absolute on appellants' stipulation.

JACKSON et al. v. SUYDAM et al.*(Court of Appeals of New York. June 26, 1888.)*

No opinion. Motion for reargument denied, with costs.

NEW YORK STATE MONITOR MILK-PAN CO. v. REMINGTON et al.*(Court of Appeals of New York. June 26, 1888.)*

W. H. Johnson, for appellant. *Thos. Richardson*, for respondents.

No opinion. Motion for reargument denied, with costs. See 16 N. E. Rep. 48.

PEOPLE v. MERWIN.*(Court of Appeals of New York. June 29, 1888.)*

Ceylon H. Lewis, for appellant. *Lawrence T. Jones*, for respondent.

No opinion. Judgment affirmed. All concur. See 48 Hun, 617, *mem.*

SEARING v. VILLAGE OF SARATOGA SPRINGS.*(Court of Appeals of New York. June 29, 1888.)**Esak Cowen*, for appellant. *C. S. Lester*, for respondent.

No opinion. Judgment affirmed, with costs. All concur, except PECKHAM, J., taking no part. See 89 Hun, 307.

HOPE v. TROY & L. R. Co.*(Court of Appeals of New York. June 29, 1888.)**E. L. Fursman*, for appellant. *J. F. Crawford*, for respondent.

No opinion. Judgment affirmed, with costs. All concur, except EARL and FINCH, JJ., dissenting, and PECKHAM, J., taking no part. See 40 Hun, 438.

WHEATON v. DELAWARE & H. CANAL CO.*(Court of Appeals of New York. June 29, 1888.)**Edwin Young*, for appellant. *E. Countryman*, for respondent.

No opinion. Judgment affirmed, with costs. All concur, except PECKHAM, J., not sitting. See 40 Hun, 638, *mem.*

COFFIN v. LESTER et al.*(Court of Appeals of New York. June 29, 1888.)**Isidor Grayhead*, for appellant. *Geo. E. Horne*, for respondents.

No opinion. Judgment affirmed, with costs. All concur. See 36 Hun, 347.

PEOPLE ex rel. GARDNER v. FRENCH et al., Police Commissioners.*(Court of Appeals of New York. June 29, 1888.)*

No opinion. Appeal dismissed, with costs. All concur. See 47 Hun, 635, *mem.*

PLATT v. PLATT et al., (three cases.)*(Court of Appeals of New York. June 29, 1888.)*

Wm. Allen Butler and *Wm. R. Martin*, for appellant. *Wm. G. Wilson* and *Payson Merrill*, for respondents.

No opinion. Order affirmed, with costs. All concur. See 42 Hun, 592.

In re STATEN ISLAND RAPID TRANSIT CO.*(Court of Appeals of New York. June 29, 1888.)**Thos. W. Fitzgerald*, for appellant. *W. W. MacFarland*, for respondent.

No opinion. Appeal dismissed, without costs, with leave to the parties to apply to the general term for a rehearing, on the ground that this motion was unnecessary, the original appeal from the order of confirmation having been, in substance, an appeal from the report and appraisal. See 43 Hun, 637, *mem.*

PEOPLE *ex rel.* CALKINS v. BOARD OF SUP'RS OF GREENE COUNTY.

(*Court of Appeals of New York*. June 29, 1888.)

N. A. Calkins, for appellant. *S. Crowell*, for respondent.

No opinion. Order affirmed, with costs. All concur. See 45 Hun, 594, *mem.*

AUGUST *et al.* v. NATIONAL PARK BANK OF N. Y.

(*Court of Appeals of New York*. June 29, 1888.)

Jas. C. Carter, for appellants. *Barlow & Wetmore*, for respondent.

No opinion. Appeal dismissed, with costs. All concur. See 48 Hun, 614, *mem.*

BADGER v. APPLETON.

(*Court of Appeals of New York*. June 29, 1888.)

W. W. Badger, for motion. *E. W. Paige*, opposed.

No opinion. Motion to dismiss granted, without costs.

(110 N. Y. 653)

BANK OF METROPOLIS v. KLINKER.

(*Court of Appeals of New York*. June 29, 1888.)

E. J. Myers, for motion. *J. Delahanty*, opposed.

No opinion. Motion to dismiss granted, without costs.

(147 Mass. 360)

BURDON *et al.* v. MASSACHUSETTS SAFETY-FUND ASS'N *et al.*

ROBINSON v. ROOSA *et al.*

(*Supreme Judicial Court of Massachusetts*. Suffolk. September 4, 1888.)

1. INSURANCE—MUTUAL BENEFIT INSURANCE—INSOLVENCY—SAFETY FUND—HOLDERS OF DEATH CLAIMS—ATTACHMENT.

The certificates of an assessment life insurance association provided for payment of death benefits not exceeding \$1,000 by assessment on certificate holders, and for payments to a "safety fund," which was to inure to the benefit of members of five years' standing by having the income of it, after five years, or after it had amounted to \$100,000, applied to the payment of future dues. If, after that time, the association should fail to pay the indemnity provided in the certificates, the fund was to be divided among all the holders of certificates then in force, but the fund should "be in no way chargeable or liable for any use or purpose except as above mentioned." The association failed before the five years, and while the fund was only \$19,000. *Held*, that the fund should be divided equally among all the holders of certificates which were in force at the time a bill to dissolve the association was filed, and could not be taken, by attachment or otherwise, by the holders of death claims, notwithstanding general expressions on the back of the certificates asserting that the association provided substantial protection for the families and dependents of deceased members by means of the safety fund.

2. SAME—DISTRIBUTION—HOLDERS OF UNFORFEITED DEATH CLAIMS.

The legal representatives of holders of certificates who died without having incurred any forfeiture, and who had not had any benefit from an assessment, are to share equally with other holders of certificates in force.

3. SAME—FORFEITURE—NON-PAYMENT OF DUES AFTER INSOLVENCY.

A certificate is not forfeited by failure to pay the monthly dues for expenses after the association stopped business.

4. SAME—CERTIFICATES NOT IN FORCE A YEAR.

Certificates which, at the time the bill for dissolution was filed, had not been in force for a year, within which time they were to make their first payment to the fund, are not to share in the fund unless it should appear that the payment had been made since that date within the year.

5. SAME—NON-PAYMENT OF ASSESSMENT.

The non-payment of an assessment duly made prior to the filing of the bill, within the time required by the certificate, would invalidate the certificate if due notice of the assessment was given.

6. SAME—DISBURSEMENT FOR EXPENSES.

A provision in the certificates that upon a division of the fund the association should retain reasonable charges for its management, does not cover the general expenses of the association except so far as they were properly chargeable to the management of the fund.

7. SAME—LEVY OF ASSESSMENT FOR DEATH CLAIMS.

As none of the holders of death claims had applied to have an assessment ordered by the court, and as it was found expressly that an attempt to raise the money to pay them by an assessment would be futile, no assessment should be ordered.

Report from supreme judicial court, Suffolk county; WILLIAM ALLEN, Judge.

Petition by the receiver of the Massachusetts Safety-Fund Association to have certain attachments and liens, or pretended attachments and liens, declared null and void, and to compel the several respondents to release and discharge the same, and to discharge the Boston Safe-Deposit & Trust Company, as a supposed trustee, and also as a co-defendant with said association in a suit in equity. The proceedings were begun by a bill in equity brought by E. Everett Burdon and others against the Massachusetts Safety-Fund Association and the Boston Safe-Deposit & Trust Company, praying for a dissolution of the association; that a receiver be appointed to take charge of its estate, etc.; and that the court determine the rights of all parties in and to certain trust funds and incomes in the hands of the trust company. The supreme judicial court entered a decree dissolving the association, and appointing Charles Robinson receiver in the cause, and said Robinson thereupon filed this petition. It was found by the single justice who heard the case that the certificates issued by the association contained the following: "The Massachusetts Safety-Fund Association of Boston, Mass., in consideration of the representations, etc., made in the application herefor, and of the admission fee paid, and of the sum of ten dollars to be paid to said association to create a safety fund, etc., does hereby issue this certificate of membership in said association, under the safety-fund and endowment system, to —, with the following agreements: 'That said association will cause to be deposited said sum of ten dollars, when received, with the Boston Safe-Deposit & Trust Company, for the uses and purposes of the association as hereinafter expressed; and shall, at the expiration of five years from January 1, 1882, if said safety fund shall then amount to one hundred thousand dollars, or whenever thereafter said sum shall be attained, make a semi-annual division of the net interest received therefrom *pro rata* among all the holders of its certificates in force under said system at such times, who shall have contributed, five years prior to the date of any such division, their stipulated proportion of said fund, by applying the same to the payment of their future dues and assessments; and that whenever said fund shall amount to one hundred thousand dollars, all subsequent receipts therefor shall be divided by the said association in like manner as the interest. Said association further agrees that if at any time after said fund shall have amounted to one hundred thousand dollars, or after five years from January 1, 1882, if that amount shall not have been attained before that date, it shall fail by reason of insufficient membership, or shall neglect, if justly and legally due, to pay the maximum indemnity provided for by the terms of the certificate issued by it under said system, and such certificate shall be presented for payment to said association by the legal holder thereof, accompanied by satisfactory evidence of its failure to pay, after demand upon it, within the time herein stipulated for limitation of action, then it shall be the duty of said association to at once convert said safety fund into money, and divide the same (less the reasonable charges and expenses for the management and control of said fund) among

all the holders of certificates then in force under said system, or their legal representatives, in the proportion which the amount of each of their certificates shall bear to the amount of the whole number of said certificates in force. And said association further agrees that so long as any certificate of membership under said safety-fund and endowment system shall remain in force, said fund shall be in nowise chargeable or liable for any use or purpose except as above mentioned. Upon the death of the member aforesaid, while this certificate is in force, all the conditions hereof having been conformed to by said member, and on the receipt by the president or secretary of said association of satisfactory proofs of such death, an assessment shall be made upon the holders of all certificates in force under said system at the date of such death, according to the table of graduated assessment rates given hereon, as determined by the respective ages and the number of such certificates in force at the date of such death; and the sum collected thereon shall be paid: provided, however, that in no case shall the payment upon this certificate, in the event of such death, exceed one thousand dollars, less any balance due said association for dues, assessment, or safety fund, to ———."

The petition was heard in the supreme judicial court before W. ALLEN, J., who reported the case to the full court.

Charles Robinson, for receiver.

The funds claimed to have been attached by the several trustee processes, or to be held by the suit in equity, were not and are not the legal estate of the association, which can be held, taken, or applied in payment of its debts. But if they had been the legal estate of the association, it is submitted that the attachments were dissolved by the dissolution of the association, which was equivalent to the death of a natural person, and the appointment of the receiver was, in effect, the same as granting administration on the estate of a deceased person. Pub. St. c. 161, § 56; Id. c. 105, §§ 40-42. The provisions of the insolvent laws (Id. c. 157, § 46) that attachments made four months prior to the publication of notice of proceedings in insolvency shall not be dissolved, do not apply to the attachments now under consideration. The fund in the hands of the receiver is not liable to pay any losses which might accrue after the decree of dissolution. *Com. v. Insurance Co.*, 119 Mass. 45, 51.

H. H. Buck, for respondent *H. F. Leonard*.

This respondent is the holder of a death claim against said association, and brought suit thereon by attachment in trustee process, and submits that the deposit company was not in any sense a party to the agreement for deposit of this fund, or to the terms of said agreement, and is not shown to have had any knowledge of those terms. The words "safety fund" are not technical words of trust, and are not sufficient to put the company on any inquiry as to the source from which the money was derived. *School-Dist. v. Bank*, 102 Mass. 174; *Shaw v. Spencer*, 100 Mass. 382. The fund being within the reach of the trustee process is not subject to equitable attachment. Such attachment is not dissolved *ipso facto*, nor subject to decree of dissolution on the subsequent appointment of the receiver. *Hubbard v. Bank*, 7 Metc. 340; *Association v. Fasset*, 102 Ill. 315. The claims upon policies established by the death of the holders before the petition for dissolution are claims of creditors, and are to be settled as such, subject to the priorities obtained by attachment of funds. *Mayer v. Attorney General*, 32 N. J. Eq. 815, 9 Ins. Law J. 671; *Com. v. Insurance Co.*, 119 Mass. 51. See, also, 1 Perry, Trusts, §§ 152, 158. The association gives a valuable consideration for this fund, in that it covenants to insure the holder of the policy. The policies recited that the sums of \$10 were paid to the "association to create a safety fund," and the specific conditions of the deposit were stated to be, among others, that the deposit

was "for the uses and purposes of the association." The association, having deposited the money on those terms, had fully complied with its agreement in that respect, and no further terms can now be implied in the agreement. It has become an executed trust. 2 White & T. Lead. Cas. in Eq. *426. There is no resulting trust in favor of the policy-holders. 1 Perry, Trusts. §§ 132, 133; *McGowan v. McGowan*, 14 Gray, 119; *Dehon v. Foster*, 4 Allen, 545. The purpose of establishing the fund was in fraud of creditors, and was not within the intention of the statute; the policy-holders cannot reclaim it, therefore, upon the strength of their policies. Story, Bailm. § 158; 1 Story, Eq. Jur. §§ 296-300; *Babcock v. Thompson*, 3 Pick. 446; *Mills v. Bank*, 10 Cush. 22; St. 1880, c. 196, § 3; *Crossman v. Association*, 143 Mass. 435, 9 N. E. Rep. 753; *Lueders v. Insurance Co.*, 4 McCrary, 149, 12 Fed. Rep. 465. If the fund is held to be not subject to the death claims by the express terms of the agreements, it is still subject to them by reason of the illegality of its creation, in attempting to avoid the claims of creditors, and by reason of appropriating to the benefit of surviving policy holders the money paid in by holders of policies since lapsed. *Bell's Case*, L. R. 9 Eq. 706, 717. The holders of policies lapsed by forfeiture have thereby lost all claims to these funds. The holders of policies, who claim part of the fund in equity, must first do equity towards the holders of death claims; and the court will appropriate the fund to the payment of these matured policies. *Insurance Co. v. Belknap*, 9 Cush. 140; *Insurance Co. v. Swift*, 10 Cush. 433; *Com. v. Insurance Co.*, 119 Mass. 45. All claims against the fund are established at the date of the application for a receiver, and none accruing since that date should share in the distribution. *Bank v. Bank*, 23 Pick. 480; *Davenport v. Tilton*, 10 Metc. 320; *Colt v. Brown*, 12 Gray, 233; *Com. v. Insurance Co.*, *supra*; *Fry v. Insurance Co.*, 31 Fed. Rep. 197; *Mayer v. Attorney General*, *supra*.

W. C. Watt, for certificate holders.

Inasmuch as the fund belongs in equity to the certificate holders, and not to the association, the Boston Safe-Deposit Company cannot be charged as trustees for the association at the suit of a creditor of the association, (*Marvel v. Babbitt*, 143 Mass. 226, 9 N. E. Rep. 566; *Stevens v. Goodell*, 3 Metc. 34; *Chapin v. Railroad Co.*, 16 Gray, 69;) and since no action can be maintained against the certificate holders by the death claimants, (*Prentice v. Brimhall*, 123 Mass. 291; *Petlee v. Peppard*, 120 Mass. 522; *Bank v. Rice*, 107 Mass. 39; *Mellen v. Whipple*, 1 Gray, 817,) it cannot be charged as trustee for them. The contention that this fund should be distributed among the death claimants derives no support from the terms of the certificate, and the circumstances never arose under which it would be justified by the terms of the certificate. It can be supported, if at all, on two grounds only: *First*, of subrogation; or, *second*, of sequestration by equity, and the enforcement of specific performance of the agreement to pay assessments. The ground of subrogation fails completely, because the very foundation for subrogation is lacking. This court ought not to exert discretionary powers to injure these certificate holders. *Stamm v. Association*, 32 N. W. Rep. 710. The court has no power to order an assessment to be made where the association has neglected to make one. *In re Insurance Co.*, 9 Biss. 188. Especially is this so if the original issue of the certificate was *ultra vires*. *Saunders v. Robinson*, 144 Mass. 306, 10 N. E. Rep. 815. The only suit the death claimants can maintain is to compel the levy of an assessment. That suit must be against the association, and, in the absence of evidence as to the amount collected upon the assessment, the damages will be nominal. *Newman v. Association*, 33 N. W. Rep. 662; *Tobin v. Society*, Id. 663; *Rainsbarger v. Association*, Id. 626; *Bailey v. Association*, 27 N. W. Rep. 770; *Smith v. Association*, 24 Fed. Rep. 685; *Curtis v. Life Co.*, 48 Conn. 98; *Eggleston v. Association*, 5 McCrary,

484, 18 Fed. Rep. 14; *In re Association*, 68 Cal. 392, 9 Pac. Rep. 458; *Ball v. Association*, 9 Atl. Rep. 103. The fund should be paid over to the receiver by the Boston Safe-Deposit & Trust Company, and by him be distributed among the certificate holders, who contributed to it and were not in default when the association failed. This association, although formed under St. 1874, c. 375, and the acts amendatory thereto, passed prior to the date of its incorporation, (viz., St. 1875, cc. 49, 107; St. 1877, c. 204; St. 1878, c. 153; and St. 1880, c. 196,) nevertheless did a business not authorized by them, or by any statute passed during its existence. And the fund in dispute was not created in accordance with the provisions of any of these statutes, and so cannot be distributed in analogy to them, or its owners be ascertained by reference to them. The court may allow reasonable counsel fees, taxed as between counsel and client out of the fund. *Frost v. Belmont*, 6 Allen, 152.

Stillman B. Allen and Asa Wellington, for attaching creditors.

C. ALLEN, J. The principal questions arising in the present case are as to the disposition which shall be made of the safety fund, so called, which has been accumulated, and which now amounts to about \$19,000. There is nothing in the statutes of the commonwealth which aids in determining these questions, and the determination of them must depend wholly upon the terms of the contracts which the association made with those who took its certificates. These certificates were in two forms, but no distinct question has been presented or arises under the second form of certificate. It does not appear that there were any claims for losses by death under this form; and only \$75 went into the safety fund from holders under it. The counsel for the certificate holders makes no special contention in regard to this amount, and the questions may be dealt with as if the whole of the safety fund came from holders of certificates under the first form. By the terms of the contract, the safety fund is not in any event directly liable for death losses. It is rather a fund for the benefit of living certificate holders, than security for the payment of money to the representatives of deceased holders. The certificate is explicit upon this point. Upon the death of a member, all that the association undertakes to do is to make an assessment upon the holders of all the certificates in force at the date of the death, and to pay the sum collected thereon, not however in any case exceeding \$1,000. The safety fund was to inure to the benefit of members of five years' standing, by having the income from it, after five years, or after the accumulation should have amounted to \$100,000, applied to the payment of their future dues and assessments. If the association should fail to pay the indemnity provided for in the certificate, then the safety fund was to be converted into money, and divided among all the holders of certificates then in force. It was not to be drawn upon to make good the indemnity for a death loss, and there was a further express stipulation that "said fund shall be in nowise chargeable or liable for any use or purpose except as above mentioned." Now, it is true that the association failed at an earlier period than was expressly provided for; that is to say, it failed before the safety fund amounted to \$100,000, and before five years had elapsed. But, under the clause last copied above, no other use is to be made of the safety fund than to apply it as above mentioned. The persons who make claim for death losses contend that this result will work an injustice, and that holders of certificates understood, and had reason to understand, that the safety fund was to provide a security for the death losses. This argument is founded on a statement on the back of the certificates that this association will provide material and substantial protection for the families or other dependents of deceased members, by means of the safety fund, which combines an improved plan of co-operative protection with a safety-fund deposit, thereby rendering all the members and their dependents perfectly secure, at the low-

est possible rates. But this statement is no part of the contract. It is only general language, not designed to supersede the necessity of reading the contract itself. There was another notice on the back of the certificate, directly calling upon the holder to "read carefully all the conditions of this certificate," and adding, "No person should be a party to a contract without knowing all its conditions." However fallacious and visionary the hopes inspired by this form of life insurance might be, and however ill-advised its provisions, we find nothing to vary the rights of the parties, as ascertained from the terms of the contract into which they have allowed themselves to enter. The court cannot act as a special providence to protect one class in particular, where all are or may be losers. All we can do is to take the contract as we find it. It follows that upon the death of a member no attachment could be made of the safety fund, nor any action at law be maintained against the association, unless upon a refusal to lay an assessment upon the holders of certificates in force. The actions which were brought appear to have been brought under the misconception that the association had bound itself to pay \$1,000. It had only bound itself to lay an assessment, and to pay over the amount collected thereon. For a refusal to lay such an assessment it may be that an action at law would lie; but the more appropriate remedy would be by a proceeding in equity to compel the association to lay the assessment. One of the conditions and agreements expressed upon the face of the certificate is that "the person to whom the certificate is issued agrees to pay to said association, upon each certificate that shall become a claim, an assessment in accordance with the table of graduated assessment rates, as printed hereon, within thirty days from day on which notice bears date." For a failure to make such payment, the certificate would become null and void. This was the security furnished for payment of death losses, and the way in which the safety fund was expected indirectly to improve this security was by ultimately furnishing a fund to enable certificate holders to pay their assessments. Such is the plain language of the contract, and such is the construction which has been given to similar contracts in all the cases but one that have been brought to our attention. The single exception is in *Lueder v. Insurance Co.*, 4 McCrary, 149, 12 Fed. Rep. 465; but the decision of the district judge in that case is overruled or overborne by other decisions. *Smith v. Association*, 24 Fed. Rep. 685, 688; *Eggleston v. Association*, 5 McCrary, 484, 18 Fed. Rep. 14; *Bailey v. Association*, 71 Iowa, 689, 27 N. W. Rep. 770; *Newman v. Association*, 72 Iowa, 242, 33 N. W. Rep. 662; *Rainsbarger v. Association*, 72 Iowa, 191, 33 N. W. Rep. 626; *In re Insurance Co.*, 9 Biss. 188; *In re Association*, 68 Cal. 392, 9 Pac. Rep. 453; *Curtis v. Life Co.*, 48 Conn. 98. The various attachments, therefore, must all be dissolved, and the claimants of death losses will take nothing from the safety fund, in consequence of the death of the holders of the certificates under which they claim; and the safety fund must be divided among all the holders of certificates in force, or their legal representatives, in the proportion which the amount of each of their certificates, that is, the certificates of each, bears to the amount of the whole number of said certificates in force. The date to be adopted in taking this account will be the date of the filing of the bill for the dissolution of the association, namely, November 3, 1885. The subsequent proceedings in the cause relate back to that date. *Bank v. Bank*, 23 Pick. 480, 489; *Mayer v. Attorney General*, 32 N. J. Eq. 815. It must therefore be ascertained, by reference to a master if necessary, what was the whole amount of certificates then in force, and the amount of certificates then held by each holder; so that each may receive his percentage of the net amount to be divided.

Certain matters of detail may be mentioned, with a view to avoid future questions. The legal representatives of holders of certificates, who died without having incurred any forfeiture, and who have not had any benefit from an assessment, though not entitled to maintain any claim upon the safety

fund in consequence of such death, will share in the division of the safety fund with other holders of certificates in force. By the third condition upon the certificates the same are to be null and void, if either the monthly dues, assessments, or the payment of \$10 towards the safety fund, are not paid to the association on the day due. The monthly dues, by the second condition, are 25 cents on each certificate for expenses, payable on the first day of each month, so long as the certificate remains in force. This payment for expenses means the expenses of carrying on the business of the association, and would cease to be due when the association ceased to carry on business. If, then, the association stopped business on May 20, 1885, as we infer from the averments of the bill, though the fact is not distinctly stated, and nowhere clearly appears in the papers before us, a certificate would not be forfeited by the failure to pay the monthly dues after that date. In respect to the payment of \$10 towards the safety fund, it might happen that the year from the date of the certificate had not expired on the 3d November, 1885, so that the holder was not in default on that date. In such case, in order that his certificate may be treated as then in force, so as to entitle him to share in the division of the safety fund, it must be made to appear that the payment of the \$10 was made within the year, though after that date, as it would be manifestly contrary to the true intent of the contract to allow holders to share in the division of the safety fund, who had contributed nothing towards it. Non-payment of any assessment duly made prior to November 5, 1885, within 80 days from the day on which the notice of such assessment bore date, would invalidate a certificate. This implies, however, that due notice of such assessment was given, as provided in condition No. 4. By the terms of the certificate, the association, upon a division of the safety fund, was to be entitled to the reasonable charges and expenses for the management and control of the same, and this must be ascertained by the master, as directed by the single justice. It is to be observed that only so much is to be retained for this purpose as will pay the reasonable charges and expenses for the management and control of said fund, which was all deposited with the Boston Safe-Deposit & Trust Company; and under this head general expenses of the association are not to be included, or at any rate no more than would be a proper proportion for the management and control of said fund. It has been suggested by the receiver that assessments for death losses may now be made under an order of the court. In answer to this it is sufficient to say that none of the holders of claims for death losses have made any application, either to the association or to the court, for such an assessment; and besides, it is expressly found by the justice, before whom the cause was heard, that it would be futile to attempt to obtain any money with which to pay death claims by means of general assessments. This relieves us from the necessity of entering upon the consideration of the question whether, under other circumstances, the court could or would order such assessment to be laid, in the course of winding up an association of this peculiar character, and how far such a method of proceeding should be carried; a question, clearly, of some difficulty. See *In re Insurance Co.*, 9 Biss. 188. A decree will be entered directing the Boston Safe-Deposit & Trust Company to transfer the safety fund to the receiver, to be divided in pursuance of the foregoing opinion; and the reasonable costs and expenses incident to this litigation may be allowed by a single justice out of the fund. Decree accordingly.

(147 Mass. 376)

COMMONWEALTH v. WHALEN.

(Supreme Judicial Court of Massachusetts. Berkshire. September 27, 1888.)

1. CRIMINAL LAW—APPEAL FROM INFERIOR COURT—PLEA IN ABATEMENT—JURISDICTION.

Where the district court has jurisdiction of the subject-matter of a complaint and of the defendant, even if the warrant on which the defendant was brought before it was issued on another complaint not further prosecuted, a plea in abatement or motion to dismiss cannot be sustained in the appellate court, on the ground that the district court could not properly find the defendant guilty, and sentence her, without further hearing than she received. The appeal from the district court vacated the judgment, and rendered immaterial the errors and irregularities therein.

2. SAME—TRIAL—OBJECTION TO EVIDENCE—INTOXICATING LIQUORS.

On the trial of a complaint for maintaining a liquor nuisance, an officer testified that he seized liquor on defendant's premises on a search-warrant, but that the liquor was returned by order of court. *Held*, that while the record was the proper method of showing the return of the liquor, if insisted on, when the testimony was given, it was error to call the jury back after the charge was finished, and they had left their seats to go to their room, and to instruct them to disregard the testimony as to the return.

Exceptions from superior court, Berkshire county; HAMMOND, Judge.

Complaint originally brought in the district court of northern Berkshire, charging the defendant, Mary Whalen, and one Thomas Whalen with maintaining a liquor nuisance. At the July term, 1888, in the superior court, after the record in the case had been amended, the defendant seasonably filed her plea in abatement, and motion to dismiss, which were as follows:

"PLEA IN ABATEMENT. And now comes the defendant, Mary Whalen, and says that at the time judgment was given against her in the court below, on March 20, 1888, as appears by the amended record herein, she was forcibly brought into said court on a complaint and warrant against her for the alleged illegal keeping of intoxicating liquors; that, as soon as she was thus brought before said court on said complaint and warrant, the said complaint and warrant was *nolle prossed*, and judgment given against her on the complaint herein, and she found guilty of the charge alleged in said complaint, without a trial, and after she was forcibly brought before said court on another and different complaint and warrant; wherefore she says that the judgment of said court below, and the sentence therein, was illegal and void, and that this court hath no jurisdiction; wherefore she ought not to be held in this court to further answer to this complaint; and she prays that she may be discharged.

"MOTION TO DISMISS. Now comes the defendant herein and says that by reference to the amended record of the district court of northern Berkshire, now on file in this court, that this court hath no jurisdiction, for the reason, among others, that this defendant hath never been legally and properly tried in the court below, on the complaint herein, but without trial was sentenced and judgment given against her, as will more particularly appear," etc.

At the trial of the defendant's plea in abatement it appeared that the defendant was, on March 20, 1888, arrested and brought before said district court upon a warrant issued by the clerk of said district court, upon a complaint charging her with illegally keeping intoxicating liquor, with intent unlawfully to sell the same; and immediately thereafter, without asking her to plead to said complaint, the same was *nol prossed*; and immediately thereafter she was sentenced, as stated in said amended record. It also appeared that the defendant, on March 19, 1888, and at the time when said Thomas Whalen was tried, as was stated in said record, this defendant was absent, claiming to be sick; that she never requested that she might be tried in her absence; that her counsel, who was also counsel for said Thomas Whalen, never consented or agreed that her trial should proceed in her absence; that her absence from court was not discovered until the case had been fully tried,

v. 17 N.E. nos. 16, 17—56

and said Thomas Whalen had been discharged, when the case as against the defendant was continued in said district court to March 20, 1888, as was stated in said amended record. The court thereupon overruled both the motion to dismiss and the plea in abatement, and the defendant excepted. The defendant was then put upon trial in the superior court, and the government offered to prove that express teams were seen at times going into an alley-way which led to the rear of the house, where defendant and her husband lived, and to the rear of several other houses in the same alley-way. To this the defendant objected, but it was admitted subject to defendant's exception. The government also offered to show that at times people were seen to go in and to come out of the house where defendant lived, at the basement door, which opened on the main street; and it was admitted, subject to defendant's objection and exception. The government did not show that any of these persons went in sober and came away drunk, or that there was anything in the conduct or appearance of such persons to indicate that they were drinking persons, or had been drinking, except one witness, testifying that he at one time saw two persons coming away from the house under the influence of intoxicating liquor, but he did not see them go in. The complainant testified that he, as an officer, within the period named in the complaint, went to the house where defendant and her husband lived, with a search-warrant, for the purpose of searching the premises, and seizing any intoxicating liquors unlawfully kept there; that he found, in a coal-shed in the rear of the house, the key of which was found in defendant's possession, a box containing a cask or keg of liquor, which was full, and had never been opened; that he seized this keg, and took it away. Upon cross-examination, he testified that it was returned by order of court; that he did not return it, but caused it to be sent back. All this evidence went in without objection. No record was introduced touching this matter. At the close of the charge, and after the jury had left their seats, the court called them back, and instructed them to disregard the fact that the keg or cask of liquor was returned; that, if it was returned by order of court, the record of the court was the proper evidence, and, there being no such record and the reasons for the order not appearing in evidence, the jury should disregard the fact that the liquor seized was returned, to which charge the defendant excepted. From the amended record it appeared that a complaint was made on March 8, 1888, upon which a warrant for the arrest of Thomas Whalen and the defendant, Mary, was issued; that on March 19, 1888, after a hearing upon the complaint, said Thomas being present, but said Mary being absent, (counsel for herself and said Thomas was present in court,) it was adjudged that said Thomas was not guilty, and the case was continued to March 20, 1888, for judgment as to said Mary; that on said March 20th said Mary was brought in, and, without further hearing, was adjudged guilty, and sentence imposed, from which sentence she appealed to the superior court. Upon these facts the jury returned a verdict of guilty, and the defendant excepted.

E. M. Wood and M. E. Couch, for defendant.

At common law no person accused of a crime could be tried in his absence. He must be personally present. Our own statute provides that the trial shall be "in the presence of the party charged." Pub. St. c. 212, § 29. When it was discovered that defendant was absent, the only legal course for the court to pursue was to have entered a default against her upon her recognizance. The statute says this shall be done. Id. § 27. The language is: "If the person so recognized does not appear, according to the condition of his recognizance, his default shall be recorded," etc. If the defendant was sick, as she claimed to be, the default could have been taken off at any time. Id. This case was not within the statute providing that under peculiar circumstances a defendant may be tried in his absence. Id. c. 214, § 10. The trial of Thomas

Whalen did not do away with the necessity of a hearing as to Mary. Id. c. 212, § 29. The district court could only render a verdict or finding after hearing the evidence at her trial. Id. c. 212, §§ 33, 34. An appeal from the judgment of a district court cannot supply the want of a trial or a verdict or of a judgment there. When a statute prescribes a course to be pursued, that is the only course which can lawfully be followed. *Roxbury v. Nickerson*, 114 Mass. 544; *West Roxbury v. Minot*, Id. 546. An appeal opens to the defendant the whole case as to the law, the facts, and the judgment. *Com. v. O'Neil*, 6 Gray, 845. Under no possible circumstances would the bare fact that express teams were seen at times going into the alley-way which led to the rear of defendant's house, and to the rear of several other houses on the same alley-way, be evidence tending to establish the defendant's guilt. Evidence of this was inadmissible. *Brightman v. Eddy*, 97 Mass. 481. In no case has the bare fact that parties were seen going in and out of a place been held as having a tendency to prove a defendant guilty of maintaining a liquor nuisance. *Com. v. Kennedy*, Id. 224; *Com. v. Taylor*, 14 Gray, 26; *Com. v. Higgins*, 16 Gray, 19; *Com. v. Berry*, 109 Mass. 367; *Com. v. Intoxicating Liquors*, 105 Mass. 595. At the close of the charge to the jury, and after they had left their seats to go to their room, the court called them back, and instructed them to disregard the fact that a cask or keg of liquor seized in a shed, in the rear of defendant's house, had been returned to the defendants by order of the court. *Beal v. Nichols*, 2 Gray, 264; *Com. v. Jennings*, 107 Mass. 491. This instruction, we submit, was error. See *Gerish v. Cummings*, 4 Cush. 392.

A. J. Waterman, Atty. Gen., for the Commonwealth.

DEVENS, J. Assuming, in favor of defendant's contention, that Mary Whalen could not properly have been found guilty of the offense charged upon her and sentenced therefor without other and further hearing than that which she received from the district court, this irregularity could not operate to deprive the appellate court of its jurisdiction, or afford ground for sustaining the defendant's plea in abatement, or motion to dismiss. The district court had jurisdiction of the subject-matter of the complaint, and of the person of the defendant, even if the defendant was brought before it also upon a warrant issued upon another complaint, which was not further prosecuted. It had a right to inquire into the facts, to apply the law, to impose the proper sentence. If its judgment was erroneous, an appeal could be taken for the purpose of avoiding the effect of it. Such appeal, in the case at bar, vacated the judgment of the district court, rendered immaterial all errors and irregularities in the proceedings there, and gave the defendant her full rights in the court above, as the whole case was thus opened there as to the law, the facts, and the judgment. *Com. v. O'Neil*, 6 Gray, 848; *Com. v. Tinkham*, 14 Gray, 12; *Com. v. McCormack*, 7 Allen, 532; *Com. v. Calhane*, 108 Mass. 481; *Com. v. Sheehan*, Id. 432, note; *Com. v. Harvey*, 111 Mass. 420; *Com. v. Holmes*, 119 Mass. 195; *Com. v. Fredericks*, Id. 199. In *Com. v. Tinkham*, *ubi supra*, it was held that, assuming that the plea of the defendant did not authorize the sentence passed by the magistrate, no reason was shown for discharging the defendant or dismissing the case brought by him to the court of common pleas by appeal, but that it was the duty of that court to try the case upon the appeal under a proper plea. The superior court had therefore jurisdiction to try the case at bar, on the appeal. We do not discuss the several exceptions to the admission of evidence taken by the defendant, as we are, upon a single ground, of opinion that there should be a new trial, and the evidence then presented may render such discussion superfluous. The complainant testified that he was an officer within the period named in the complaint; that he went to the premises of defendant and her husband, described the finding of a cask

of liquor there, and the place where, and circumstances under which, it was found. He further added that he seized this cask, and took it away. On cross-examination he testified, without objection, that it was returned by order of the court, he himself causing it to be sent back. No record was introduced as to this matter. At the close of the charge, and after the jury had left their seats, the presiding judge recalled them, and directed them "to disregard the fact that the keg or cask of liquor had been returned; that if it was returned by order of the court, the record was the proper evidence of the same, and, there being no record of the court in evidence, and the reasons for the order not appearing in evidence, that the jury should disregard the fact that the liquor seized was returned." To this the defendant duly excepted, and we think the direction was erroneous. The officer had not been limited to the mere statement of the circumstances under which he had found liquor on defendant's premises. He had been permitted to testify, without objection by defendant, and apparently without producing any search-warrant, that he had seized and taken it away on his warrant. He had thus placed it in legal custody. When he further testified, without objection by the commonwealth, and when the court had received the evidence, that it was returned by order of court, the presiding justice could not properly, after the close of the charge, instruct the jury to disregard the fact. It is true that the order of the district court could properly only have been proved by production of a properly attested copy of the record. The evidence might therefore have been refuted when offered. But when no objection on that account had been made, and when the evidence had been received, it should not have been rejected, after the evidence, and, indeed, the whole case had been completely closed. It may well have been that the defendant, by the acceptance of the parol evidence of what the record contained, had deemed it unnecessary to put in a properly attested copy. Even if the evidence, as presented by him, failed to show the reasons why the district court had ordered a return, this went to its weight rather than its competency, and the record itself, if produced, might not have disclosed them. If, independent of or in addition to the facts and circumstances under which a cask of liquor had been found on defendant's premises, it was competent to show, as against the defendant, that the cask had been actually seized on a search-warrant, (which may be doubted, as the seizure is not an act of the defendant, nor is he bound by the judgment of the officer who makes it,) it was competent on the part of the defendant to diminish its force by showing that it had been returned to him by order of the court. Had the learned judge ordered both the evidence of the seizure and the return to be struck out, and left this part of the case to be considered by the jury, only on the facts and circumstances testified to by the officer, which attended his discovery of the cask of liquor on defendant's premises, the defendant would perhaps have had no ground of exception. But when the evidence that the liquor was seized on a search-warrant was permitted to remain, unless proper evidence that it was returned is competent, injustice would be done the defendant. For these reasons the evidence, as originally given on this point, was proper to be considered by the jury. Exceptions sustained.

(147 Mass. 344)

MOORS v. WASHBURN et al.

(*Supreme Judicial Court of Massachusetts. Suffolk. June 28, 1888.*)

PLEDGE—SPECIAL SECURITY—RIGHT TO HOLD FOR GENERAL INDEBTEDNESS.

A borrower pledged goods deposited with a warehouseman to plaintiff as collateral security for a note, and agreed that it might be held as general security for part and future advances. The wool was converted by a third person, and replenished by the borrower for the benefit of plaintiff, who was surety on the bond, and who sold it for more than enough to pay his note, and applied the balance of the proceeds to the payment of the general indebtedness. The warehouseman brought

an action of trover against the third person, and recovered judgment for the value of the wool. There was a judgment in the replevin suit for the return of the property, which by agreement was settled by deducting the price for which the wool was sold by plaintiff from the amount of the judgment in trover. *Held*, that the plaintiff was entitled to the balance of the judgment in trover, to apply on the borrower's general indebtedness.

Appeal from superior court, Suffolk county; DEWEY, Judge.

Bill in equity by Joseph B. Moors against C. Everett Washburn and others, praying that the sum of \$750, in the hands of Washburn, be decreed to be paid to the plaintiff. Hearing in the superior court before DEWEY, J., who found for the defendants, and the plaintiff appealed. The material facts are stated in the opinion.

C. Everett Washburn, pro se.

The contract and condition clearly intend that the specific loan should be paid out of the proceeds of sale. If the proceeds of sale were insufficient to liquidate the specific loan, then other collateral might be sold and applied; and, if the proceeds were more than the specific indebtedness, then the surplus might be held and applied for other indebtedness. Certainly the plaintiff had no right to apply the proceeds of this collateral to other accounts, leaving the specific loan, thereby secured, unpaid. The plaintiff has had the full benefit of his collateral security, as contemplated in his contracts with George F. Moore. He has also had the full benefit intended by Pratt's assignment to Washburn. His present claim is therefore unjust and inequitable. On appropriation of payment, see *Hunt v. Nevins*, 15 Pick. 504; *Hicks v. Bingham*, 11 Mass. 300; *Parker v. Green*, 8 Metc. 144.

H. L. Harding, for plaintiff.

The assignee of a judgment takes the right of the judgment creditor. Freem. Judgm. § 427; *Northam v. Gordon*, 23 Cal. 255. It is immaterial whether he has notice of any equities or not. Freem. Judgm. § 427; *Rea v. Forrest*, 88 Ill. 275; *Blakesley v. Johnson*, 13 Wis. 530. Washburn was chargeable with constructive notice of the plaintiff's title and rights. *Bank v. Logan*, 74 N. Y. 568. Independently of his distinct promise to pay the plaintiff, the defendant cannot claim, as a purchaser for value without notice, any other or better right than his assignor had. His assignor, Pratt, the warehouseman, had merely a lien for his fees. Story, Bailm. § 453; *Barker v. Brown*, 138 Mass. 340. His possession and special title entitled him to recover the full value of the wool in trover; but "in such a suit the special owner would hold the balance above the amount recovered for the injury sustained by him as special owner, in trust and for the benefit of the general owner." *Rindge v. Coleraine*, 11 Gray, 157, 162; *Ullman v. Barnard*, 7 Gray, 558; *Adams v. O'Connor*, 100 Mass. 515. In no case can a party, having a special or qualified interest, recover damages beyond the extent of his interest, except as he is trustee, and responsible over to the general owner. *King v. Bangs*, 120 Mass. 514, 516. No contract which Pratt could make with Washburn could prejudice the plaintiff's rights. A warehouseman cannot divest an owner's title, even by a sale to an innocent purchaser for value. *Dows v. Bank*, 91 U. S. 618, 637; *Bank v. Crocker*, 111 Mass. 163; *Thacher v. Moors*, 134 Mass. 156. It is perfectly well settled that a pledge may be made to cover future advances or a general indebtedness. 2 Kent, Comm. 534; Jones, Pledges, §§ 355, 358, 359, 361. And, in all cases of pledge contracts, the pledge is understood to be a security for the whole, and every part of the debt or engagement; so that the payment or discharge of a part would leave it a perfect pledge for the residue of the debt or engagement. Schouler, Bailm. § 187. Even if the wool had not been stored in plaintiff's name, and if plaintiff were only the transferee of the warehouse receipts, still he would have more than a mere lien for his advance; he would

be the legal owner of the wool, and of its equivalent, the \$750. See *De Wolf v. Gardner*, 12 Cush. 19, 26; *Dow v. Bank*, 91 U. S. 618; *Casey v. Cavaroc*, 96 U. S. 467; *The Thames*, 14 Wall. 98; *Forbes v. Railroad Co.*, 133 Mass. 154; *Bank v. Logan*, 74 N. Y. 568, 582, 583; *Bank v. Fiske*, 71 N. Y. 353; *Hoffman v. Noble*, 6 Metc. 68. Having the legal title, (defeasible on a condition never performed,) he was entitled to all the rights of absolute ownership, including the right of possession, and to all rights of action for injury to his right of possession, and to all other rights incident to and growing out of the property. Both Moore and Pratt are estopped to deny the plaintiff's title and right. Colb. Coll. §§ 415, 416.

W. ALLEN, J. The defendant, Washburn, has in his hands money collected on a judgment in an action of trover brought by Pratt against the Boston Heel & Leather Company, for the conversion of 15 bags of wool, in which action Washburn was the attorney for the plaintiff. Moore was the general owner of the wool, and had pledged it to the plaintiff as collateral security, and it was stored in the plaintiff's name with Pratt as a warehouseman, when it was converted by the Heel & Leather Company. The judgment was for \$1,758, the value of the wool. The only interest Pratt had in the wool was his lien as warehouseman; but that has been satisfied, and the right to the fund is in the plaintiff or in Moore, subject to the claim of the defendant, Washburn, for his fees, which is not in dispute. The defendant says, in the first place, that the debt which was secured by the wool has been paid. The agreement, under which the wool was pledged, recited that Moore transferred the wool to the plaintiff as collateral security for the payment of Moore's note, which was described, and contained these words: "It is understood and agreed by me that the conditions printed or written on the other side, and assented to by my signature, shall form part of this contract." One of the conditions referred to was this: "Any and all collateral security held by J. B. Moors and Company for my account, whether under the within contract or otherwise, may be held and applied by said J. B. Moors and Company, not only as security for the specific indebtedness within mentioned, but also as general collateral security for any and all indebtedness or liability existing, or which may hereafter exist, from me to you, whether previous to the giving of said security or subsequent thereto." There is no ambiguity in this. The contract is explicit that the security held under it may be held as general collateral security for present and future indebtedness, and the claim of the defendant that the right of the plaintiff to the security ceased when he received enough from it to pay the note specifically secured by it cannot be sustained. He had a right to treat it as security for the large general indebtedness of Moore to him.

The other objection is, in effect, that the plaintiff, having sold the wool, and applied the proceeds upon the indebtedness it secured, cannot also hold the damages recovered for its conversion. The material facts upon which this objection is founded are that, after the action of trover was commenced against the Boston Heel & Leather Company, for the conversion of the wool, it was replevied from that company in an action in the name of Moore, but for the benefit of the plaintiff, and delivered to the plaintiff, who sold it for more than enough to pay the note specially secured by it, and applied the proceeds on Moore's general indebtedness. The plaintiff was one of the sureties on the replevin bond. Judgment was rendered for the defendant in replevin, and a return of the goods was ordered on the same day on which judgment was entered in the action of trover. The plaintiff advised with the defendant, Washburn, in regard to both suits. A settlement was made of both suits, and the judgment in the action of trover was satisfied on discharging the replevin bond and the payment of the \$750 by the Boston Heel & Leather Company. Pratt, the plaintiff in trover, represented in that action the interests of the general owner and of the pledgee. The replevin was by the general owner at the re-

quest and for the benefit of the pledgee. The general owner and the pledgee were both upon the replevin bond, and the defendant in replevin was entitled to recover of them the value of the goods as found in that action; and was liable in the action of trover to pay, for their benefit, the value of the goods as found in that action. Whatever may have been the effect of the order of return, the satisfaction of the judgment in the action of trover fixed the general property in the wool in the defendant in that action, and substituted the damages in that action for the property converted. Moore and the plaintiff, as the real party who replevied, and party to the bond, were bound to return the wool to the Heel & Leather Company; and, failing to do that, were liable for its value on the replevin bond for the benefit of that company. The parties discreetly settled the whole matter by deducting the agreed amount of the liability of Moore and the plaintiff on the replevin bond (which seems to have been the amount for which the plaintiff had sold the wool) from the amount of the judgment in the action of trover. We are at a loss to see how this could give to Moore any right, as against the plaintiff, to the damages in that action, or release them from the plaintiff's lien as pledgee of the wool. If the plaintiff should receive, in all, less than the amount of the judgment in trover, it would be in consequence of the replevin of the property by Moore, and of the sale of the property by the plaintiff under the possession obtained by the replevin, which was valid as to Moore. If he should receive more, it would be for the benefit of Moore, in the same manner as if the property had been sold for more than its value. We do not regard the assignment of the judgment by Pratt to the defendant Washburn as material. Decree for the plaintiff.

(147 Mass. 356)

BERNARD et al. v. BARNEY MYROLEUM Co. et al.

(*Supreme Judicial Court of Massachusetts. Suffolk. September 4, 1888.*)

1. FRAUDULENT CONVEYANCES—WHAT CONSTITUTES—CORPORATIONS.

A company, whose president had loaned it money which he had borrowed from his brother, voted to give its notes therefor to its president, or "to whom he may desire." The president executed the company's notes to his brother, but did not then deliver them. Subsequently finding that he could not get an extension of time on other debts owed by the company, he had suit brought on the notes, and the company's property attached, but, to gain time, continued negotiations with other creditors. The company then made an assignment to the brother, providing for carrying on the business of the company in the company's name, instead of immediately selling out the property, and its president was left in charge by his brother. *Held*, that these facts authorized, if they did not in law require, a finding that the intent of both parties to the assignment was to hinder, delay, and defraud creditors of the company.¹

2. SAME—ACTIONS TO SET ASIDE NOT CREDITORS' BILLS—DECREE.

Pub. St. Mass. c. 151, § 3, gives jurisdiction in equity to reach and apply in payment of a debt property fraudulently conveyed to hinder, delay, or defraud creditors. *Held*, that a bill thereunder was not a creditors' bill, and a decree applying the property to the payment of the complainant's claim, without regard to other creditors, was proper.

Report from supreme judicial court, Suffolk county; C. ALLEN, Judge.

Bill in equity by Joseph Bernard and Arthur Hershheim, doing business under the firm name of Leo Bernard & Co., against the Barney Myroleum Company and Gilbert N. Hall, to set aside an assignment executed by the Barney Myroleum Company to Gilbert N. Hall, on the ground that it was fraudulent as against creditors. Heard in the supreme judicial court, and reported to the full court.

¹ Concerning preferences of relatives by directors of insolvent corporations, see *Adams v. Milling Co.*, 85 Fed. Rep. 433. See, also, note to *Id.*

As to what constitutes a fraudulent conveyance, and what is proof of an intent to hinder, delay, and defraud creditors, see *Marmon v. Harwood*, (Ill.) 16 N. E. Rep. 236, and note; *Conley v. Thornton*, (Ga.) 7 S. E. Rep. 127, and note; *Stoddard v. Rowe*, (Iowa,) 59 N. W. Rep. 84, and note.

Henry G. Nichols and Charles K. Cobb, for plaintiffs.

The debt intended to be secured was in reality the debt of Charles H. Hall, the treasurer. It is submitted that Gilbert N. Hall was not a creditor of the corporation, and that the purpose and effect of the assignment was to put the property of the corporation into the hands of one who was not a creditor of the corporation, but of Charles H. Hall. Such an assignment is obviously fraudulent and void, as against creditors of the corporation. Assuming, however, that Gilbert N. Hall was a creditor of the company, the assignment is fraudulent and void. The wording of the statute of 13 Eliz. c. 5, is important to the consideration of this case. The intent is to be considered (a) as a question of law; (b) as a question of fact. *Harris v. Sumner*, 2 Pick. 129. See, also, *Pierson v. Manning*, 2 Mich. 445, 446; *Hill v. Agnew*, 12 Fed. Rep. 230; *Jones v. Syer*, 52 Md. 211; *Platt v. Brown*, 16 Pick. 553; *Goodrich v. Downs*, 6 Hill, 438; *Barney v. Griffin*, 2 N. Y. 365; *Leitch v. Hollister*, 4 N. Y. 211; *Dana v. Lull*, 17 Vt. 390; *Merrill v. Englesby*, 28 Vt. 150; *Arthur v. Bank*, 9 Smedes & M. 433; *Bank v. Nunes*, 80 Ky. 334; *Nicholson v. Leavitt*, 6 N. Y. 518, by GARDINER, J. The debtor, by a creation of a trust, may direct the application of the property. This the law permits, and such delay as may be necessary for that purpose. But the debtor cannot in this way avoid the obligation of immediate payment, nor extend the period of credit without the assent of the creditor. *Gardner v. Bank*, 95 Ill. 298; *Jones v. Syer*, *supra*; *Richardson v. Marqueeze*, 59 Miss. 80; *Arthur v. Bank*, 9 Smedes & M. 394; *Hutchinson v. Lord*, 1 Wis. 286; *Dunham v. Waterman*, 17 N. Y. 1; *Barney v. Griffin*, *supra*; *Quincy v. Hall*, 1 Pick. 357. As a question of fact, "to prove the fraud of the grantor, his conduct and declarations before the conveyance may be the best evidence of his fraudulent purpose," in *Foster v. Hale*, 12 Pick. 89. If one of the purposes of a conveyance is to deter the grantor's creditors from attaching the assigned property, such a conveyance is absolutely void, although the principal object of the parties is to secure a *bona fide* debt. *Crowninshield v. Kirtledge*, 7 Metc. 520, cited with approval in *Lynde v. McGregor*, 13 Allen, 181; *Johnson v. Whitwell*, 7 Pick. 71; *Brinks v. Hesse*, 84 Pa. St. 246; *Wadsworth v. Williams*, 100 Mass. 130. "A conveyance made with an actual purpose and intent to defraud creditors, present or future, is not valid against them in favor of a grantee who participated in the fraudulent intention, although made for a full consideration, and by a grantor in the possession of any amount of property." *Anthony v. Stype*, 19 Hun. 265; *Kittredge v. Sumner*, 11 Pick. 50; *Bank v. Keavy*, 128 Mass. 298; *Gashert v. Apple*, 14 Abb. Pr. 64; *Haydock v. Coope*, 53 N. Y. 74; *Clark v. Taylor*, 37 Hun. 812, (1885.) The capital and debts of banking and other moneyed corporations constitute a trust fund and pledge for the payment of creditors and stockholders." *Curran v. State*, 15 How. 312; 2 Mor. Priv. Corp. (2d Ed.) §§ 779, 787. And the directors of a corporation, after it has become insolvent, are under a positive obligation to manage the assets in their hands with strict regard to the equitable rights of creditors. *Conro v. Gray*, 4 How. Pr. 166; *Bradley v. Farwell*, 1 Holmes, 433, and cases cited. "In case of the insolvency of a corporation, its assets become a trust fund for the benefit of its creditors, under the management of its officers. That a court of equity will not suffer an injury to the creditors or stockholders resulting from such a breach of trust on the part of the directors to pass without a remedy is well settled in the most carefully considered decisions, both in England and this country. *Richards v. Insurance Co.*, 43 N. H. 263; *Drury v. Cross*, 7 Wall. 299; *Improvement Co. v. Terrell*, L. R. 10 Eq. 168; *Nathan v. Whitlock*, 9 Paige, 152; 2 Story, Eq. Jur. § 1252; *Railroad Co. v. Bee*, 48 Cal. 398; *Crandall v. Lincoln*, 52 Conn. 73; *Warner v. Hopkins*, 111 Pa. St. 328, 2 Atl. Rep. 83; 2 Mor. Priv. Corp. (2d Ed.) § 787, notes 2 and 3; *Taylor v. Taylor*, 74 Me. 582. The defendant corporation is a citi-

zen of New Hampshire, created by and subject to the laws of that state, under which an assignment with preferences is invalid. Gen. Laws N. H. c. 140, § 1; *Coats v. Donnell*, 94 N. Y. 168. See, also, *Johnson v. Sharp*, 31 Ohio St. 611; *Benedict v. Parmenter*, 13 Gray, 88; *Chafes v. Bank*, 71 Me. 514. To hold this assignment valid would be to hold that a foreign corporation can make an assignment here which is contrary to the laws of the state creating it, and which could be set aside here, if it were a domestic corporation, by proceedings in insolvency, as in contravention of the statutes of this commonwealth. If it be argued that this court has not jurisdiction to grant the prayers of the bill, we submit it is within the general equity jurisdiction of this court to set aside fraudulent conveyances at the suit of a creditor. In this case, it is found that the action of the defendant corporation in making the assignment was especially aimed at the complainants. Pub. St. Mass. c. 151. And the bill can be maintained by a simple creditor. *Weis v. Goetter*, 72 Ala. 259; 1 Story, Eq. Jur. (13th Ed.) p. 356 *et seq.*; *Crompton v. Anthony*, 13 Allen, 38; *Warner v. Hopkins*, 111 Pa. St. 328, 2 Atl. Rep. 83; *Mining Co. v. Atwell*, L. R. 7 Eq. 847; *Conro v. Gray*, 4 How. Pr. 166; 2 Mor. Priv. Corp. (2d Ed.) § 797. Where a diversion or waste of the assets of an insolvent corporation is threatened in violation of equitable rights of creditors, a court of equity will grant an injunction, and appoint a receiver at the suit of one who is either a judgment or simple creditor; or even though his debt be not due. 2 Mor. Priv. Corp. § 860, and cases cited; Id. § 863. See, also, *Innes v. Lansing*, 7 Paige, 583; *Whitcomb v. Fowle*, 7 Abb. N. C. 295. Nor is the fact that the defendant corporation is a foreign corporation material, the defendant having appeared generally. *Desper v. Water-Meter Co.*, 137 Mass. 252; *Insurance Co. v. French*, 18 How. 407. And the court may appoint a receiver of a foreign corporation where the officers reside in this commonwealth, and its property is situated here. Beach, Rec. § 427; High, Rec. (2d Ed.) § 305, note 2; *Murray v. Vanderbilt*, 39 Barb. 140. And see, especially, *Redmond v. Hoge*, 3 Hun, 171. The defendant Gilbert N. Hall was chargeable with knowledge of the fraudulent intent of the assignment by reason of the knowledge of his agent, Charles H. Hall. *Jewett v. Carter*, 132 Mass. 335; *Rogers v. Palmer*, 102 U. S. 263; Story, Ag. §§ 140, 452. He cannot, therefore, hold the property, as against the creditors of the corporation, and should be ordered to restore it.

Champlin, Ryther & Wentworth, and *John H. Wigmors*, for defendants.

An insolvent debtor may at common law, and in the absence of an insolvent law applicable to his case, assign his property, entirely or in part, to a creditor, by way of payment, even though a preference is thereby given to the exclusion of other creditors; and such a transfer cannot be set aside on any ground, (*Green v. Tanner*, 8 Metc. 421; *Banfield v. Whipple*, 14 Allen, 13; *Penniman v. Cole*, 8 Metc. 496; *Potter v. Belden*, 105 Mass. 11; *Bank v. Refinery*, 109 Mass. 38; *Gardner v. Lane*, 9 Allen, 492; *Giddings v. Sears*, 115 Mass. 505.) provided there is no actual fraudulent intent; that is, according to the cases, that no secret trust is agreed on in favor of the debtor, by which some advantage is secured to him. *Banfield v. Whipple*, 14 Allen, 13; *Rice v. Cunningham*, 116 Mass. 466; *Sleeper v. Chapman*, 121 Mass. 408. And an insolvent corporation, by its directors, has the same power as a natural person to assign its property to a creditor, giving a preference thereby. *Sargent v. Webster*, 13 Metc. 497; *Pond v. Framingham*, 130 Mass. 194; 2 Mor. Priv. Corp. § 802, note 3; Burrill, Assignm. (2d Ed.) § 101; Bump, Fraud. Conv. 350, 396. Even if the insolvency law were applicable, only the assignee in insolvency could set the preference aside; no creditor could. *Potter v. Belden*, *supra*; *Penniman v. Cole*, *supra*; *Gardner v. Lane*, *supra*; *Bank v. Refinery*, *supra*. But in the present case not even the assignee in insolvency could

set it aside, for the insolvent act of this state does not apply to foreign corporations, (Pub. St. c. 157, § 127;) and therefore its provisions cannot affect the defendant corporation, (*Sargent v. Webster*, 13 Metc. 503; *Carpenter v. Cushman*, 121 Mass. 265.) But even if the assignment had been one which could be set aside by a creditor, as being in fraud of creditors, a creditor at large cannot do so. If the proceedings had been at law, only a creditor having an execution, attachment, or other similar legal process could set aside the assignment. Bump, Fraud. Conv. 462; *Russ v. Butterfield*, 6 Cush. 242. And where the proceeding is in equity, as here, the creditor must first have obtained a judgment, which the plaintiff has not done. Bump, Fraud. Conv. 534; Burrill, Assignm. 746; *Caswell v. Caswell*, 28 Me. 232. In apparently only two cases in this commonwealth in which such a bill has been brought the creditor in the one instance (*Trow v. Lovett*, 122 Mass. 571) had obtained a judgment, which the court intimated was essential to his case; in the other, (*Giddings v. Sears*, 115 Mass. 508,) the court intimated doubts, no judgment appearing to have been obtained, whether they had jurisdiction of the bill. But, though no direct decision can be found in Massachusetts, the general rule (see Bump and Burrill, above) is undoubted. See *Thornton v. Railway Co.*, 123 Mass. 35; *Carver v. Peck*, 131 Mass. 293; and *Remington v. Bay Co.*, 140 Mass. 496, 498, 5 N. E. Rep. 292. An assignment of personal property is governed by the law of the place where it is made, irrespective of the domicile of the parties to the transfer. Burrill, Assignm. §§ 310, 311. This assignment comes within the principle of the well-known rule of *Taylor v. Insurance Co.*, 14 Allen, 353, and *May v. Wannemacher*, 111 Mass. 202. The plaintiff has argued that the provision in the assignment authorizing the assignee to receive payment of debts by installments, and to compound with debtors of the company, renders the assignment void. Such a provision, however, is valid. Burrill, Assignm. § 228. Assignees have authority to do so, even if it is not expressly given in the assignment. Id. § 401. The provision authorizing the assignee "to carry on the business, with a view to the gradual winding up of the same," is valid, and the assignee has such power, even apart from the assignment. Id. § 396; *Woodward v. Marshall*, 22 Pick. 474. So the provision authorizing the assignee to employ the agents of the corporation to assist in managing and closing the business is legal. Burrill, Assignm. § 371; *Shattuck v. Freeman*, 1 Metc. 14. That the assignment did not state the amount of the claim of Gilbert Hall, the creditor, is immaterial. It is not necessary to insert the amount of the debt. Burrill, Assignm. § 146. It is proper to direct the assignee to return the surplus, if any, to the debtor. Id. § 207, and note 4. A majority of the directors form a quorum, in the absence of a different regulation, and a majority of the quorum are competent to decide. *Sargent v. Webster*, 13 Metc. 497; Ang. & A. Corp. § 495; Brice, Ultra Vires, 39, 647; 2 Mor. Priv. Corp. §§ 635, 675; *Beecher v. Rolling-Mill Co.*, 45 Mich. 103, 109, 7 N. W. Rep. 695. The plaintiff asks that a receiver be appointed to take possession of the property of the corporation, and to wind up and liquidate its affairs. To this it is to be said that the bill does not indicate that its purpose is the winding up of the affairs of the company. No facts are alleged upon which such a conclusion can be based. High, Rec. § 288; Aldr. Eq. Pl. & Fr. 241; Pub. St. c. 105, §§ 40-44.

W. ALLEN, J. The first question presented is whether it was competent for the justice who heard the case to find, upon the facts reported, that the assignment was made with the intent to hinder, delay, and defraud creditors of the company. It may be assumed that Gilbert N. Hall, the assignee, was a creditor of the company, and that the ostensible purpose of the assignment was to secure payment to him, and that the company had a right to give a preference to him over other creditors, and that the detriment to other cred-

itors resulting from the preference was not fraudulent, or evidence of fraud, as to them. A creditor receiving a conveyance in preference to other creditors stands in no better position than a purchaser for value; and in either case the question is whether one purpose of the conveyance is to hinder, delay, and defraud creditors. The distinction made by Mr. Chief Justice BIGELOW in *Banfield v. Whipple*, 14 Allen, 13, is enough for the present case. He says: "The distinction is between a transfer of property made solely by way of preference of one creditor over others, which is legal, and a similar transfer made with a design to secure some benefit or advantage therefrom to the debtor, which is fraudulent and illegal." See, also, *Giddings v. Sears*, 115 Mass. 505. The material facts bearing on the intent and purpose of the assignment can be briefly stated. Charles H. Hall owned one-half of the stock of the company, and was its president, treasurer, and manager. He lent money to the company, which he borrowed for the purpose of his brother Gilbert N. Hall, and for which he gave partial security upon his own property. The company subsequently voted to give its notes to Charles H. Hall, "or to whom he may desire," to cover said money lent by him to the company; and Charles H. executed notes of the company, payable to the order of Gilbert N., for the amount, which notes constitute the debt of Gilbert N., to secure which the assignment in question was made. Charles H. acted for Gilbert N., in the matter, under full authority, and having the entire management of the matter. Charles H. retained the notes in his possession until the assignment, and no entry of them was made in the books of the company. The assignment was made September 21, 1887. The plaintiff had been selling goods to the company for more than two years prior to August, 1887, and for a year before that time the company had been unable to meet its notes at maturity, and had been assisted by the plaintiff by advances in cash to pay its notes. On the 23d of August, 1887, the company showed a statement of its condition to the plaintiff, and negotiations continued between the parties until the assignment, in regard to the terms upon which the plaintiff would grant an extension of the time of payment of their debt, and give further credit to the company. At least as early as September 17th, four days before the assignment, the company had given up any intention to make an arrangement with the plaintiffs, and the assignment to Gilbert N. Hall had been determined on; but the pretense of negotiations with the plaintiffs was kept up, and letters and telegrams sent to them for the purpose of deceiving them, and preventing them from taking legal measures to collect their debt. On the 19th of September, a suit was commenced, by direction of Charles H. Hall, on the notes to Gilbert N., on which all the property of the company was attached; and on September 21st, at a meeting of the directors at which Charles H. Hall and one other director, Gilbert N. Hall, and one other person, who was counsel for the company and Charles H., were present, the assignment which had been prepared under the direction of Charles H. was adopted, and it and the notes were delivered to Gilbert N. Hall. In the assignment there are provisions for carrying on the business, extracts from which are as follows: "The party of the second part may, in his discretion, carry on, in the name of the party of the first part or otherwise, the business as carried on by the party of the first part, with a view to the gradual winding up of the same, instead of immediately selling the same; and, for the purpose of such carrying on and winding up, he may employ or authorize the employment of any of the agents of the party of the first part, as manager or managers of said business; * * * and it is agreed and declared that, for the purpose of carrying on, as aforesaid, the said business, it shall be lawful for the party of the second part from time to time, at the expense of the estate hereby transferred, to procure, by purchase, lien, or otherwise, such stock in trade, fixtures, materials, chattels, and articles as he shall think fit." Gilbert N. Hall took formal possession of the property, but left it in charge of Charles H.

Hall, as his agent, who continued to carry on the business until the filing of the bill in this case.

Not taking into account facts stated in the report, and perhaps some before adverted to, which are equally consistent with an intent to prefer Gilbert N. Hall and an intent to secure the continuance of the business, it appears that Charles H. was a creditor of the company for the amount which was secured by the notes to Gilbert N.; that Charles H. acted for the company, and also acted for Gilbert N.; that his interest personally, and as the representative of the company and of Gilbert N., was that the property of the company should not be sold to pay its creditors, whether himself, Gilbert N., or the plaintiffs, but should be continued in the business; that his object, and the object of the company in the negotiations with the plaintiffs, was to prevent the property of the company from being taken to pay its debts, and to secure its continued use in the business; that the attachment was made by Charles H., not to secure the debt to Gilbert N., but to prevent the attachment of the property by the plaintiffs before the intended assignment could be perfected; and that the purpose of the assignment was to prevent the property from being attached by the plaintiffs, and to continue its use in the business. The evidence was clearly competent to prove these facts, and to authorize, if it did not in law require, the finding that the intent of both parties to the assignment was to hinder, delay, and defraud creditors of the company. See *Dunham v. Waterman*, 17 N. Y. 1; *Jones v. Syer*, 52 Md. 211; *Spencer v. Slater*, 4 Q. B. Div. 18; *Gardner v. Bank*, 95 Ill. 298.

Pub. St. c. 151, § 3, gives jurisdiction in equity to reach and apply, in payment of a debt, any property of a debtor liable to be attached or taken on execution in a suit at law against him, and fraudulently conveyed by him with intent to defeat, delay, or defraud his creditors. This provision was first enacted in St. 1875, c. 235. Before that statute, a creditor could reach property of his debtor, fraudulently conveyed, by attachment and execution in a suit at law. The statute gave him a convenient remedy in equity to enforce the same right. A bill under the statute is not a creditors' bill, or primarily a bill to reach property which cannot be come at to be attached or taken on execution, but a bill to enforce the right of a creditor to take property of his debtor on execution. The bill is brought by a single creditor in his own behalf, and under the decree the property will be applied to his debt. *Powers v. Raymond*, 137 Mass. 483; *Squire v. Lincoln*, Id. 399; *Trow v. Lovett*, 122 Mass. 571; *Giddings v. Sears*, 115 Mass. 508. Decree for plaintiff.

(147 Mass. 370)

COOPER v. COOPER *et al.*

(Supreme Judicial Court of Massachusetts. Suffolk. September 5, 1888.)

ASSUMPSIT—WORK AND LABOR—BY WIFE FOR SUPPOSED HUSBAND.

A woman married a man and lived with him till his death, but afterwards learned that he had a former wife, still living, and not divorced. *Held*, that she could not recover in an action of contract against his administrator for her services in keeping house for him during his life.¹

Exceptions from superior court, Suffolk county; BACON, Judge.

¹Where it is shown that the person rendering services is a member of the family of the person served, and receiving support therein, a presumption of law arises that such services were gratuitous, and in such case, before the person rendering the service can recover, the express promise of the party served must be shown, or such facts and circumstances as will authorize the jury to find that the services were in the expectation, by one of receiving, by the other of making, compensation therefor. *Keegan v. Estate of Malone*, (Iowa,) 17 N. W. Rep. 461. See, also, on the necessity of showing an express promise in such cases, *Ulrich v. Arnold*, (Pa.) 13 Atl. Rep. 881, and note; *Madeira's Appeal*, (Pa.) 5 Atl. Rep. 258, and note; *Neale v. Engle*, (Pa.) 7 Atl. Rep. 61, and full note; *Ormsby v. Rhoades*, (Vt.) 10 Atl. Rep. 723, and note; *Mobley v. Webb*, (Ala.) 3 South. Rep. 812; *Doremus v. Lott*, 1 N. Y. Supp. 793.

Contract by Mary J. Cooper, otherwise called Mary Townesend, against John F. Cooper *et al.*, administrators of the estate of James W. Cooper, to recover for services as housekeeper for defendants' intestate. At the trial in the superior court the presiding judge ruled that the evidence (the substance of which is stated in the opinion) did not show any express contract to pay for services, and that when the parties lived together as husband and wife there could be no implied contract to pay for the same, and directed a verdict for the defendants, to which ruling and direction the plaintiff excepted.

Stillman B. Allen and Thomas Savage, for plaintiff.

The marriage of January, 1869, between plaintiff and defendants' intestate, was void *ab initio*. Pub. St. c. 145, § 4. The plaintiff is therefore barred from any claim for dower or alimony. 1 Bish. Mar. & Div. (6th Ed.) § 301; *Chase v. Chase*, 55 Me. 21. By the terms of the statute referred to she is barred from the rights of a widow, and the same statute pronounces her whole life with her (supposed) husband, and the services performed for him during those years, not those of a wife, but of an outside party. The entire consideration of her contract being illegal, her only remedy is to sue on the implied contract of intestate to recompense her for her service and labor. *Thurston v. Percival*, 1 Pick. 415; Metc. Cont. 7. The law will raise an implied contract where there is no express promise, or where the consideration is subsequently shown to be illegal, to pay for services performed for and accepted by another. This is the position of plaintiff and defendants' intestate in the case at bar. Defendants' only answer is that the labor was performed gratuitously, under plaintiff's belief that she was intestate's wife. But said belief, and plaintiff's action in accordance therewith, were caused by intestate's own false representations, willfully made, and neither he nor his representatives will be allowed to take advantage of his own wrong. *Cartwright v. Bate*, 1 Allen, 514. A woman who has been deceived into a void marriage with a man, who already has a wife living, may, on discovering the deception, sue the supposed husband for damages arising from his fraudulent act, and for services during cohabitation. 2 Bish. Mar. & Div. (6th Ed.) §§ 690, 696; *Blossom v. Barrett*, 37 N. Y. 434. This action in *assumpsit* survives against intestate's administrators, and is the proper form of action in the premises. If a man take a horse from another, and bring him back again, the owner may maintain trespass against the wrong-doer, or, after his death, an action for the use and hire against the executor. Lord MANSFIELD, in *Hamblly v. Trott*, Cowp. 371; quoted by JACKSON, J., in *Cummings v. Noyes*, 10 Mass. 435. See, also, *Jones v. Hoar*, 5 Pick. 285, 286. By parity of reasoning, the plaintiff may now bring her action for labor and service performed, against the administrators of the wrong-doer. Both they and the heirs are estopped from denying the liability. *Donnelly v. Donnelly*, 8 B. Mon. 113; *Strode v. Strode*, 3 Bush. 227. There are two causes in the reports where the facts were almost exactly similar to those in the case at bar. *Higgins v. Breen*, 9 Mo. 497; *Fox v. Dawson*, 8 Mart. (La.) 94.

W. B. French, for defendants.

Upon the facts stated, there is no basis upon which an implied contract can rest, and no consideration for an implied promise. *Pelly v. Rawlins*, Peake Ad. Cas. 226; *Osborn v. Hospital*, 2 Strange, 728; *Dearborn v. Bowman*, 3 Metc. 155; *McGilveray v. Capen*, 7 Gray, 523; *Shepherd v. Young*, 8 Gray, 152; *James v. Cummings*, 132 Mass. 78. The law will not imply a promise to pay for services rendered between persons living in the relation of husband and wife, although the labor was performed without reference to their cohabitation. *Robbins v. Potter*, 11 Allen, 588, 98 Mass. 532.

W. ALLEN, J. The plaintiff and James W. Cooper intermarried in the year 1869, and lived together as husband and wife until his death, in 1885.

After his death, the plaintiff learned that a former wife, from whom he had not been divorced, was living, and brought this action of contract against his administrator, to recover for work and labor performed by her as housekeeper while living with the intestate. The court correctly ruled that when the parties lived together as husband and wife there could be no implied promise by the husband to pay for such work. The legal relations of the parties did not forbid an express contract between them, but their actual relations, and the circumstances under which the work was performed, negated any implication of an agreement or promise that it should be paid for. *Robbins v. Potter*, 11 Allen, 588, 98 Mass. 532. The case at bar cannot be distinguished from that cited, unless upon the grounds that the plaintiff believed that her marriage was legal, and that the intestate induced her to marry him by falsely representing that he had been divorced from his former wife. But the fact that the plaintiff was led by mistake or deceit into assuming the relation of a wife, has no tendency to show that she did not act in that relation; and the fact that she believed herself to be a wife excludes the inference that the society and assistance of a wife which she gave to her supposed husband was for hire. It shows that her intention in keeping his house was to act as a wife and mistress of a family, and not as a hired servant. There was clearly no obligation to pay wages arising from contract; and the plaintiff's case is rested on the ground that there was an obligation or duty imposed by law from which the law raises a promise to pay money, upon which the action can be sustained. The plaintiff's remedy was by an action of contract for breach of promise to marry, or, if she was induced to marry by false representations, of tort for the deceit. *Blossom v. Barrett*, 37 N. Y. 434. Her injury was in being led by the promise or the deceit to give the fellowship and assistance of a wife to one who was not her husband, and to assume and act in a relation and condition that proved to be false and ignominious. The duty which the intestate owed to her, was to make recompense for the wrong which he had done to her. It is said that from this duty the law raised a promise to pay her money for the work performed by her in housekeeping. The obligation to make compensation for the breach of contract could be enforced only in an action upon the contract. The obligation to make recompense for the injury done by the tort was imposed by law, and could be enforced only in an action of tort. It was not a debt or duty upon which the law raised a promise which would support an action of contract. The same act or transaction may constitute both a cause of action in contract and in tort, and a party may have an election to pursue either remedy, and in that sense may be said to waive the tort and sue in contract. But a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them, upon which *assumpsit* can be maintained. *Jones v. Hoar*, 5 Pick. 285; *Brown v. Holbrook*, 4 Gray, 102; *Ferguson v. Carrington*, 9 Barn. & C. 59. See, also, *Metc. Cont.* 9, 10; 1 Chit. Cont. 87; *Earle v. Coburn*, 130 Mass. 596; *Milford v. Com.*, 144 Mass. 64, 10 N. E. Rep. 516. But the objection to maintaining the plaintiff's action lies deeper. The work and labor never constituted a cause of action in tort. The plaintiff could have maintained no action of tort against the intestate for withholding payment for her work and labor in housekeeping, or for, by false representations, inducing her to perform the work without pay. The particular acts which she performed as a wife were not induced by the deceit, so that each would constitute a substantial cause of action, but by the position which she was deceived into assuming, and would be elements of damage in an action for that deceit. Labor in housekeeping was a small incident to a great wrong, and the intestate owed no duty, and had no right to single that out and offer payment for it alone, and the offer to do so might well have been deemed an aggravation of the injury to the plaintiff. We have been referred to *Higgins v. Breen*, 9 Mo. 497, and *Fox v. Dawson*, 8 Mart.

(La.) 94, as decisions contrary to the conclusion which we have reached. It does not appear upon what ground the latter case was decided. The former was decided in favor of the defendant, the administrator, upon technical grounds, but the question of his liability was considered. It was assumed that an action of contract could have been maintained against the intestate for work and labor, and the question discussed was whether the action would survive against his administrator, and it was held that it would. Upon the evidence in the present case we think that no action, certainly no action of contract for the cause of action declared on, could have been maintained against the intestate. Even if the intestate had been liable in tort, we are not prepared to assent to the proposition that an action of contract will lie against an administrator for a tort of his intestate, for which no action of contract could have been sustained against him. In the opinion of a majority of the court, the entry must be: exceptions overruled.

(147 Mass. 374)

COMMONWEALTH v. WELCH.

(Supreme Judicial Court of Massachusetts. Berkshire. September 24, 1883.)

INTOXICATING LIQUORS—NUISANCE—CRIMINAL PROSECUTION.

Under Pub. St. Mass. c. 101, §§ 6, 7, providing that whoever keeps or maintains a tenement used for the illegal keeping or sale of intoxicating liquor shall be liable to the penalty therein specified, one who holds a liquor license of the first class and also a common victualler's license, but does not hold an innholder's license, is liable where it appears that he kept and stored quantities of intoxicating liquor in a rear room adjoining the room specified in the license, but having no connection or communication with it, which liquor was kept for the purpose of being sold under the license in the room specified therein, and not otherwise.

Report from superior court, Berkshire county; HAMMOND, Judge.

Complaint under Pub. St. c. 101, for keeping and maintaining a liquor nuisance, between May 1, 1887, and December 16th following, in the town of North Adams. Trial in the superior court, where the jury returned a verdict of guilty, and the presiding judge reported the case to the supreme judicial court.

A. W. Preston, J. C. Crosby and C. J. Parkhurst, for defendant. A. J. Waterman, Atty. Gen., for the Commonwealth.

MORTON, C. J. It appeared at the trial that the defendant had a license of the first class under Pub. St. c. 100, § 10, to sell intoxicating liquor in a certain room in a building called the "Mansion House," in North Adams, which room was particularly designated and described in the license; that he had no license as an innholder; that during a part of the time covered by the complaint he kept and stored large quantities of intoxicating liquor in a rear room adjoining the room specified in the license, but having no connection or communication with it, which liquor was kept for the purpose of being sold under the license in the room specified therein, and not otherwise. We assume, in favor of the defendant, though it is not directly stated, that he had a license as a common victualler. We are of opinion that the superior court rightly ruled that such keeping in the rear room was illegal. The statute provides that a license of the first class shall be issued only to a person who holds a license as an innholder or a common victualler, and that it "shall specify the room or rooms in which such liquor shall be sold or kept by a common victualler." It further provides that "no person licensed as aforesaid, and not licensed as an innholder, shall keep, sell, or deliver any such liquors in any room or part of a building not specified in his license as aforesaid." Pub. St. c. 100, § 9, cl. 5. This last provision is not merely a condition of the license, but is a substantive provision relating to premises not covered by the license, and a violation of it is punishable under Pub. St. c. 100, § 18. It is a part of the scheme of the statute that the public officers may at any time

enter upon the licensed premises to ascertain the manner in which the business is conducted, and to examine the quality and purity of the liquors kept for sale. Pub. St. c. 100, § 15. This furnishes a reason why all liquor kept for sale should be kept in the licensed premises, which are open to the inspection and examination of the public officers. But whatever may be the reason, the statute is explicit, and clearly prohibits a licensee of the first class from keeping liquors intended for sale in any other place except the room or rooms specified in the license. It follows that upon the facts of this case the defendant was guilty of the illegal keeping of intoxicating liquors in the rear room, and that he is liable to a complaint or indictment under Pub. St. c. 101, §§ 6, 7, which provides that whoever keeps or maintains a tenement used for the illegal keeping or sale of intoxicating liquor shall be liable to the penalty therein specified. Judgment on the verdict.

(147 Mass. 380)

COMMONWEALTH v. HOULE.

(*Supreme Judicial Court of Massachusetts*. Berkshire. September 27, 1888.)

1. INTOXICATING LIQUORS—SALES TO MINORS—SALES BY SERVANT—INSTRUCTION.

On the trial of an indictment for maintaining a liquor nuisance, the prosecution sought to charge the defendant, who had a license, with illegal sales by his bar-keeper to a minor. *Held*, that an instruction that, "nothing to the contrary appearing, evidence of a sale by a servant in his master's shop of his master's goods there kept for sale would, if believed, warrant the jury in finding the sale was authorized by the master, and that this would be so although the defendant was not on the premises at the time the sale was made," was not erroneous.¹

2. CRIMINAL LAW—TRIAL—INSTRUCTIONS—OPINION ON EVIDENCE.

The court instructed the jury that it seemed that there was no way consistent with the prisoner's innocence to explain the testimony, except that the witnesses committed perjury, but subsequently told them that if they could explain the testimony otherwise, they must acquit the prisoner. *Held*, that the instructions were sufficiently favorable to the prisoner.

Indictment against the defendant, George L. Houle, for maintaining a liquor nuisance. Trial in the superior court, before HAMMOND, J., where the jury returned a verdict of guilty, and the defendant excepted.

H. C. Joyner and William Turtle, for defendant.

The instructions given were erroneous. By them it was not made clear that the commonwealth must prove the guilt of the defendant, or prove that the sale was authorized by the defendant, but, on the contrary, a fair and natural interpretation of the instructions would be that the defendant must prove that a sale made by his bar-tender was made without the knowledge or consent of defendant, and against his instructions. In other words, that if the commonwealth proved a sale by the bar-tender in the defendant's shop, of the defendant's liquors there kept for sale, this would warrant the jury in finding the defendant guilty, unless the defendant proved the contrary, or, in the language of the court, made the contrary appear. *Com. v. Briant*, 142 Mass. 463, 8 N. E. Rep. 338; *Com. v. Putnam*, 4 Gray, 16; *Com. v. Stevenson*, 142 Mass. 466, 8 N. E. Rep. 341; *Com. v. Hayes*, 145 Mass. 289, 14 N. E. Rep. 151; *Com. v. Dunbar*, 9 Gray, 298.

A. J. Waterman, Atty. Gen., for the Commonwealth.

The motion to quash was properly overruled. The allegation that the defendant kept a building, place, and tenement, is not open to objection. The word "place" is broad, and includes building and tenement, as building includes tenement. *Com. v. Bossidy*, 112 Mass. 278; *Com. v. Welch*, 2 Allen, 510; *Com. v. Godley*, 11 Gray, 454; *Com. v. Jones*, 142 Mass. 575, 8 N. E. Rep. 603. The dictum of the court in *Com. v. Jones* is not decisive in this case, as the con-

¹ See note at end of case.

struction impliedly given to the word "place" in that case was under a different statute (act 1882, c. 220, § 1.) To hold that the definition there given to the word, as applicable to this case and statute, would be to restrict the meaning of it to a narrow limit, and one not justified by its accepted scope and use. The allegation that the premises were "used for the illegal sale and illegal keeping" of intoxicating liquors, charged but one offence, and evidence that they had been used for either would have been sufficient. *Com. v. Curran*, 119 Mass. 206; *Com. v. Dolan*, 121 Mass. 374; *Com. v. Nichols*, 10 Allen, 199; *Com. v. Tay*, 146 Mass. 146, 15 N. E. Rep. 503. The court rightly declined to give the instructions requested by the defendant. Those given were clearly correct, and in accordance with the decision in *Com. v. Hayes*, 145 Mass. 295, 14 N. E. Rep. 151. The instructions as to the alternative explanation to be made of the testimony of the witnesses, as amended, were correct, and not open to objection. *Com. v. Clifford*, 145 Mass. 97, 13 N. E. Rep. 345.

DEVENS, J. The defendant held a license of the first and fourth class to sell intoxicating liquors at his hotel, which was the place he was indicted for keeping and maintaining as a liquor nuisance. The commonwealth sought to establish its case by proving several sales of liquor to minors, made by the bar-keeper of the defendant at the hotel in question. While the jury were instructed that the defendant would not be responsible for such sales if made without his knowledge, the defendant in no way participating therein, nor approving nor countenancing such sales, they were further instructed "that, nothing to the contrary appearing, evidence of a sale by a servant in his master's shop of his master's goods there kept for sale, would, if believed, warrant the jury in finding the sale was authorized by the master, and that this would be so although the defendant was not on the premises at the time the sale was made." The instruction also submitted the whole question of the authority of the bar-keeper to the jury, under all the circumstances of the case, stating that there was no presumption of law either way. This left the weight of the evidence offered by the commonwealth, and the inferences to be drawn from it, entirely to the jury, and is in accordance with the view expressed in *Com. v. Briant*, 142 Mass. 463, 8 N. E. Rep. 388. It was as a question of fact solely that the jury were to determine whether an authorized sale by the bar-keeper had been proved, and the jury were permitted to make this inference if, under all the circumstances, they should see fit to do so. In *Com. v. Hayes*, 145 Mass. 289, 14 N. E. Rep. 151, it is also intimated that instructions precisely similar to those given in the case at bar would be unobjectionable.

The instruction of the court that there would seem to be no other way consistent with the defendant's innocence, by which the testimony of the witnesses could be explained except upon the theory that they had committed perjury, was distinctly modified by the court, and the jury were then instructed that if they could explain the testimony of these witnesses upon any other theory than that these witnesses had committed perjury, it was their duty to do so, and that this question was left to them. Whether the instruction as originally given was correct, need not be considered, as the jury must have understood it to have been withdrawn, and that subsequently given to have been substituted therefor. *Com. v. Clifford*, 145 Mass. 97, 13 N. E. Rep. 345. As finally given, we see no objection to it; indeed, the instruction was, so far as it went, favorable to the defendant. The testimony of the witnesses had been direct as to the sales. The instruction made it the duty of the jury, if this testimony could be explained upon any other theory than that of perjury, to thus explain it for the benefit of the defendant. The whole charge is not before us, but only such part as the defendant has selected for exception. It is not to be inferred that the court failed to instruct the jury that the defendant was to be presumed innocent, and that it was for the commonwealth to

prove his guilt beyond reasonable doubt. Still less is it to be inferred that because the jury were told that if the direct evidence could be explained upon any other theory than that of perjury, it should be so explained that they were not also made fully to understand that if the witnesses for the commonwealth failed to command their confidence, or were, in their opinion, guilty of perjury, that the defendant was entitled to an acquittal. Exceptions overruled.

NOTE.

INTOXICATING LIQUORS—ILLEGAL SALES—PRINCIPAL'S LIABILITY FOR SALES BY AGENT. On an indictment for selling liquor to a minor, evidence of previous general instructions by defendant to his servants not to furnish liquors to minors is immaterial, where it is admitted or conclusively appears that the particular sale charged was made with his knowledge and approval. *State v. Mueller*, (Minn.) 88 N. W. Rep. 691. Where it positively appears that defendant must have known of the sale by his servant, an instruction that he was liable whether he knew of it or not, is harmless, if error at all. *People v. Riley*, (Mich.) 83 N. W. Rep. 922. But it is held in *People v. Parks*, 18 N. W. Rep. 618, that under the *Michigan* statute of 1881, a liquor dealer cannot be held criminally responsible for the illegal sale of liquor by his clerk, without his knowledge. But he is so responsible where the sale is made with his knowledge and consent. *State v. Skinner*, (Kan.) 8 Pac. Rep. 420. And it was held in *West Virginia*, in the case of *State v. Denoon*, 5 S. E. Rep. 315, that a druggist is liable for an illegal sale of liquors by his clerk, though such sale is made without his knowledge, and contrary to his instructions. The same doctrine is upheld under the *Mississippi* statute. *Teasdale v. State*, 3 South. Rep. 245. The proprietor of a saloon is responsible for the act of his bar-keeper in unlawfully keeping open such saloon on Sunday. He must, at his peril, see that it is kept closed. *People v. Blake*, (Mich.) 18 N. W. Rep. 860; *People v. Roby*, *Id.* 865.

(122 Ill. 1)

SPIES et al. v. PEOPLE.

(Supreme Court of Illinois.)

For majority opinion, see 12 N. E. Rep. 865.

MULKEY, J., (concurring.) Not intending to file a separate opinion, as I should have done had health permitted, I desire to avail myself of this occasion to say from the bench that while I concur in the conclusion reached, and also in the general view presented in the opinion filed, I do not wish to be understood as holding that the record is free from error, for I do not think it is. I am nevertheless of opinion that none of the errors complained of are of so serious a character as to require a reversal of the judgment. In view of the number of defendants on trial, the great length of time it was in progress, the vast amount of testimony offered and passed upon by the court, and the almost numberless rulings the court was required to make, the wonder with me is that the errors were not more numerous and more serious than they are. In short, after having carefully examined the record, and given all the questions arising upon it my very best thought, with an earnest and conscientious desire to faithfully discharge my whole duty, I am fully satisfied that the conclusion reached vindicates the law, does complete justice between the prisoners and the state, and that it is fully warranted by the law and the evidence.

(115 Ind. 464)

BRANCH v. FAUST.

(Supreme Court of Indiana. September 18, 1888.)

1. APPEAL—REVIEW—OBJECTIONS TO PLEADINGS—OBJECTION NOT RAISED BELOW.

Rev. St. Ind. 1881, § 343, provides that by failure to present objections to a complaint, by demurrer or answer, all objections will be deemed waived, except an objection to the jurisdiction and the objection that the complaint does not state facts sufficient to constitute a cause of action. *Held*, that an objection on the latter ground, raised for the first time by assignment of error in the appellate court, must challenge the complaint as a whole, and not a particular paragraph of it; and such objection will fail if the complaint contains a single good paragraph.

2. SAME—RECORD—FINDINGS NOT SIGNED BY JUDGE.

Findings of fact and conclusions of law, copied into the transcript, and brought up on appeal, but not signed by the judge of the trial court, will not be regarded as a part of the record, unless brought into it by a bill of exceptions.

Appeal from circuit court, Madison county; DAVID MORSE, Judge.

Lake & Goodykoontz, for appellant. *Henry & Ryan*, for appellee.

ZOLLARS, J. Appellant has assigned as errors that the third paragraph of appellee's complaint does not state facts sufficient to constitute a cause of action, and that the court below erred in its conclusions of law upon the facts specially found. These assignments are met by counsel for appellee with the contention that error cannot be assigned in this court that a single paragraph of a complaint does not state facts sufficient to constitute a cause of action, and that, as the special finding of facts and conclusions of law copied into the transcript are not signed by the judge, and have not been brought into the record by a bill of exceptions, there is no question properly before this court for decision. This contention cannot be disregarded without violating the provisions of the Code, and the rules of practice long since settled by the decisions of this court. There was no demurrer to the third paragraph of the complaint filed below. Its sufficiency is brought in question for the first time by an assignment of error in this court. The Code provides that by a failure to present objections to a complaint by a demurrer or answer all objections thereto shall be deemed to have been waived, "except only the objection to the jurisdiction of the court over the subject of the action, and except the objection that the complaint does not state facts sufficient to constitute a cause of action." Rev. St. 1881, § 843. Such an objection to a complaint may be made by an assignment of error in this court, but, like a motion in arrest of judgment, it challenges the complaint as a whole, and will not be available if, in the complaint, there is one good paragraph. So the above section of the Code clearly provides, and so it has uniformly been interpreted. *Kelsey v. Henry*, 48 Ind. 37; *McCallister v. Mount*, 73 Ind. 559; *Trammel v. Chipman*, 74 Ind. 474; *Railway Co. v. Peck*, 99 Ind. 68; *Express Co. v. Rawson*, 106 Ind. 215, 6 N. E. Rep. 337. The clerk below has copied into the transcript what purports to be a special finding of facts, and the court's conclusions of law thereon. Neither the finding of facts nor the conclusions of law is signed by the judge; and hence, under a long line of decisions by this court, they are not, and could not, become a part of the record, unless brought into it by a bill of exceptions. There is no bill of exceptions. The finding of the court must therefore be regarded simply as a general finding in favor of appellee, and, as the evidence is not before us, we cannot determine whether the finding and judgment are or are not erroneous. *Smith v. Davidson*, 45 Ind. 396; *Shane v. Lowry*, 48 Ind. 205; *Smith v. Johnson*, 69 Ind. 55; *McClellan v. Bond*, 92 Ind. 424; *Conner v. Town of Marion*, 112 Ind. 517, 14 N. E. Rep. 484. Judgment affirmed, with costs.

(115 Ind. 423)

GAYLORD *et al.* v. CITY OF LA FAYETTE *et al.*

(*Supreme Court of Indiana*. September 18, 1888.)

1. TRUSTS—DECLARATION—EXECUTORY TRUST.

Rev. St. Ind. 1881, § 2969, provides that no trust concerning lands, except such as may arise by implication of law, shall be created, unless in writing, signed by the party creating the same, or his attorney, etc. Held that, under this section, a letter from a father to his son, saying that he had purchased land, had caused the deed to be made to the son, and that he should soon ask him to convey it to the writer's grandchildren for their support, and requesting him to tell his wife how the matter stood, that she might know in the event of the son's death, creates an imperfect, executory trust for the ultimate benefit of the grandchildren, and, such trust being voluntary, the donor has the right to perfect and complete it by causing the later conveyances to be made.

2. MORTGAGE—FORECLOSURE—CONCLUSIVENESS OF DECREE.

After the land had been deeded to the mother of the beneficiaries, with remainder over to them, and the mother and children had taken possession, and the latter had become of age, a mortgage on the land was executed by the mother and children to cover debts evidenced by the joint notes of the mother and children, and subsequently a decree of foreclosure of the mortgage was entered. *Held*, that the decree could not be avoided, as against the children, by proof that they had no knowledge of the trust at the time the mortgage was made, nor when the decree was taken; and that the mortgagee and his assignees, and the purchasers at the sale, had such knowledge at the time they acquired their rights.

Appeal from circuit court, Tippecanoe county; JOHN M. LARVE, Judge.

B. W. Langdon and Coffroth & Stuart, for appellants. *Robert Jones, Chase & Chase*, and *W. C. L. Taylor*, for appellees.

MITCHELL, J. Thomas F. and Harry C. Gaylord commenced this action in the month of February, 1882, with the purpose of establishing their right and quieting their title in and to certain real estate in the city of La Fayette. The undisputed facts, so far as a decision of the merits of the controversy require them to be stated, are as follows: On the 9th day of April, 1859, Nathan B. Dodge, grandfather of the appellants, resided in the city of La Fayette, at which place he afterwards died, in May, 1866. He was twice married. His second wife, by whom he had one child, survived him. Of his first marriage there were four children, viz.: Joshua Cleves Dodge, who, at the date above mentioned, resided in the city of Boston; Mrs. Emeline F. Granger; Mrs. Martha A. Gaylord, a widow, and mother of the appellants; and Mrs. Mary J. Chadwick, with dependent children. The son and daughter first named were in affluent circumstances, while both the daughters last named were comparatively poor. On the date above mentioned Nathan B. Dodge purchased two tracts of land, in the city of La Fayette, from Albert S. White, for \$12,600, which amount he afterwards fully paid. One of the tracts, valued at \$8,500, was conveyed by White, by the direction of Nathan B. Dodge, immediately to Joshua Cleves Dodge. On the same day the conveyance was made by White, Nathan B. Dodge wrote a letter to his son, Joshua Cleves, of which the following is a copy: "LA FAYETTE, INDIANA, April 9, 1859. CLEVES: I have this day purchased the A. S. White property. I pay \$12,600 for it. I have 14 rods on Columbia street, and 12 rods on Missouri street, and 81 feet fronting on South street. I gave him the house that I live in at \$3,200, a lot that I got in payment for my farm at \$800, and \$6,000 cash in hand; \$1,000 on 1st of July next; \$1,000 in six months; \$600 one year from to-day. I have had a deed made out to you for the property where he lives; that is, the cottage and large house, 145 feet on Columbia street, and 12 rods on Missouri street. I shall build myself a house for my own residence on 81 feet and 12 rods back, on the east side of the lot, and a house for rent on South, 81 feet front. The property is now renting for \$500 per year. The property that is deeded to you is worth about \$8,500. That I shall want a deed from you in a few days to Mrs. Gaylord's children and Mrs. Chadwick's. I shall send on a deed for you to sign in a few days. The property is now in your name, and I wish you would tell your wife how it is situated now, that she would know all about it if you should be taken away; and if I should, I want that property that is deeded to you to be made over to the four children, the rents and profits to be paid them yearly for their support, and when they become 21 years of age, to have the property in fee-simple to dispose of as they please. * * * I think I have bought the White property very low. It cost him \$16,000, and as property is all the time advancing it must bring that again; but I will not sell it, as it is a good location, and I will let the children have it. Will write you again in a few days. Yours truly. N. B. DODGE." So much of the reply to the above letter as is pertinent reads as follows: "BOSTON, April 18, 1859. FATHER: Yours of the 9th was duly received, and contents noted. I have told Fanny all about

the arrangements you proposed making in case I should be taken away, and she would follow the injunctions of your letter to me in that event. * * * Yours truly, J. C. DODGE." The title to the land referred to in the foregoing correspondence remained as above until the 16th day of November, 1860, when Joshua C. Dodge and wife, at the request of Nathan B., conveyed part of the tract embraced by the deed from White to Joshua C. to Nathan B. Dodge for life, remainder over to Martha A. Gaylord, during her life, with remainder over in fee to her two sons, Thomas F. and Harry C. Gaylord. Later on a similar conveyance was made of the residue of the tract, the title to which remained in Joshua C., with like remainder over to Mrs. Chadwick and her children. Nathan B. Dodge took possession of the property immediately after the purchase from White, and continued to occupy it until his death, which, as has been seen, occurred in May, 1866, having meanwhile made lasting improvements on the Gaylord tract of the estimated value of \$4,500, and on the Chadwick tract of the value of \$6,000. Upon the death of the father, the daughters took possession under the deeds to them respectively. While so in possession of the parcel conveyed to them as above, Mrs. Gaylord and her two sons, both being at the time over 22 years of age, executed two separate mortgages, covering the Gaylord tract, to secure debts of \$7,000 and \$2,000, respectively, due to Stephen Jones. These debts, which were evidenced by the joint promissory notes of the mother and sons, were subsequently assigned to John S. Williams, who instituted a foreclosure suit in the superior court of Tippecanoe county in 1876, making Mrs. Gaylord and the appellants Thomas F. and Harry C. Gaylord parties thereto. On the 25th day of September, 1876, there was found to be due on the several mortgage debts the sum of \$10,304, for which amount a personal judgment was rendered against the mortgagors; which judgment was followed by a decree of foreclosure, and an order directing the sale of the right, title, and interest of the mortgagors in and to the property conveyed. The property was sold in pursuance of the decree, John S. Williams becoming the purchaser. It is through this decree and sale that the city of La Fayette claims title to what may be called the "Gaylord Tract." The Chadwick tract is not directly involved in this litigation. Upon the facts thus summarized two questions of a controlling character are presented, upon the determination of which the judgment of the court below should either be affirmed or reversed: *First*. Was the deed from White to Joshua Cleves Dodge, and the correspondence between the latter and his father, effectual as the declaration of a perfectly created trust, so as to vest the beneficial interest in the land conveyed at once, and irrevocably, in the Gaylord and Chadwick children? *Second*. If a trust was thereby at once perfectly created and effectually declared, was the interest which the Gaylord children took in the land in controversy extinguished by the foreclosure proceedings to which they were made parties? The appellants seek to maintain the affirmation of the first and the negation of the last of the above propositions.

Pertinent to the first point it may be said, if the transaction created a trust, since the subject-matter thereof was land, it was essential to its validity that it should have been created or declared in conformity with section 2969, Rev. St. 1881, which provides that "no trust concerning lands, except such as may arise by implication of law, shall be created, unless in writing, signed by the party creating the same, or by his attorney thereto, lawfully authorized in writing." While a literal interpretation of the above statute might seem to require that the deed or instrument in which the estate or property to be affected by the trust is granted or conveyed should also contain the declaration of the trusts upon which the property is to be held, it is nevertheless settled that the statute will be satisfied if the trust has been manifested, or can be proved by any writing under the hand of the party to be charged, or of the party who is by law enabled to declare the same, provided the fiduciary rela-

tion, together with the nature, terms, and conditions thereof, are set forth in the writing with sufficient certainty so as to enable a court to carry it into execution in the manner intended by the donor or creator of the trust. 1 Perry, Trusts, §§ 82, 83; 2 Pom. Eq. Jur. §§ 1006, 1007, and notes. There is hence no well-founded objection to the alleged trust in the present case growing out of the fact that it was manifested by the letters which appear in the record, instead of being declared in the deed from White to Joshua C. Dodge. *Forster v. Hale*, 3 Ves. 696; *Brown v. Combs*, 29 N. J. Law, 39; *Raybold v. Raybold*, 20 Pa. St. 308; *Kingsbury v. Burnside*, 58 Ill. 329; *Pinnock v. Clough*, 16 Vt. 508; *Steere v. Steere*, 5 Johns. Ch. 1; *Hollinshead v. Allen*, 17 Pa. St. 275. The trust in the present case, if one was perfectly created, was intended as a provision for the grandchildren of the settlor, who were natural objects of his bounty. It was therefore upon such a good or meritorious consideration as to become irrevocable and enforceable in case it was created or declared in such a manner as to fall within the category of executed trusts. *Waterman v. Morgan*, 114 Ind. 237, 16 N. E. Rep. 590, and cases cited. A voluntary trust, resting upon a meritorious consideration, once perfectly created, is irrevocable. *Rycroft v. Christy*, 3 Beav. 238; *Paterson v. Murphy*, 11 Hare. 88; *Souwerbye v. Arden*, 1 Johns. Ch. 240; *Hildreth v. Eliot*, 8 Pick. 293. A trust may be said to be executed when it has been perfectly and explicitly declared in a writing, duly signed, in which the terms and conditions upon which the legal title to the trust-estate has been conveyed or is held, and the final intention of the creator of the trust in respect thereto appear with such certainty that nothing remains to be done except that the trustee, without any further act or appointment from the settlor, carry into effect the intention of the donor as declared. In such a case, even though there was no valuable consideration upon which the trust was originally declared, a court of chancery will enforce it in favor of one whose relation to the donor was such as to show a good or meritorious consideration. *Crawford's Appeal*, 61 Pa. St. 51, 52; *Stone v. Hackett*, 12 Gray, 227; *Ellison v. Ellison*, 6 Ves. 656; *Kekewich v. Manning*, 1 De Gex, M. & G. 175; 2 Pom. Eq. Jur. § 1001; 1 Perry, Trusts, § 98. Where, however, property has been conveyed upon a trust, the precise nature of which is imperfectly declared, or where the donor reserves the right to define or appoint the trust-estate more particularly, although it may be apparent that the creator of the trust has, in a general way, manifested his purpose ultimately at a time and in a manner thereafter to be determined, either by himself or by the trustee, to bestow the property upon a person named, the trust is incomplete and executory, and not within the jurisdiction of a court of chancery; the rule being that courts of equity will not aid a volunteer to carry into effect an imperfect gift or an executory trust. *Adamson v. Lamb*, 3 Blackf. 446; *Harmon v. James*, 7 Ind. 263; *Dillon v. Coppin*, 4 Mylne & C. 647; *Colyear v. Mulgrave*, 2 Keen, 82, 97; *Edwards v. Jones*, 1 Mylne & C. 226; 2 Story, Eq. Jur. § 793b; 2 Pom. Eq. Jur. § 1001. Whether the trust is perfectly executed or not is a question of fact, in each case to be determined by the purposes and objects which the settlor had in view, as manifested in the writing and from the situation and relation of the parties, and of the property which is the subject of the supposed trust. In cases where the writing is indefinite, or the language ambiguous and of doubtful construction, the practical interpretation given it by the parties themselves in carrying out their purpose is entitled to great, if not controlling, weight and influence. *Reissner v. Oxley*, 80 Ind. 580; *Chicago v. Sheldon*, 9 Wall. 54.

In the present case the land in controversy was conveyed by White to Joshua Cleves Dodge, upon a valuable consideration, fully paid by Nathan B. Dodge, the conveyance being so made by the direction and with the consent of the purchaser. Under the provisions of the statute no use or trust in the land resulted in favor of Nathan B. Dodge, or any other persons, except to the ex-

tent that Joshua Cleves Dodge agreed to hold the land in trust for his father, or to the extent that a trust in favor of the Gaylord and Chadwick children was declared in the letter of Nathan B. Dodge to his son, Joshua Cleves. Turning, now, to the letter, and it will be observed that the writer first informs his son that he had purchased the White property at a stipulated price, and that he had caused the legal title to a portion of it to be conveyed to him. He then proceeds to declare his further purpose in relation to the property as follows: "I shall want a deed from you in a few days to Mrs. Gaylord's children and Mrs. Chadwick's. I shall send on a deed for you to sign in a few days." This language indicates, beyond the possibility of mistake, that Nathan B. Dodge did not intend that his son, Joshua Cleves Dodge, should take and hold the land in trust for the Gaylord and Chadwick children, except conditionally, until the deeds referred to should be forwarded. His scheme, plainly, was that the title should be vested in his son, for the time being, with a view of ultimately requiring it to be transferred to his grandchildren, in accordance with deeds which he was to have prepared under his own supervision. The effect of this part of the letter was to create a trust in favor of the father to hold the title to the land conveyed until such a time as he should, by deeds to be prepared and sent to his son, direct or appoint the ultimate disposition to be made of the estate. The trust-estate was conveyed, subject to the direction of the father in the deeds which he reserved the right to require of his son. While the whole tenor of the letter indicates that it was the purpose of Nathan B. Dodge that the property should be, as it eventually was, settled upon the Gaylord and Chadwick children, it indicates with equal certainty that it was not his purpose to complete the transaction by the conveyance and letter to his son. Something more was to be done by the donor in order to consummate the gift, and vest the title to the property in his grandchildren in such manner as he might thereafter determine. Taking into account the relation of the parties, the evident desire to make, and the propriety of making provision for Mrs. Gaylord and Mrs. Chadwick during their lives, as well as to provide for their children, it seems to us that the foregoing, in addition to being the interpretation which the parties themselves put upon the letter, is the reasonable and only proper construction to put upon it. We have not overlooked that part of the letter of Nathan B. Dodge to his son, in which, after referring to the fact that the title to the property had been taken in the latter's name, the writer says: "Tell your wife how it is situate now, that she may know all about it if you should be taken away; and if I should, I want that property that is deeded to you to be made over to the four children, the rents and profits to be paid them yearly for their support, and when they become twenty-one years of age to have the property in fee-simple to dispose of as they please." Without pausing to consider what, if any, effect the language above quoted might have had upon the conveyance to Joshua Cleves Dodge, in the absence of the declaration previously made by the writer, in respect to his purpose to send deeds for his son to execute, it is only necessary to say it in no way tended to make the trust more certain or perfect; nor did it impair the right which the donor had plainly reserved to himself to appoint the particular estate which he intended to settle upon the Gaylord and Chadwick children, in the deeds which he declared he should require his son to execute at a future day. It was only in the event of the death of Nathan B. Dodge, without having caused the deeds to be prepared and executed, defining the respective interests of his grandchildren, that the clause last referred to in the letter could become operative. Our conclusion is that the letter referred to created an imperfect, executory trust, for the ultimate benefit of the Gaylord and Chadwick children; that, being voluntary, the donor had the right to perfect and complete it by causing conveyances to be made, as he subsequently did. There is nothing in the conclusion reached in *Gaylord v. Dodge*, 31 Ind. 41, which is opposed to the decision arrived at in the present case.

In respect to the second proposition it is sufficient to say, without regard to whether or not the appellants derived their title as *cestuis que trustent* under the deed from White to Joshua Cleves Dodge and the contemporaneous letter of Nathan B. Dodge, or through the deed from Joshua Cleves Dodge to them, there can be no doubt that whatever interest they actually had in the land at the time they executed the mortgage to Jones, no matter how acquired, was included in and conveyed by the mortgage. Even a quitclaim deed or mortgage conveys or binds the present interest of the grantor or mortgagor. This mortgage having been afterwards foreclosed, and the appellants having been made parties to the proceeding, they are effectually concluded by the decree from asserting any prior interest so long as the judgment remains in force. The primary purpose of a foreclosure suit is to obtain a decree cutting off and foreclosing whatever interest or estate the mortgagor may have had in the mortgaged premises at the time the mortgage was executed. After the decree, and so long as it remains in force, having been made a party, the mortgagor is estopped from asserting any anterior right or title to the lands mortgaged. If it were otherwise, the conclusive effect of a decree might always be avoided. *Adair v. Mergentheim*, 114 Ind. 303, 16 N. E. Rep. 603; *Hefner v. Insurance Co.*, 123 U. S. 747, 8 Sup. Ct. Rep. 337. The judgment in a suit to foreclose a mortgage is conclusive on all the title held by the defendants at the date of the judgment. *Newcome v. Wiggins*, 78 Ind. 306; *Freem. Judgm. § 303. Ulrich v. Drischell*, 88 Ind. 354. The appellants sought to avoid the effect of the decree by averring that they had no knowledge of the trust at the time the mortgage was made, nor when the decree of foreclosure was taken, and by averring further that the mortgagee and his assignees, and the city of La Fayette, had knowledge of the trust when they acquired their respective rights. These averments, while they might have force in an application to set aside the decree, do not in any way militate against its conclusive effect while it stands. It has been decided, until it should now be accepted as settled, that a judgment, however obtained, unless it is void, cannot be ignored, and the rights of the parties inquired into, in a collateral proceeding, the same as if the judgment had no existence. *Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. Rep. 223; *Weiss v. Guerinneau*, 109 Ind. 438, 9 N. E. Rep. 399. A decree against a mortgagor in a foreclosure proceeding is effectual to foreclose all the mortgagor's interest in the mortgaged estate, adverse to the plaintiff, held by the former at the time the mortgage was executed, without regard to whether a particular interest thus held and afterwards asserted was brought in issue or not. *Barton v. Anderson*, 104 Ind. 578, 4 N. E. Rep. 420. A decree of foreclosure is as comprehensive in its effect upon the title of the mortgagor as a decree in a proceeding to quiet title. *Railway Co. v. Allen*, 113 Ind. 581, 15 N. E. Rep. 446. Counsel have presented and discussed other questions, which we have considered, and in respect of which we find no reversible error committed by the court. In view of the conclusions already arrived at, these questions do not affect the merits of the case, nor are they of sufficient importance to justify us in stating them. The judgment is affirmed, with costs.

(116 Ind. 433)

CUNNINGHAM v. STATE.¹

(*Supreme Court of Indiana. September 18, 1883.*)

CRIMINAL LAW—COMMITMENT—WAIVER OF OBJECTIONS—BAIL.

A circuit judge, without any complaint or charge having been made, ordered a defendant examined before him on supplementary proceedings to be committed to jail to answer to the charge of perjury, of which, the order recited, it was probable he had been guilty in his examination. Defendant gave bail for his appearance to answer to the charge at the next term, but failed to appear. Held that, whether the original order was valid or not, the irregularity was waived by execution of the recognizance without objection to the proceedings.

Appeal from circuit court, St. Joseph county; DAVID NOYES, Judge.

¹ Rehearing denied.

Andrew Anderson, for appellant. *Lucius Hubbard*, for the State.

Howk, J. This was a suit by and in the name of the state of Indiana, as plaintiff, against Eliza Cunningham, appellant, and one Andrew Cunningham, as defendants, upon a forfeited recognizance. The state's complaint contained two paragraphs, to each of which appellant's separate demurrer for the alleged insufficiency of the facts therein stated to constitute a cause of action was overruled by the court. The cause was then submitted to the court for trial, and a finding was made for the state in the sum of \$1,000, and over appellant's motion for a new trial the court rendered judgment accordingly. In this court appellant Eliza Cunningham has assigned errors which call in question the overruling of her separate demurrers to each paragraph of the state's complaint, and her motion for a new trial. In his brief of this cause appellant's learned counsel relies for the reversal of the judgment below upon the alleged error of the court in overruling the demurrer to the second paragraph of the complaint. Counsel concedes, as we understand him, that the evidence in the record fully sustains the facts averred in the second paragraph of complaint; and that, if such facts are sufficient to constitute a cause of action in favor of the state, the judgment below ought to be affirmed; otherwise, counsel earnestly insists that such judgment must be reversed. The question presented for our consideration and decision, therefore, may be thus stated: Does the second paragraph of the complaint herein state facts sufficient to constitute a cause of action? In such second paragraph of complaint the state alleged that on the 22d day of June, 1887, defendant Andrew Cunningham was defendant in a civil suit pending in the St. Joseph circuit court, in this state, wherein the Gutta-Percha Paint Company was plaintiff, and was then and there sworn as a witness, and gave his testimony in said cause on the trial thereof in such court; that, upon hearing the testimony of said Andrew Cunningham on the trial of said cause, and when he had given and finished his testimony, the court made an order, in substance, as follows: "*State of Indiana vs. Andrew Cunningham*. Now, it appearing to the court, on the trial of the cause of the *Gutta-Percha Paint Company et al. vs. Andrew Cunningham et al.*, that it is probable that said Andrew Cunningham is guilty of perjury in his examination in proceedings supplementary to execution, before the judge of the court in January, 1886, it is therefore ordered that said Andrew Cunningham be committed to the jail of this county to answer the charge of perjury, at the next term of this court, in default of bail. It is further ordered that the bail of said Andrew Cunningham be fixed at the sum of one thousand dollars, and that he give his recognizance in that sum to the sheriff, with surety to be approved, and, in default thereof, that he be committed to the jail of said county until discharged by law." The state further averred that said Andrew Cunningham was duly arrested by the sheriff of said St. Joseph county on such order, and, to procure his release from imprisonment, executed his recognizance, with defendant Eliza Cunningham as his surety, conditioned that he would appear at the first day of the next term of said court, to-wit, at its October term, 1887, to answer said charge and abide the judgment of the court; that said recognizance was accepted and approved by said sheriff, and defendant Andrew Cunningham was released from custody, and said recognizance was duly certified to and filed in the office of the clerk of said court, and recorded; that defendant Andrew Cunningham appeared on the first day of such next term of said court, and the grand jury thereof proceeded to the examination of such charge, and duly found an indictment against said defendant at said October term, 1887, and duly returned the same into the St. Joseph circuit court at said term thereof, which indictment charged said defendant with the crime of perjury; that said defendant failed to appear or plead to said indictment, but absented himself from the state and had not since appeared; that said defendant was duly called, but

made default, and said recognizance was duly forfeited by the court, and the forfeiture thereof duly entered of record; and that no part of such recognizance had been paid. Wherefore, etc.

Upon the facts stated in the foregoing paragraph of complaint, admitted to be true by appellant's demurrer thereto, and fully established by the evidence, it is earnestly contended by her counsel that the order of the court below, under which Andrew Cunningham was arrested and held by the sheriff of St. Joseph county, was absolutely void and of no effect, and that therefore the recognizance in suit, given by him with appellant as his surety to secure his discharge from such arrest, was also void and of no binding force. Counsel thus states the question which, he claims, is presented for decision by the record of this cause, namely: "Has the circuit court in this state the right or power, of its own volition, without any complaint or charge having been made or preferred, to order a citizen to be arrested or imprisoned in the county jail for a period of three months, or until the ensuing term of court, to answer some charge which, in the opinion of the court, may thereafter be preferred against him?" If counsel were correct in claiming that the question quoted is presented by the record, we should have little or no hesitancy in answering it, as counsel does, in the negative. We are of opinion, however, that the record of this cause presents no such question for our decision. Whether the court below had or had not the right or power to make the particular order, in all its details, under which Andrew Cunningham was arrested and imprisoned, or whether such arrest and imprisonment, in their inception, were or were not legal and valid, it is certain, we think, that he had the right and power to waive all defects, errors, and illegalities in such proceedings, or any of them. That is substantially what Andrew Cunningham did, as shown by the record now before us, when he, and appellant as his surety, executed the recognizance sued upon herein. It nowhere appears in the record of this cause that Andrew Cunningham or appellant objected or excepted to any of the proceedings of the court, which preceded and led to their execution of the recognizance in suit, and the subsequent adjudication of forfeiture thereof. By their recognizance voluntarily executed, with a full knowledge of all the facts and circumstances connected with the arrest and imprisonment of Andrew Cunningham on the charge of perjury, the recognizers in legal effect waived all objections thereto, and bound themselves that said Andrew should appear on the first day of the next term of the court below to answer such charge, and abide the judgment of such court. After the execution of such recognizance it is clear that Andrew Cunningham was held thereby, and not by virtue of the prior order of the court. In the case under consideration, therefore, it is a matter of no moment whatever whether such prior order of the court was legal or illegal, valid or invalid, for the illegality or invalidity of such order would constitute no possible defense to this suit upon the recognizance. *Rubush v. State*, 112 Ind. 107, 18 N. E. Rep. 877; *Ard v. State*, 114 Ind. 542, 16 N. E. Rep. 504. Our conclusion is that the court below did not err in overruling appellant's demurrer to the second paragraph of the state's complaint herein. Nor have we found any error in the record of this cause which authorizes or requires the reversal of the judgment. The judgment is affirmed, with costs.

(115 Ind. 459)

MOULDER v. KEMPF.

(*Supreme Court of Indiana*. September 18, 1888.)

1. CONTINUANCE—ABSENCE OF ATTORNEY—DISCRETION OF COURT.

The question as to whether a cause will be postponed or continued is in the discretion of the court, and a refusal to postpone will not be disturbed where it appears that the leading attorneys for the parties had agreed to postpone the trial, the court not having consented, and that the appellant's leading attorney was there-

fore absent, but that he was represented at the trial by another attorney, and, as far as the record shows, made as good a defense as could have been made with further time.¹

2. VENUE IN CIVIL CASES—CHANGE OF VENUE—TIME OF APPLICATION.

Under Rev. St. Ind. 1881, § 1825, directing that courts shall adopt rules for conducting proceedings therein not inconsistent with the laws of the state, a rule that an application for change of venue shall be made at least one day before the case comes on for trial is proper, and a refusal of a change of venue because asked too late under such a rule will not be disturbed on appeal, where the applicant is opposing the granting of a license to another to sell liquor in small quantities, and the ground of the application is that the applicant for the license had great influence in the county, and the popular prejudice was in his favor.

Appeal from circuit court, Clinton county; A. E. PAIGE, Judge.

Blacklidge, Blacklidge & Moon, for appellant. *Freeman Cooper*, for appellee.

NIBLACK, C. J. This was an application by Martz Kempff, to the board of commissioners of the county of Howard, for a license to sell intoxicating liquors in a less quantity than a quart at a time, in the town of Russiaville, in that county. Section 5314, Rev. St. 1881. Thomas H. Moulder remonstrated against the granting of a license to Kempff upon the grounds that he had formerly been connected with the sale of intoxicating liquors at the place described in his application, and that during that time he and his partner in the business had kept a disorderly house. Also that on a day named he, the said Kempff, had been guilty of selling intoxicating liquors by retail without a license. The board of commissioners, after hearing the evidence, refused to grant a license. Kempff thereupon appealed to the Howard circuit court, where, upon his motion, the venue of the cause was changed to the county of Clinton. On the first day of the next term of the Clinton circuit court, which began on Monday, the 7th day of November, 1887, the cause was, in the absence of both Moulder and his counsel, set down for trial on the succeeding Monday, the 14th day of the same month. On the day following, that is, on the 8th day of November, 1887, H. C. Sheridan, one of Kempff's attorneys, who resided at Frankfort, in Clinton county, wrote to Blacklidge & Bro., attorneys, residing at Kokomo, in Howard county, and who were leading counsel for Moulder, informing them as to the time at which the cause had been set for trial, and suggesting to them that if the time named would not suit them, they had better see James F. Morrison, of Kokomo, Kempff's senior counsel, and get him to agree to some other time. Soon after the receipt of this letter, Morrison acting on the one side, and Blacklidge & Bro. on the other, entered into an agreement in writing that the cause should be postponed and set for trial on Monday, the 21st day of the month named, and mailed it to Sheridan, at Frankfort. On Monday, the 14th day of November, 1887, B. C. Moon, of Kokomo, appeared in the Clinton circuit court as attorney for Moulder, and presented an affidavit made by James C. Blacklidge, a member of the firm of Blacklidge & Bro., stating that he had been and still was the principal attorney and counselor of Moulder in the management of his defense; that his engagements in the Howard circuit court, in the trial of causes, were at the time such that it was impossible for him to prepare the cause for trial on that day; that, relying upon the agreement between Morrison and his firm for the postponement of the cause until the 21st day of that month, a statement of the circumstances which led to it having been submitted, and being restrained by engagements in other courts, the attorneys for Moulder had not caused the witnesses on his behalf to be subpoenaed, and had not prepared the cause for trial, and in consequence could not then try the same; that the affidavit was not made for delay merely, but that justice might be

¹ As to when a continuance will be allowed on the ground of absence of counsel, see *Culver v. Colehour*, (Ill.) 5 N. E. Rep. 89; *Association v. Frimm*, (Ill.) 16 N. E. Rep. 98.

done. Upon this affidavit Moon moved that the cause should be postponed until some future day, naming a day on which no cause was pending for trial, or be continued until the next term; but his motion was overruled, and he was required to at once proceed with the trial of the cause. Moulder then filed his affidavit for a change of venue from the county, for the alleged reasons—*First*, that Kempff had an undue influence over the citizens of the county; *secondly*, that an odium attached to his, the said Moulder's, defense in the cause, on account of local prejudice. But his application was overruled upon the ground that there was a rule of the Clinton circuit court which required applications for a change of venue to be filed at least one day before the day on which the cause was set for trial. After hearing the evidence, the circuit court found in favor of Kempff upon all the matters necessary to sustain his application for a license, and after overruling a motion for a new trial gave judgment in his favor, concluding with an order that the auditor of Howard county should issue to him a license in accordance with his application.

The first question made in argument is upon the refusal of the circuit court to either postpone or continue the cause. It is conceded that the propriety of postponing or continuing, or of refusing either to postpone or continue, a cause, rests very largely in the discretion of the court, and that a judgment ought not to be reversed on account of a decision in respect either to a postponement or a continuance, except where it very clearly appears that the court's discretion has been erroneously exercised. But it is claimed that the case presented is one in which the discretion of the court was obviously abused. The absence of the principal counsel in a cause may justify its postponement or continuance, dependent upon the circumstances attending his absence, and his peculiar relations to the cause, but a judgment will not be reversed because a postponement or continuance was refused on account of the absence at the trial of the principal attorney, or only attorney, in the cause, unless it be made to appear that some real injustice was probably done by the refusal. It is not error to overrule a motion for postponement on account of the absence of the principal attorney where the party has other attorneys, unless it appear that he had not time to consult his other attorneys, and to give them full information as to the nature of his case. *Work, Pr. §§ 738-749; Belck v. Belck*, 97 Ind. 78; *Eslinger v. East*, 100 Ind. 434. A case may be postponed by the agreement of the parties acting for themselves, or through their attorneys, and with the consent of the court; but an agreement by the parties that a cause shall be postponed does not operate as a postponement without the sanction of the court, and does not of itself bind the court. A party is therefore not justified in assuming that a cause will be postponed simply because he has agreed with his adversary that it shall be; nor is he authorized to assume that opposing counsel acted in bad faith because the court declined to sanction an agreement to a postponement. Neither is a defendant injured by the overruling of his motion to postpone, or by being deprived of an opportunity of summoning his witnesses, unless he has a meritorious defense, or his witnesses are material. Applying these general principles to the affidavit of Blacklidge, we have no reason for either inferring or concluding that Moulder was injured in any material respect by being required to go to trial at the time the cause was tried. He was represented by counsel at the trial, made a defense, and reserved exceptions, and for aught that appears of record he made as good a defense as he would have done if additional time had been given. There is therefore no affirmative showing that Moulder was really injured by his failure to obtain further delay in going to trial. *Whitehall v. Lane*, 61 Ind. 93. The next question argued is based upon the refusal of the Clinton circuit court to change the venue on the application of Moulder. Section 1325, Rev. St. 1881, directs that the courts shall adopt rules for conducting proceedings therein not inconsistent with the

laws of this state, and it has been frequently held that, under the authority thus conferred, our courts may, by the adoption of an appropriate rule, regulate the time within which applications for changes of venue shall be made, and may overrule an application for a change of venue made after the time fixed for such a rule on the ground that it comes too late. See Work, Pr. § 1278, and cases cited; *Krutz v. Griffith*, 68 Ind. 444; *Krutz v. Howard*, 70 Ind. 174; *Hays v. Morgan*, 87 Ind. 231; *Rout v. Ninde*, 111 Ind. 597, 13 N. E. Rep. 107; *Moore v. Sargent*, 112 Ind. 484, 14 N. E. Rep. 466. Cases might arise in which a strict enforcement of such a rule would not be justified, but there is nothing in this case to make it an exception to the general rule announced as above. *Ringgenberg v. Hartman*, 102 Ind. 537. The Clinton circuit court, consequently, did not err in overruling Moulder's application for a change of venue. An exception was reserved below upon the sufficiency of the evidence to sustain the finding which was made by the court, but no argument has been submitted here in support of that exception. The judgment is affirmed, with costs.

(115 Ind. 466)

STATE v. WABASH RY. CO.

(Supreme Court of Indiana. September 18, 1888.)

CORPORATIONS—INSOLVENCY AND RECEIVERS—CRIMES OF RECEIVER'S AGENT.

Where a corporation is in the hands of a receiver, who has full possession of its property, and entire charge of its affairs, the corporation cannot be prosecuted for crimes or misdemeanors committed by the agents or servants of the receiver, as the corporation can do no act or commit no offense while the receiver is in full control.

Appeal from circuit court, Huntington county; HENRY G. SAYLER, Judge. Prosecution by the state against the Wabash Railway for obstructing a public highway. There was a judgment for defendant, and plaintiff appeals. *E. C. Vaughn, B. M. Cobb, and C. W. Watkins*, for appellant. *C. B. & W. V. Stuart*, for appellee.

ELLIOTT, J. The record shows that the Wabash Railway Company is in the hands of a receiver appointed by the circuit court of the United States, and that the servants of the receiver constructed a platform across what had once been a public street, but which it is claimed had been vacated. It is only necessary for us to decide that where a corporation is in the hands of a receiver, who has full possession of its property, and entire charge of its affairs, the corporation cannot be prosecuted for crimes or misdemeanors committed by the agents or servants of the receiver. As the corporation can do no act while the receiver is in full control, it can commit no offense. This seems so clear as not to require discussion. *Railroad Co. v. Davis*, 23 Ind. 553; *Bell v. Railroad Co.*, 53 Ind. 57. We need not inquire or decide whether a corporation is liable to a criminal prosecution for the acts of its agents or servants in obstructing a highway, for here the wrong charged against the corporation was not committed by the corporation, but by an officer of the federal court, placed in charge of the corporate affairs. Judgment affirmed.

(115 Ind. 421)

REYNOLDS v. STATE *ex rel.* COOPER.

(Supreme Court of Indiana. September 19, 1888.)

BASTARDY—PROSECUTION—SUFFICIENCY OF EVIDENCE.

Under Rev. St. Ind. 1881, § 980, which provides that a prosecution for bastardy shall be in the name of the state, on the relation of the prosecuting witness, but the rules of evidence shall be the same as in civil cases; and section 983, which provides that "the trial and continuance thereof of such prosecution, both before the justice and in the circuit court, shall, in all respects not otherwise provided for, be governed by the law regulating civil suits,"—a prosecution for bastardy is a civil proceeding, and a preponderance of the evidence is all that is necessary to establish the case against the defendant.

Appeal from circuit court, La Porte county; DANIEL NOYES, Judge.
Wile & Osborn, for appellant. *L. A. Cole*, for appellee.

ZOLLARS, J. In this action by the state upon the relation of Jennie Cooper, appellant was adjudged to be the father of her illegitimate child. The only point made here is that the finding and judgment by the court below are not sustained by sufficient evidence. A part of the argument is that the proceeding partakes so much of the nature of a criminal proceeding that no judgment should be rendered against a defendant unless the evidence shows beyond a reasonable doubt that he is the father of the child. That argument is not well founded. It is settled by a long line of our cases that, under the Code, a prosecution for bastardy is a civil action, and that the rules of practice applicable to other civil actions are applicable to it, except when a different and special procedure is provided. *Galvin v. State*, 56 Ind. 51; *State v. Brown*, 44 Ind. 329; *Hawley v. State*, 69 Ind. 98; *State v. Evans*, 19 Ind. 92; *Stone v. State*, 33 Ind. 538; *Saint v. State*, 68 Ind. 128; *De Priest v. State*, Id. 569; *Maloney v. Newton*, 85 Ind. 565, (569;) *Powell v. State*, 96 Ind. 108. These cases are in harmony with the letter and spirit of the general provisions of the Code, and especially with sections 980 and 983, Rev. St. 1881, which are as follows: "Sec. 980. The prosecution [for bastardy] shall be in the name of the state of Indiana, on the relation of the prosecuting witness; but the rules of evidence shall be the same as in civil cases," etc. "Sec. 983. The trial and continuance thereof of such prosecution, both before the justice and in the circuit court, shall, in all respects not otherwise provided for, be governed by the law regulating civil suits." The only reasonable conclusion to be drawn from these statutes, the general provisions of the Code, and the cases cited, and others that might be cited, is that, in a prosecution for bastardy, a preponderance of the evidence is all that is necessary to establish the case against the defendant. In such a case, as in other civil actions, this court will not reverse the judgment if there is evidence fairly tending to support it. That rule has been uniformly applied. *Dibble v. State*, 48 Ind. 470; *Askren v. State*, 51 Ind. 592; *De Priest v. State*, *supra*. If any other authority were necessary, it will be found in the late case of *Insurance Co. v. Jachnichen*, 110 Ind. 59, 10 N. E. Rep. 636, where, after a thorough examination of the whole question, and a review of numerous cases and authorities, it was held that in all civil actions a preponderance of the evidence only is necessary to establish the affirmation of an issue, whatever the nature of that issue may be.

We have examined the evidence as we find it in the record. It would not be profitable to set it out in full, nor in substance. The judgment cannot be reversed upon the evidence. The testimony of the relatrix is corroborated; that of appellant is not. The judgment could not be reversed upon the evidence, if the rule contended for by counsel for appellant were the proper rule to apply in such cases. As we have already seen, in a case like this a preponderance of the evidence is all that is necessary to justify the trial court in finding the affirmative of an issue. And in this court, as already stated, a judgment will not be reversed if there is evidence fairly tending to support it. Judgment affirmed, with costs.

(115 Ind. 467)

STATE v. JOHNSON.

(*Supreme Court of Indiana*. September 19, 1888.)

1. GAMING—LEASING PREMISES FOR GAMBLING PURPOSES—AGRICULTURAL SOCIETY—INDICTMENT.

Acts Ind. 1885, p. 127, makes it unlawful for "any officer or officers, or any manager, director, or trustee of any county fair, agricultural society, or joint-stock association, or the officers of any fair, agricultural, joint-stock company, or asso-

ciation," to rent or donate any portion of their grounds for gambling purposes, and imposes a fine upon any officer or officers who violate any of its provisions. *Held*, that an indictment drawn under this act, which charges that defendants were the officers of an agricultural and mechanical society, is not defective for not alleging that such society is a county fair, agricultural society, or joint-stock association.¹

2. SAME.

An indictment charging that defendants, "as officers, managers, and directors," etc., did unlawfully rent, etc., is not bad for uncertainty, on the ground that the statutory penalty is imposed upon any "officer or officers," and not upon managers and directors. The words "officer" or "officers" in the statute were intended to designate any person or persons duly invested with authority to grant privileges upon the society's grounds, and the words "managers and directors" in the indictment may be treated as surplusage merely.¹

Appeal from circuit court, Knox county; F. W. VIEHE, Judge.

J. C. Adams and *The Attorney General*, for appellant. *De Wolf, Chamber & De Wolf*, for appellee.

MITCHELL, J. At the January term, 1888, of the Knox circuit court, the grand jury returned an indictment, in which they informed the court that Thomas Johnson, and six others named therein, acting as officers, managers, and directors of the Knox County Agricultural & Mechanical Society of Knox county, in the state of Indiana, which is alleged to be a society organized under the laws of the state of Indiana, did, on the 10th day of October, 1886, unlawfully rent, lease, and donate a portion of the premises and grounds owned, used, and occupied by the above-named society, to one Adam Marsh, to be used for the purpose of carrying on a game of chance, with wheel of fortune and dice, devices for the purpose of wagering money, etc. The court sustained a motion to quash the indictment, and upon this appeal taken by the state the propriety of this ruling is presented.

An act of the general assembly, approved April 4, 1885, (Acts 1885, p. 127,) makes it unlawful for any officer or officers, or any manager, director, or trustee of any county fair, agricultural society, or joint-stock association, or the officers of any fair, agricultural, joint-stock company, or association, organized under the laws of this state, to rent, lease, let, or donate any portion of the premises or grounds, or any booth, stall, or tent owned, used, leased, or occupied by any fair, society, etc., to any person, etc., to be used for the purpose of carrying on any game of chance or skill, or any scheme, lottery, or drawing with dice, cards, balls, or wheels, or any other device for the purpose of wagering money, etc. The act prescribes a penalty of \$25 against any officer or officers who violate any of its provisions. The first objection urged against the indictment in the brief filed on behalf of the appellees is that it is not alleged therein that the Knox County Agricultural & Mechanical Society is a county fair, agricultural society, or joint-stock association. It is said the statute only makes gambling unlawful on grounds owned, used, or occupied by a society organized for agricultural purposes, and that because the indictment fails to charge that the society, of which the defendants were the officers and managers, was organized for the purposes above named, it charges no crime. We do not concur in this view. The statute makes it unlawful for any officer or officers of any agricultural society or joint-stock association to rent or donate any portion of the grounds owned, used, leased, or occupied by such society for gambling purposes. The indictment charges that the defendants were the officers of an agricultural and mechanical society, organized under the laws of this state, and that, as such officers, they did, on a day named, unlawfully rent, etc., grounds owned by such society for gambling purposes. It is wholly immaterial whether the society, of which the defend-

¹As to how near an indictment or information must conform to the wording of the statute creating the offense, see *State v. Hupp*, (W. Va.) 6 S. E. Rep. 919, and note; *State v. Davis*, (Me.) 15 Atl. Rep. 41, and note; *State v. Merkley*, (Iowa,) 39 N. W. Rep. 111, and note; *State v. Jacobs*, (Iowa,) 39 N. W. Rep. 293, and note.

ants were the officers and managers, was organized for one purpose or another. It was organized under the law of the state of Indiana, and was called an "Agricultural and Mechanical Society." Its officers incurred the penalty of the law when they leased or donated, if they did lease or donate, any portion of the grounds of the society for gambling purposes, if they leased it with knowledge that it was to be so used. In support of the second and only other objection it is contended on behalf of appellees that the indictment is bad for uncertainty, in that the charge is that the defendants, "as officers, managers, and directors" of the Knox County Agricultural, etc., Society, did unlawfully rent, etc. It is said that the statutory penalty is pronounced only against any "officer or officers" who violate any of the provisions of the act, and that managers, directors, and trustees are not included in the penal clause. If this were conceded to be a correct construction of the act, the description of the defendants as officers, managers, and directors would not vitiate the indictment or make it bad for uncertainty. "Managers and directors" would be treated as surplusage merely. The words "officer" and "officers," as used in the act under consideration, were not, however, employed in a strictly technical sense. They were intended to designate any person or persons duly invested by the society with authority to grant privileges to other persons upon its grounds or premises, and to make it unlawful and penal for such persons intentionally to rent or donate any portion of the society's grounds for gambling purposes, with knowledge that they were to be so used. Our conclusion is that the court erred in sustaining the motion to quash. The judgment is reversed.

NIBLACK, C. J., took no part in the decision of this cause.

(116 Ind. 98)

JARRARD v. STATE, 1

(Supreme Court of Indiana. September 19, 1883.)

1. CONSTITUTIONAL LAW—TITLES OF LAWS—REFORMATORIES.

Act Ind. 1883, in reference to the state reform school, is entitled "An act designating a name by which the house of refuge for the correction and reformation of juvenile offenders shall hereafter be known. * * * regulating the commitments thereto, and for the more efficient and uniform government of said institution," etc. *Held*, that the title is sufficient to embrace section 1 of said act, which provides for the commitment of boys to the "Indiana Reform School for Boys."

2. SAME—LEGISLATIVE POWERS.

Under Const. Ind. § 2, art. 9, authorizing the legislature to provide "for the establishment of houses of refuge for the correction and reformation of juvenile offenders," the legislature had a right to pass the act entitled as above; and as such act provides a method for ascertaining by a judicial investigation whether there is proper cause for commitment to a reform school, it is not objectionable as arbitrarily taking children from their parents.

3. REFORMATORIES—COMMITMENT OF BOYS—COMPLAINT.

A complaint for commitment of a person to the reform school, which alleges that such person's guardian, because of advanced age, cannot exercise that control and restraint which is necessary to prevent the ward from becoming an evil member of society, and shows also that the latter is vicious, and associates late at night with immoral, drunken, and dissolute persons, at his own pleasure, contains enough to make it good, though other statements therein are trifling and ridiculous.

Appeal from circuit court, Steuben county; R. WES. McBRIDE, Judge.

D. E. Palmer, Frank S. Roby and John F. Sherman, for appellant. Emmet A. Britton, for appellee.

ELLIOTT, J. The appellant was committed to the reform school upon the complaint of George Reading. The act of 1883 is entitled "An act designating a name by which the house of refuge for the correction and reformation of juvenile offenders shall hereafter be known; providing for the appointment of commissioners and their compensation, and prescribing their powers and

¹ Rehearing denied.

duties; regulating the commitments thereto, and for the more efficient and uniform government of said institution; authorizing the governor to commute the sentence of boys under twenty-one years; declaring how the expenses of maintaining the institution shall be paid; repealing all laws in conflict with this act, and declaring an emergency." Acts 1883, p. 19. We have no doubt that the title is sufficiently clear and comprehensive to embrace section 1 of the act, which provides for the commitment of boys to the "Indiana Reform School for Boys." The title of the act contains the clause, "regulating commitments thereto," and this certainly embraces section 9. Under our decisions we have little doubt that the title would be sufficient without that clause. The legislature had power to enact the statute under examination. The object of the statute is not to punish, but to reform. Boys are sent to the school, not as criminals to punishment, but to prevent them from becoming criminals. We do not deem it necessary to enter upon a discussion of this question, for we think it settled in accordance with principle that the legislature has power to provide for the reformation of boys who are entering upon a career of wickedness, by prescribing measures for committing them to a reformatory institution. *Ex parte Crouse*, 4 Whart. 9; *Industrial School v. Supervisors*, 40 Wis. 328; *Roth v. House of Refuge*, 31 Md. 329; *Petition of Ferrier*, 103 Ill. 367; *County v. Humphreys*, 104 Ill. 378. But we need not look beyond our own constitution for authority, for that provides that the legislature may provide "for the establishment of houses of refuge for the correction and reformation of juvenile offenders." Section 2, art 9. We do not hold, or mean to hold, that boys can be arbitrarily taken from their parents or guardian, and committed to a reformatory school. We sanction no such doctrine. What we here hold is that, where parental restraint is not strong enough to prevent boys from becoming evil members of society, the law may interfere, and place them where they may be restrained and reformed. The act before us provides a method for ascertaining by a judicial investigation, in a court of general superior jurisdiction, whether there is cause for taking bad boys from the control of parents, and placing them in charge of the officers of the commonwealth, and it cannot, therefore, be justly said that it arbitrarily takes children from their parents.

The complaint shows that the appellant's guardian, because of his advanced age, cannot exercise that control and restraint which is necessary to prevent the appellant from becoming an evil member of society, and it shows also that he is vicious, and associates "late at night, with immoral, drunken, and dissolute persons, at his own pleasure." We agree with appellant's counsel that some of the statements of the complaint are trifling and ridiculous, but there is enough in it to make it good. Judgment affirmed.

(115 Ind. 435)

NEW YORK, C. & ST. L. RY. CO. v. DOANE.

(*Supreme Court of Indiana*. September 20, 1883.)

1. CARRIERS—OF PASSENGERS—INJURY TO PASSENGER—CARRYING BEYOND PLATFORM.

Defendant's freight train stopped several hundred feet from the platform of the station to which plaintiff had taken passage, and the conductor and brakeman immediately left the caboose, without giving her any directions or assistance in alighting. A line of freight cars were standing on one side of the caboose, and there was a ditch on the other, and plaintiff, supposing she would be let off at the platform, remained on the train. She was carried some distance beyond the platform, when the train was stopped, but the conductor refused to back to the platform. On alighting, the conductor said or did something impressing her with the belief that she could easily reach the platform by walking back on the track. The track was fenced on both sides, and plaintiff, in attempting to cross a cattle-guard, fell, and was injured. There were two gates by which plaintiff might have passed through the fence, and reached the platform by a circuitous route, but she did not observe

V. 7 N.E. NOS. 16, 17—58

them. *Held*, that plaintiff was not negligent in not alighting from the train when it first stopped, and that defendant was negligent in not backing to the platform, and was liable for the injury.¹

2. DAMAGES—FOR PERSONAL INJURIES—EXCESSIVE.

Plaintiff's arm was broken by the fall and permanently disabled, rendering her permanently less able to earn her own living, which she had been accustomed to do. *Held*, that a verdict for \$1,000 damages was not excessive, although plaintiff was past middle age.²

Appeal from circuit court, Kosciusko county; ELISHA V. LONG, Judge.
Frazer & Frazer and *John B. Coles*, for appellant. *Adamson & Cook* for appellee.

NIBLACK, C. J. Notwithstanding some discrepancies between witnesses on certain matters of minor importance, there was evidence in this case very strongly tending to establish the following facts: That during the year 1883, as well as since that time, the appellant, the New York, Chicago & St. Louis Railway Company, ran a train of cars known as a local freight train daily over its line of road between a point near the city of Chicago, in the state of Illinois, and the city of Fort Wayne, in this state; that it was in the habit of carrying passengers in a caboose attached to the rear end of that train, between all the stations on that part of its line of road; that the appellee, Rebecca Doane, on the 18th day of June, 1883, entered the caboose of that train at a station on the road known as Mentone, for the purpose of being conveyed as a passenger to a station nine or ten miles further east, called Claypool, and paid to the conductor of the train the amount demanded by him for transportation to the station last named; that there was a depot or station house, with a platform 40 or 50 feet attached, on the north side of the road at Claypool; that the train consisted of near, if not quite, 30 cars; that when it reached Claypool it stopped along-side of the platform, the caboose standing on the track at least several length of cars, and probably several hundred feet, west of the platform; that several freight cars were, at the time, standing on a switch on the south side of, and immediately adjacent to, the caboose; that on the north side of the caboose a ditch containing some water, several feet deep and four or five feet wide, ran along near and parallel with the railway track; that Mrs. Doane was unable to see any safe or convenient way of getting out of or away from the caboose; that there was a plank across the ditch, some 50 or 60 feet east of the caboose, over which persons sometimes walked, but the strip of ground between the ditch and the railway track was so narrow as to make it impracticable for her to attempt to reach the plank with her two bundles of baggage which she was carrying with her; that, being told by one of her fellow passengers that the train would probably pull up to and let her off at the platform, she remained in the caboose; that at or about the time the train stopped the conductor and the only brakeman then near it left the caboose, without giving Mrs. Doane any directions as to how or when she could safely leave the train, and without offering her any assistance in leaving it; that before leaving the caboose the brakeman announced the name of the station, but, from dullness of hearing or some other cause, she did not hear the announcement; that she was, however, otherwise informed that the train was approaching Claypool; that after the expiration of 15 or 20 minutes the train proceeded on its way east, without stopping at the platform; that in passing the platform the conductor stepped from it into the caboose, and, seeing that Mrs. Doane was still on the train, he climbed on

¹Where a railway company takes passengers on its freight trains, it is bound to exercise reasonable care and diligence for their safety on leaving the train. *Smith v. Banking Co.*, (Ga.) 5 S. E. Rep. 772, and note. As to the duty of a common carrier to safely deposit a passenger at his place of destination, and the duty it owes to passengers on alighting from its train, see *Railway Co. v. Williams*, (Tex.) 8 S. W. Rep. 78, and note.

²As to what are and what are not excessive damages in actions for injuries to the person, see *Railroad v. Mitchell*, (Ky.) 8 S. W. Rep. 706, and note; *Henry v. Railroad Co.*, (Iowa,) 39 N. W. Rep. 193, and note; *Weber v. City of Creston*, Id. 126, and note.

top and gave the necessary signal to have the train stopped; that the train was stopped accordingly, on a curve 80 or 90 rods away from, but still in sight of, the station-house; that Mrs. Doane thereupon demanded that she should be returned to the station by backing up the train, but the conductor declined to so back up the train, and requested her to get off where the train then was, which, with his assistance, she did, the locality being one with which she was entirely unacquainted; that on her reaching the ground the conductor either said or did something which impressed her with the belief that she could easily get back to the station by walking on the railway track, and that this was the best route for her to take; that where she left the train there was a wire fence, consisting in part of barbed wires, on both sides of the railway track, running back to a railroad crossing near the station-house; that, seeing no other way open to her, she, with her bundles, started along the track in the direction of the station-house; that she had proceeded only a short distance when she came to a cattle-pit, from which plank fences three or four feet high extended each way to the respective wire fences; that, realizing the danger there might be in attempting to pass over the cattle-pit, but failing to observe any means of getting around it, and fearing she might be caught by some other passing train, she stepped upon and started to walk over the cattle-pit, exercising as much care as was consistent with her then excited and very nervous condition; that when about half-way across the cattle-pit she fell, and broke one of her arms near the wrist, and was otherwise bruised and injured; that with the assistance of a gentleman, who came to her relief, she got back to the station house, where she received surgical aid and attention; that the injury to her arm had proved to be a very painful and permanent injury; that her wrist had not regained, and never would regain, its normal condition, her arm being thus left in a maimed and weakened predicament. It was also shown that somewhere not far from where Mrs. Doane left the train there was a gate, on the north side of the road, which opened into a private lane leading north through a farm; that some distance further north there was another gate, on the west side of the lane, which led into an open field; that she might have gone through these two gates, and thence through the open field, and by a circuitous route have reached the station-house without walking upon the railway track, but she had no knowledge of the fact that she might get to the station-house in that way, and nothing occurred to direct her attention to the practicability of her getting back by that or any other route outside of the railway track. A jury returned a verdict in favor of Mrs. Doane, assessing her damages at \$1,000, and, over exceptions reserved, judgment was given upon the verdict. Error is assigned upon the overruling of a demurrer to the complaint, which consisted of two paragraphs, and the refusal of the circuit court to grant a new trial.

In support of the errors assigned it is sought to be maintained in argument—*First*, that upon the facts contained in the complaint and substantially proven at the trial, Mrs. Doane was guilty of contributory negligence in not leaving the caboose when the train stopped at Claypool, and also in attempting to walk back along the railway track and over the cattle-pit after she left the train; *secondly*, that upon the facts as stated, the injury complained of was too remote to constitute a cause of action against the railway company; *thirdly*, that the damages assessed were, in any view which ought to be taken of the facts as proven, excessive; *fourthly*, that certain instructions given to the jury were erroneous.

A railroad company may refuse to carry passengers on its freight trains, but if it admits a person into a caboose attached to one of its freight trains, to be transported as a passenger, and takes the customary fare for his transportation as such, it incurs the same liability for his safety as though he had taken passage in one of its regular passenger coaches. It is neither expected nor required that a passenger upon a freight train shall be provided with all the

comforts and conveniences which are usually afforded passengers on a regular passenger train, but there is on that account no diminution in the obligation of those in charge of the freight train to carry its passengers with becoming and all necessary care, and to deliver them safely at, or conveniently near, their respective places of destination. It is the duty of a railroad company engaged in the transportation of passengers, whether by freight or passenger trains, to so run and manage its trains, and to so handle its passengers, that no one shall be injured by its own negligence. 2 Wood, Ry. Law, 1121 *et seq.*; *Railway Co. v. Selby*, 47 Ind. 471; *Railway Co. v. Dickerson*, 59 Ind. 317. It is also the duty of a railroad company to provide suitable stations and platforms to enable persons to enter its cars, and passengers to safely alight when they have accomplished their journey. As pertinent to that duty, Wood, *supra*, at section 305, on page 1123, says,—and we have no doubt, correctly,—that “the trains must be stopped at the station, so that passengers can alight upon the platform, and if they are stopped at any other place, and the station is called, so that passengers are required or have a right to understand that they are required to stop there, the company is liable for injuries received in leaving such place, to the same extent and upon the same ground that it would be liable for injuries received from the defectiveness of its own premises.” *Railroad Co. v. Butler*, 112 Ind. 598, 14 N. E. Rep. 599. These general principles apply as well to the carrying of passengers by freight as by passenger trains, subject only to such modifications as are made necessary by the nature of the business in which freight trains may be engaged. Where a freight train is accustomed to discharge its passengers at some place other than the platform, or when it is impracticable for it to reach the platform with its caboose or other car in which its passengers are carried, it may require passengers to leave its train at some other appropriate and convenient place not connected with the platform. In such an event, however, passengers are entitled to receive such care and attention as are necessary to enable them to properly reach the station, and this is especially so where the place at which they are discharged is either inappropriate or inconvenient. *Woolery v. Railway Co.*, 107 Ind. 881, 8 N. E. Rep. 226. Further on, at page 1186, the same author says that “if the train overshoots or stops short of the platform, at an unusual place, it is held that the company is bound to assist the passengers to alight; and, in any event, in such a case, it would be its duty to either back the train to the station, or notify the passengers where and how to alight, and warn them of any dangers incident to alighting at that point; and if, through no fault of the passenger, he is injured by alighting at that point, or in getting from there to the station or highway, the company is liable therefor.” Applying these principles to the facts of this case, the railway company failed in its duty in not either stopping the caboose at the platform at Claypool, or assisting Mrs. Doane to alight from the train which stopped west of that place, and to reach the station in safety. Under all the circumstances, she was justified in not leaving the caboose where it stopped, as well as in inferring that it would be pulled up to the platform before leaving the station. It also failed to perform a plain and very urgent duty when it neglected to either back its train to a convenient point near the station, or to give her such assistance or instructions as were necessary to assure her safe return to the station-house after it had carried her beyond her place of destination. The duty of a railroad company as a common carrier of passengers is not fully performed until it delivers its passenger, in proper condition, at the station to which he has paid his fare. Mrs. Doane was not guilty of negligence in failing to discover some gates leading into private inclosures, and into an open and remote field, through which she might have returned to the station by an unmarked and circuitous route. It was, under the circumstances, not only natural, but reasonable, aside from any directions or intimations which the conductor may have given her, that she should have

attempted to follow the railway track back to the station-house. Until she reached that point, she was still constructively a passenger on the railway train, and had a right to rely upon any information or directions which she may have received from the conductor. See *Wood*, above cited, pp. 1124-1126. Nor was Mrs. Doane guilty of contributory negligence in her effort to walk over the cattle-pit. It was important to her that she should pass that place in some way, and within a reasonable time, and no other practicable method of passing it was apparently open to her. It is a matter within the common knowledge of all that a person may, by the exercise of a high degree of care, ordinarily walk with safety over a cattle-pit. But a cattle-pit is not a suitable place to compel a passenger to walk over to reach the end of his journey, and it was negligence on the part of the railway company to place her in a position which seemingly required her to incur the hazard of walking upon such a place. It is an old rule that where one person places another in such a situation that the latter must adopt a perilous alternative, the former is responsible for the consequences. *Jones v. Boyce*, 1 Starkie, 493. A practical application of this rule in aid of the general principles previously announced as above, leads us to the further conclusion that the injuries to Mrs. Doane were proximately caused by the negligence of the railway company. This view is fully sustained by the cases of *Railway Co. v. Eaton*, 94 Ind. 474, and *Railroad Co. v. Buck*, 96 Ind. 346.

Nothing is shown from which we can infer that the damages were excessive. Notwithstanding Mrs. Doane had, at the time of her injuries, passed the meridian of life, the maiming and permanent disabling of her arm was no trivial matter to her. She thereby became very materially less able to earn her own living (which she had been accustomed to do) for the rest of her life. The amount she recovered impresses us as a very moderate compensation for the injuries for which she sued.

Objections are specifically made to some of the instructions given to the jury, but none of the instructions complained of are inconsistent with the legal principles we have applied to the evidence, and hence what we have already said practically disposes of all the questions made upon the instructions. Having in view the same legal principles, the demurrer to the complaint was rightly overruled. The judgment is affirmed, with costs.

(115 Ind. 493)

O'HALERAN v. O'HALERAN *et al.*

(*Supreme Court of Indiana*. September 20, 1888.)

EXECUTORS AND ADMINISTRATORS—SALES UNDER ORDER OF COURT—RIGHTS OF HEIRS TO CONTEST CLAIMS.

The remedy prescribed by Rev. St. Ind. 1881, § 2326, as amended by Acts 1883, p. 157, § 13, providing that upon a petition showing a meritorious defense to a claim allowed against the estate by the administrator, the heirs shall be entitled to an order setting the claim for trial, as in case of claims not allowed, is not exclusive; and the heirs may, in order to protect the real estate from sale by the administrator, show that a claim allowed by the administrator was not a valid claim against the estate. Following *Scherer v. Ingberman*, 11 N. E. Rep. 8, 12 N. E. Rep. 304.

Appeal from circuit court, Tippecanoe county; DAVID P. VINTON, Judge. Petition by Michael O'Haleran, as administrator of the estate of Patrick Reagan, for the sale of real estate, to pay alleged debts against the estate. The appellees, Margaret O'Haleran and others, answered, denying that any debts were owing by the estate. The petition was dismissed, and Michael O'Haleran appeals. Rev. St. 1881, § 2326, as amended by Acts 1883, p. 157, § 13, provides that upon a petition showing a meritorious defense to a claim allowed against the estate by the administrator, the heirs shall be entitled to an order setting the claim for trial, as in case of claims not allowed.

E. A. Greenley, for appellant. *R. P. & J. C. Davidson*, for appellees.

ZOLLARS, J. Patrick Reagan devised all of his real estate to his daughter, Catherine. Subsequent to his death she died, intestate, leaving the appellees herein, who were defendants below, her only heirs at law. After her death, appellant, upon his own application, was appointed administrator of Reagan's estate, and as such, and for the purpose of paying alleged debts, filed his petition for the sale of the real estate so devised to the daughter, Catherine. Appellees answered, among other things, that at the time of his death Reagan owed no debts, and that the only claim against the estate is an allowance by appellant, as administrator, of a claim filed by his wife, which was and is without any foundation, Reagan never having been indebted to her. The court below overruled a demurrer to the third paragraph of the answer, the substance of a portion of which is given above, and upon the evidence adduced dismissed appellant's petition. The evidence is not in the record, and hence no question is made as to its sufficiency. The case is submitted upon the assignment that the court below erred in overruling the demurrer to the answer.

The pleadings upon neither side are as definite and certain as they ought to be, but we think they present the question argued by counsel; and that is, have the owners of the real estate, in order to protect it from sale by the administrator, a right to defend against, and show, if they can, that the claim filed by appellant's wife is not a proper and valid claim against the Reagan estate, notwithstanding its allowance by appellant as administrator? Counsel for appellant claim that they have not that right in a proceeding like this, and that their only remedy is that prescribed by section 102 of the act of 1881, (Rev. St. 1881, § 2326,) as amended by the act of 1883. (Acts 1883, p. 157, § 13.) The precise question thus presented was before us for decision in the case of *Scherer v. Ingerman*, 110 Ind. 428, 11 N. E. Rep. 8, 12 N. E. Rep. 304; and we there held that, in a proceeding by an administrator for the sale of real estate to pay an alleged claim against the estate, the owner or owners of the real estate have the right, in order to protect it, to defend against the claim upon its merits, notwithstanding it may have been allowed by the administrator. We are satisfied that the conclusion there reached is the correct one, and adhere to it. No mention was made in that case of the amendment of 1883, but there is nothing in that amendment which at all affects the question which was there involved, and is here involved. See, also, *Mackey v. Ballou*, 112 Ind. 198, 13 N. E. Rep. 715; *Hunter v. French*, 86 Ind. 320. The court below did not err in overruling the demurrer to the third paragraph of the answer. Judgment affirmed, with costs.

(116 Ind. 214)

LEAKE v. BALL et al.*

(Supreme Court of Indiana. September 20, 1893.)

1. FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER—CONSIDERATION.

A creditor, who, as security for a debt, with plaintiffs' consent, takes from his debtor an assignment of an insurance policy which had already been assigned to plaintiffs, to indemnify them as sureties for another debt, assuming and agreeing to pay the last-named debt, is liable to plaintiffs, who have been compelled to pay said debt, although the policy is not yet collected; such promise not being within the statute of frauds.¹

2. CONTRACT—ACTIONS ON—PLEADING—FRAUD—OFFER TO RETURN PROPERTY.

An answer in an action founded on a promise to pay a debt, in consideration of the transfer to defendant of an insurance policy, is fatally defective if it charge fraud in procuring the promise without offering to return the policy.

Appeal from superior court, Vigo county; JAMES M. ALLEN, Judge.

¹ As to what promises are within the statute of frauds, as being promises to pay the debt of another, see *Stewart v. Jerome*, (Mich.) 38 N. W. Rep. 895, and note; *Clark v. Jones*, (Ala.) 4 South. Rep. 771; *Helt v. Smith*, (Iowa,) 39 N. W. Rep. 81, and note.

*Rehearing denied.

Action by Isaac P. Ball, Ellis O. Whiteman, and Thomas W. Harper, to recover of Junius P. Leake the amount of a note paid by them as sureties for one James Hook. Judgment for plaintiffs, and defendant appealed.

C. F. McNutt and Davis & Davis, for appellant. *L. D. Leveque and T. W. Harper*, for appellees.

ELLIOTT, J. It is alleged in the complaint of the appellees that James Hook became indebted to Vigo Encampment No. 17 of the Independent Order of Odd Fellows; that, to secure this debt, he executed a promissory note, and that the appellees became his sureties thereon; that, at the time the note was executed by the appellees, Hook assigned to them a policy of insurance held by him in the Odd Fellows' Mutual Aid Association, to indemnify them against loss; that the value of the policy at the time of this assignment was \$2,500; that judgment was subsequently obtained on the note executed by Hook and the appellees; that Hook was indebted to Leake, the appellant, and, with the consent of the appellees, executed to him the following assignment of the policy of insurance: "For value received, I assign this policy to J. P. Leake, to secure a note of \$1,011.00, dated January 7, 1884. Leake is to assume and pay the money due the encampment, on which Ball and Harper are sureties. After paying himself the amount of the note and interest and money paid on the lodge claim above mentioned, the balance to go to the family of Hook." It is further alleged that the appellees were compelled to pay the judgment obtained against them, and that Leake accepted the assignment and policy, and still retains the policy, and that he has not paid the debt due the encampment.

The promise of Leake is not within the statute of frauds. He obtained a thing of value, and, instead of promising to pay the consideration directly to the party with whom he contracted, promised to pay it to a third person. He promised to pay his own debt by paying the creditor of the party with whom he contracted, for what he promised to pay was part of the consideration he agreed to pay for the policy. It was none the less his own debt that he promised to pay, because the person with whom he dealt, instead of requiring that the money be paid to him, required that it be paid to a third person. We need not, however, discuss the question at length; for the law, as many decisions assert, is decisively against the appellant. *Wolke v. Fleming*, 103 Ind. 105, 2 N. E. Rep. 325; *Windell v. Hudson*, 102 Ind. 521, 2 N. E. Rep. 303; *Railway Co. v. Caldwell*, 98 Ind. 245; *Kodembarger v. Bramblett*, 78 Ind. 213; *Manufacturing Co. v. Porter*, 75 Ind. 428; *Campbell v. Patterson*, 58 Ind. 66; *McDill v. Gunn*, 43 Ind. 315; *Davis v. Calloway*, 30 Ind. 112; *Day v. Patterson*, 18 Ind. 114. The case before us is stronger than any of the cases cited, for here the appellees were the holders of an interest in the property transferred to the appellant. There was a consideration for Leake's promise,—the assignment of the policy to him. The assignment of a policy of insurance is a valid consideration for a promise. It is not material whether the consideration moved from the appellees or from Hook. It is sufficient if Leake obtained the consideration for which he contracted. It appears, however, that a consideration moved from the appellees as well as from Hook, for they consented to the assignment, and yielded their prior rights. The promise of Leake is to pay the debt due the appellees at once. There is nothing in the agreement warranting the conclusion that he was not to pay until after Hook's death. The answer charges that the promise of the appellant was obtained by the fraud of one of the appellees. Several objections are urged against the answer by the appellees, but we deem it necessary to consider only one of them. The objection that the answer does not tender back the policy, nor offer to return it, is fatal. The appellant cannot avoid his promise and still retain the policy. It is said by counsel that the appellant has an equitable interest in the assignment, and from this their conclusion is that he has a

right to retain the policy, and still avoid his contract. This argument is plainly fallacious. A contract cannot be affirmed in part and rejected in part. It must be totally repudiated, or not repudiated at all. The appellees had a right to the policy under the prior assignment, and this right must be fully restored to them, or the appellant must pay what he agreed to pay in his contract with them and their debtor. Judgment affirmed.

(115 Ind. 474)

BRIGHAM *et al.* v. HUBBARD *et al.*

(Supreme Court of Indiana. September 21, 1888.)

1. FRAUDULENT CONVEYANCES—PREFERENCES—HUSBAND AND WIFE.

A husband, at the time he conveyed property to his wife, was indebted in the sum of \$3,700, excluding his indebtedness to her, which was \$700. The value of his property, above incumbrances, was \$8,000. In the conveyance to his wife, as well as in other conveyances, he preferred some of his creditors as against others, but he was attempting to pay his debts so far as possible, and was not shown to have done anything dishonest. His wife supposed he had ample means with which to pay his debts. Held, that the husband had a right, in good faith, to prefer some of his creditors, including his wife, and she a right to accept the preference, and that the conveyance was not fraudulent.¹

2. SAME—VALUE OF PROPERTY CONVEYED.

To ascertain how much property was attempted to be placed beyond the reach of creditors by the conveyance of a husband to his wife, the value of the wife's one-third interest in the property, and the value of the husband's exemption, should be deducted from the total value; and where the value thus reduced does not exceed the price paid by the wife, the conveyance will not be set aside.

3. EVIDENCE—MADE COMPETENT BY EXAMINATION OF ADVERSE PARTY.

A party who voluntarily elicits facts, on cross-examination, cannot complain that the opposite party was improperly allowed to introduce evidence of such facts.

Appeal from circuit court, Henry county; M. E. FORKNER, Judge.

L. P. Newby and J. M. Morris, for appellants. T. B. Redding and Wm. O. Barnad, for appellees.

ZOLLARS, J. In December, 1884, Charles S. Hubbard, appellee herein, conveyed real estate to his wife, his co-defendant below and co-appellee here. Appellants, to whom he was indebted, subsequently instituted this action against him and his wife, to set aside the conveyance as fraudulent as against them and his other creditors. The cause was tried by the court, and resulted in a finding and judgment in favor of the defendants for costs.

Appellants contend that the judgment is not sustained by sufficient evidence. We have read all of the evidence carefully, and are well satisfied that the judgment cannot be reversed by reason of its insufficiency. It is so well settled by the decisions of this court that a judgment will not be reversed upon the weight of the evidence, if there is evidence fairly tending to sustain it, that it is not necessary to cite cases, nor, indeed, to restate the rule. Here the evidence not only tends to sustain the finding and judgment, but makes it quite apparent that the court below ruled correctly in awarding judgment in favor of appellees for costs. So far as shown by the evidence before us, Charles S. Hubbard, at the time of the conveyance to his wife, was indebted in the sum of about \$8,700. If the amount which he and his wife claim he was indebted to her is included, his total indebtedness was about \$9,400. Rating the property conveyed to the wife at the value placed upon it by appellants, the total value of his property at that time, above incumbrances, was near \$8,000. He was unable to pay his debts at that time,—was insolvent.

¹ A conveyance made by a debtor in failing circumstances to his wife, in payment of a *bona fide* debt proportionate to the value of the property conveyed, no use being reserved to the debtor, is valid against creditors. *Whaun v. Atkinson*, (Ala.) 4 South. Rep. 681, and note; *Cooper v. Bank*, (Kan.) 18 Pac. Rep. 937, and note; *Manufacturing Co. v. Mastin*, (Iowa), 39 N. W. Rep. 219, and note; *Smith v. Sieberling*, 85 Fed. Rep. 677, and note.

But, notwithstanding that fact, we think that the evidence fails to show that his purpose in making the conveyance to his wife was to defraud his creditors. In the conveyance to her, as in other conveyances made soon afterwards, he preferred some of his creditors as against appellants, but he seems to have been engaged in an effort to pay his debts so far as possible. For example, one piece of property, worth about \$600, he conveyed to a creditor to whom he was indebted in that amount. He mortgaged his stock of boots and shoes, of the value of about \$5,000, to other creditors, to whom he was indebted in that amount. The stock went in payment of those debts. His real estate in Indianapolis was already under mortgage. What became of it is not shown. The probability is that the mortgagees finally took it. At least, he is not shown to have done anything dishonest as connected with it. He had a right to give a preference to some of his creditors, including his wife, as against others, and such preference will be upheld, if untainted with fraud. *Grubbs v. Morris*, 103 Ind. 166, 2 N. E. Rep. 579; *Hoes v. Boyer*, 108 Ind. 494, 9 N. E. Rep. 427; *Proctor v. Cole*, 104 Ind. 373, 3 N. E. Rep. 106, and 4 N. E. Rep. 303. If it should be conceded that Hubbard had a fraudulent intent in the conveyance to his wife, there is no evidence at all that she had any notice of such intent. As already stated, at the time of the conveyance to her, he was engaged in selling boots and shoes, and had a stock of the value of \$5,000. She testified that she knew he was indebted to Frank White, but there is no evidence that she knew the amount of the indebtedness, or had any suspicion even that he was not able to pay it at any time. She was settled in the belief that he had ample means with which to pay all of his debts. We have not been cited to the evidence, and, after a diligent search, have been unable to find any, that he was indebted to Frank White in any amount. But if there was such an indebtedness, and she knew of the amount, that alone would not overthrow the conveyance to her. The debt from Hubbard to her being *bona fide*, she had a right to accept a preference. *Dice v. Irwin*, 110 Ind. 561, 11 N. E. Rep. 488; *Cornell v. Gibson*, 114 Ind. 144, 16 N. E. Rep. 180. Hubbard knew that he was insolvent, and in making the conveyance to his wife doubtless intended to give her a preference, as he subsequently preferred other creditors. The conveyance to Mrs. Hubbard seems to have been first suggested by Mr. Butler, a brother-in-law, who was Hubbard's attorney, and knew of his insolvent condition. He suggested to her that she had better have a deed for the property, as she had no security for the amount which her husband owed her, but he did not inform her of her husband's insolvency. He also suggested the matter to Hubbard, and wrote the deed, which was soon after executed.

It is contended by appellants that the price paid by Mrs. Hubbard was inadequate, and that such inadequacy is an evidence of fraud. We do not think so. In 1857 Mrs. Hubbard received \$200 from her father. In 1861 she received the further sum of \$100 from him. These sums she turned over to her husband, to be used in the construction of the house which was included in the conveyance to her from her husband. It was so used. After her father's death, in 1876, she received \$422 from his estate. Of that amount she again turned over to her husband \$122, to be used in repairing the property, and it was so used. For the balance (\$300) he gave her his note, drawing 6 per cent. interest. It is not necessary for us to decide whether or not Mrs. Hubbard could have coerced a payment to her by her husband of the amounts thus used in the construction and repair of the house, nor whether or not there was such a moral obligation to pay it resting upon the husband as would have afforded a good consideration for the conveyance to her. See *Sedgwick v. Tucker*, 90 Ind. 271, and cases cited; *Proctor v. Cole*, 104 Ind. 373, 3 N. E. Rep. 106, and 4 N. E. Rep. 303. If the sums thus used in the construction and repair of the house, with interest thereon, should be charged against Hubbard as a debt due to his wife, his indebtedness to her was at least \$700, as

she testified it was at the time the deed was executed. But it is not necessary to charge him with those sums in order to uphold the conveyance, and hence we do not decide the questions above suggested. So far as concerns the number of witnesses, the preponderance of the evidence is that the property conveyed to Mrs. Hubbard was not worth over \$1,000, if, indeed, that much. In support of the judgment it ought to be assumed that the court below found that the property was not worth over \$1,000. The note for \$300 was made in 1876. The conveyance was made in December, 1884. From the date of the note to the date of the conveyance was about eight years. Two years' interest had been paid. There was, therefore, about six years' interest due, which amounted to about \$108, making the total amount due upon the note about \$408. That was the amount which Mrs. Hubbard paid for the property, leaving out of the calculation the other sums above mentioned. The difference between the amount thus paid and the value of the property was \$592. But it must be remembered that, under our statute, the wife's one-third interest in the real estate could not have been subjected to sale, and that upon the sale of the property upon execution, in satisfaction of the husband's debts, and the making of the deed in pursuance of such sale, she would have been entitled to claim the one-third in severalty. Two-thirds of the property only, therefore, was subject to sale upon execution in satisfaction of Hubbard's debts. Two-thirds of one thousand is \$666.66. Hubbard was a married man and a householder, and as such, under our statutes, was entitled to hold, as exempt from execution, property of the value of \$600. Had the property conveyed to his wife been offered for sale, upon execution, as his property, he could have claimed from it, or out of the proceeds of it, \$600. In ascertaining, therefore, how much of his property subject to sale, upon execution, really passed to his wife by the conveyance to her, her one-third interest and the amount exempt by law from execution must be deducted from the value of the real estate thus conveyed. Adding the wife's one-third, \$333.33, to the amount exempt from execution, we have \$933.33. There would thus be left subject to sale for Hubbard's debts only \$66.67 in value. That would have been all that his creditors could have reached and held as against the wife's interest and Hubbard's claim for an exemption. An execution had been issued against Hubbard's property prior to the institution of this action, and was levied upon the personal property which he then owned. He claimed his exemption, and the whole of the property so levied upon, amounting to \$319 in value, was set off to him. Assuming that, if the conveyance to his wife had not been made, the real estate so conveyed would have been taken under an execution, and that Hubbard would have claimed his exemption from the personal property, as he did, he would still have been entitled, and would yet be entitled, to claim from the real estate the difference between \$600 and \$319, the value of the personal property so set off to him. He would thus have been entitled, and would yet be entitled, to claim from the real estate \$281 in value. That amount, added to the wife's one-third, would make \$614.33, to be deducted from \$1,000, the value of the real estate, in order to ascertain just how much was placed, or was attempted to be placed, beyond the reach of creditors by the conveyance to the wife. The difference between \$1,000 and \$614.33 is \$385.67. Upon the assumption last above that amount, and that only, the creditors could have reached by legal process, had no conveyance been made to the wife. Without any question she paid more than that sum for the real estate, by the surrender of her note for \$300 and the accumulated interest, amounting in all to about \$408. It will thus be seen, also, that no possible benefit could accrue to the creditors, should the conveyance to Mrs. Hubbard be set aside. When such is the case, a court of equity will not interfere. *Smith v. Selzer*, 114 Ind. 229, 16 N. E. Rep. 524. It is suggested, rather than argued, that the court below erred in admitting certain testimony by Charles Butler. As already stated, he was a brother-in-

law of the appellees, and the attorney for Hubbard. In response to a question by counsel for appellee, he was allowed to state that, prior to the execution of the deed to Mrs. Hubbard, he suggested to her that, as her husband was indebted to her, she had better have a deed from him for the property here in dispute. Without examining the questions further, it is entirely sufficient to say that the same conversation between Butler and Mrs. Hubbard was drawn out by appellants, upon the cross-examination of Mrs. Hubbard. They are therefore in no condition to object to appellees' bringing forward the same evidence in the examination of Butler. Nor could they have been injured by a reproduction of the facts which they had thus voluntarily elicited in the cross-examination of Mrs. Hubbard. Having found no error in the rulings of the court below, the judgment is affirmed, with costs.

(116 Ind. 317)

LANIER *et al.* v. WALLACE *et al.* ¹

(*Supreme Court of Indiana*. September 21, 1888.)

PARTNERSHIP—FIRM AND INDIVIDUAL CREDITORS—CONVEYANCE BY PARTNER TO FIRM—FRAUDULENT CONVEYANCE.

A conveyance of separate property, executed in good faith by a partner, in payment of or as security for a debt owing by him to the firm, is valid as against his individual creditors, and inures to the receiver of the firm for the benefit of the firm creditors; and a firm creditor, for whose debt such partner is also individually liable as surety, is not entitled to priority of payment over the other firm creditors, out of the property conveyed to the firm by such partner; the rule that a firm creditor, for whose debt one of the partners is also individually liable, is entitled to participate in the firm assets, to the exclusion of individual creditors, and in the individual assets of the partner to the exclusion of firm creditors, not applying.

Appeal from superior court, Marion county; NAPOLEON B. TAYLOR, Judge. *Baker, Hood & Hendricks*, for appellants. *Harrison, Miller & Elam*, for appellees.

MITCHELL, J. Prior to the 15th day of July, 1884, Stoughton A. Fletcher, Thomas H. Sharpe, Ingram Fletcher, and Albert E. Fletcher were partners, carrying on a general banking business in the city of Indianapolis, under the firm name of Fletcher & Sharpe. The firm became insolvent, and upon the application of one of the partners William Wallace, Esq., was, on the date above mentioned, duly appointed by the superior court of Marion county to take charge of the assets of the firm as receiver. During the pendency of the receivership, Winslow, Lanier & Co., bankers, of the city of New York, filed an intervening petition, in which they represented that the firm of Fletcher & Sharpe was indebted to them in a large amount, which indebtedness was evidenced by two promissory notes executed by the firm, and secured by the separate indorsements of three of the partners individually. The intervenors asserted the right to participate ratably in the assets of the firm, and also to be preferentially paid any balance of their claim remaining unpaid out of the proceeds of certain individual property which, they averred, those members of the firm who had become liable as indorsers, had transferred to a trustee, for the benefit of the firm, prior to the declaration of insolvency, and which, it was alleged, had since been transferred to the receiver. There was a hearing upon issue taken, and upon due request the court found the facts specially, and stated conclusions of law thereon, adverse to the claim of the intervenors for a preference. The only facts specially found material to the determination of the questions involved are, in substance, that on the 21st day of January, 1884, the persons above named, having carried on the banking business as partners under the firm name of Fletcher & Sharpe, for the period of 10 years or more, entered into a new partnership agreement, at which time, as subsequent events proved, the firm, as well as the individual members thereof, although owning a large amount of property, were of doubtful solv-

¹ Rehearing denied.

ency, if they were not, indeed, actually insolvent. Two of the partners, viz., Ingram and Albert E. Fletcher, were each largely indebted to the firm, the debt of the first-named being \$448,286, while that of the last-named amounted to \$300,000 or thereabouts. Each of the above-named partners owned a large amount of individual property, which they, as well as the other members of the firm, believed would sell for more than sufficient to pay the amounts due from them, respectively, to the firm. It was accordingly stipulated, as part of the new agreement, that Ingram and Albert E. Fletcher should severally convey and transfer all their individual property, real and personal, to a trustee in trust, to be sold and converted into money by the firm, and the proceeds applied to the liquidation of their respective debts due the firm, and the residue, if any, placed to the credit of each as capital stock. It was also agreed that Thomas H. Sharpe, one of the partners, should convey the undivided one-half of a certain bank building owned by himself and the two Fletchers above named, as tenants in common, to the firm, subject to an incumbrance which it was stipulated the firm should pay. In pursuance of the agreement above mentioned, and upon the considerations therein named, and no other, the several partners, their respective wives joining, made conveyances of their individual real estate, according to the terms of the new agreement, the conveyance by Sharpe having been made to the firm on the 23d day of January, 1884, while the deeds from the Fletchers to the trustee were executed on the 2d day of February, 1884. The trustee subsequently conveyed the Fletcher property to the receiver. The value of the property conveyed by Ingram and Albert E. Fletcher did not, in either case, equal the amount due from them, respectively, to the firm. The court finds that the conveyances were made in good faith, in order to provide for the payment of debts actually due the copartnership from the several partners, and to enable the firm to pay its debts, and carry on its business. Afterwards, in April and June, 1884, Fletcher & Sharpe made two notes, one for \$25,000, the other for \$20,000, both payable to the firm of Fletcher & Sharpe. These notes were indorsed by the firm, whose indorsement was followed in regular course by that of Thomas H. Sharpe, Ingram Fletcher, and Albert E. Fletcher. Upon the notes so indorsed, the intervenors, Winslow, Lanier & Co., loaned to the firm of Fletcher & Sharpe the amount of money specified in each note, respectively. The intervenors did not know of the conveyances above mentioned, made by the several partners to the firm of Fletcher & Sharpe at the time of making the loan, the indorsement of the partners having been accepted in order to obtain the security of their personal liability on the notes. No inquiry was made by Winslow, Lanier & Co. concerning the individual property of the several members of the firm of Fletcher & Sharpe, nor were there any representations made by any member of the latter firm in that regard. Subsequently a receiver was appointed by the Marion superior court, who took possession of all the property and assets of the firm, including the property conveyed to the firm, and to the receiver, as above mentioned, in pursuance of the partnership agreement made on the 21st day of January, 1884.

The question is whether or not, upon the foregoing facts, the intervenors were entitled to priority of payment over other firm creditors, out of the property conveyed to the firm by the several partners. There seems to be no dispute, as, indeed, there could not well be, upon the proposition that a creditor who holds a note of which a firm are the makers, and one or more members thereof indorsers, has in his hands a valid, joint obligation against the firm, and at the same time a distinct, several, and separate obligation against those who signed as indorsers. This result flows from the fact that the contract of an indorser is entirely independent and distinct from that of the maker, each contract being in itself, when the indorsement is in regular course, conclusive in its legal import. The creditor holding a note so made and indorsed may therefore pursue his remedy against the partners as makers, and he may also

proceed against those individually liable as indorsers. When the property of the firm, or the individual estates of the members bound as indorsers, is being judicially administered, the creditor is entitled to participate with the partnership creditors in the joint estate, and he may at the same time avail himself of any appropriate remedy he would otherwise have against the indorsers, or their respective estates. He may receive dividends from the joint estate as a partnership creditor and from the separate estate of the partners liable on their contract of indorsement, as an individual creditor. *Wilder v. Keeler*, 3 Paige, 167-176; *Mead v. Bank*, 6 Blatchf. 186; *Emery v. Bank*, 3 Cliff. 507; *In re Bradley*, 2 Biss. 515; *In re Babcock*, 3 Story, 399. This is upon the principle that one who holds two independent obligations as security for a debt is entitled to avail himself of both until the debtor is once completely satisfied. Having established the right of a creditor, who holds the note of a firm, indorsed by some or all of its members, to participate in the joint estate of the partners, to the exclusion of individual creditors, as well as in the separate estate of the indorsers, to the exclusion of partnership creditors, and resting their ultimate right for preference on this proposition, counsel for the intervenors plausibly contend that since the conveyances of their individual property, made by the several members of the firm of Fletcher & Sharpe, in pursuance of the new partnership agreement, were intended merely as security for debts due from those members to the firm, such conveyances, although absolute in form, constituted in fact only mortgages. Therefore, it is said, the property thus conveyed remained the individual property of the several members, subject only to a mortgage in favor of the firm, notwithstanding the conveyances. Hence, the argument proceeds, the rights of the partnership creditors having become fixed and vested in the partnership property by the appointment of a receiver, the correlative rights of the individual creditors in the individual property, being compensatory, must have become fixed and vested in the individual property of the several members at the same time. The conclusion is said to follow, since the intervenors, who occupy the double character of individual and partnership creditors, have thus obtained a vested right in or lien upon the individual as well as the partnership property, that neither the insolvent firm of Fletcher & Sharpe, nor the receiver, will be bound to assert the prior mortgage in favor of the firm, upon the separate property of the individual members, as against the subsequent lien of the intervenors, who are also creditors of the firm. The joint creditors represented by the receiver, it is said, have no rights except such as they derive by subrogation from Fletcher & Sharpe, and since the latter could not have come into competition with the intervenors, their own creditors, in obtaining payment out of the individual property conveyed as above, their joint creditor cannot do so. It is undoubtedly true that a debtor will not be permitted to avail himself of a prior security, if to do so would defeat the collection of a debt which he is legally or equitably bound to pay. Where property is incumbered as security for the payment of two debts, if the holder of the first lien is under a duty ultimately to pay the debt secured by the second, it would be manifestly inequitable to permit him, in case the property was insufficient to pay both, to set up the prior lien, to the discomfiture of his own creditor. Thus, if a partner borrow money on his individual security or credit, although for the use of the firm of which he is a member, while he might have a partner's lien *inter sese*, he has none against the firm creditors, because he himself owes the joint debts due the creditors of the firm. 2 Lindl. Partn. 683; *Ketchum v. Durkee*, 1 Hoff. Ch. 538. Upon like principles, the assignee of the last series of notes secured by mortgage is entitled to preference over the mortgagee, who retains a prior note, in case the latter became liable for the payment of the last note by his contract of indorsement. *Wilber v. Buchanan*, 85 Ind. 42; 2 Jones, Mortg. § 1701. The facts found by the court, however, do not make the present a case for the application of the principles above

stated. Without conceding that the conveyance of their separate property by the individual members of the firm of Fletcher & Sharpe, in pursuance of the agreement above referred to, and dissenting entirely from the view that the appointment of a receiver of the assets of the firm in any way affected the relation of the individual creditors to the separate property of the several members, so as to give those creditors a vested right in or lien upon the separate property of the partners, yet, if these points were conceded to the intervenors, we are unable to see how it would aid their purpose, unless the conveyances referred to were invalid and of no effect as against individual creditors. Whether the deeds operated as absolute conveyances, or as mortgages, there is no question but that they were executed some months prior to the appointment of the receiver, and before the intervenors became creditors either of the firm of Fletcher & Sharpe or of any of its individual members. Nor is there any dispute but that the conveyances were made either to pay or secure actual subsisting debts due from the owners of the property, respectively, to the copartnership. The property having been transferred to secure the payment of *bona fide* debts due the firm long before the receiver was appointed, as soon as a receiver was appointed it vested in him, for the benefit of the creditors of the firm. The effect of the conveyances very clearly was to convert that which was theretofore individual property into property belonging to the firm. Debts due from the individual members of a partnership, like other debts due the firm, become assets in the hands of a receiver, who stands in some respect as assignee of the firm property, and are to be collected and applied to the payment of firm debts accordingly. If such debts are secured by mortgage, granting that the conveyances in question constituted mortgages only, or otherwise the security, like the debt, stands for the benefit of the firm creditors, unless the security was taken in violation of the rights of individual creditors. The inquiry thus ultimately comes to this: is a conveyance of separate property, executed in good faith by a partner to secure a debt owing by him to the firm of which he is a member, valid as against the individual creditors of the partner? Upon principle and authority this question must be answered in the affirmative.

It is settled everywhere that when the assets of a partnership, or the individual property of the members of a firm, are brought under the jurisdiction of a court for judicial administration, the equitable rule of distribution will be applied, and the partnership assets will be devoted, first, to the payment of the firm debts, and the individual property of the several partners to their individual debts, respectively. But where the partnership assets remain under the control of the partners, they have the power to appropriate any portion of it to pay or secure the individual debts of the members of the firm. Thus, in *Fisher v. Syfers*, 109 Ind. 514, 10 N. E. Rep. 306, this court said: "Where debts are fairly owing by either partner individually, the mere preference of individual over partnership creditors, by the execution of a chattel mortgage in the firm name, or by authority of the partners, upon the property of the firm, is not of itself such a fraud upon the partnership creditors as will authorize the setting aside of the chattel mortgage at the suit of the creditor." *Bank v. Sprague*, 20 N. J. Eq. 13; *Kirby v. Schoonaker*, 3 Barb. Ch. 46; *Kennedy v. Bank*, 23 Hun, 494; Jones, Chat. Mortg. § 44; *In re Kahley*, 2 Biss. 383. So, in the same decision, it is said: "The rule that obtains in the distribution of the estates of partners, and under which partnership creditors are entitled to priority of payment out of the partnership assets, is an equitable doctrine for the benefit and protection of the partners, respectively. Partnership creditors have no lien upon partnership property. Their right to priority of payment out of the firm assets, over the individual creditors, is always worked out through the liens of the partners." *Warren v. Farmer*, 100 Ind. 593; *Trentman v. Swartzell*, 85 Ind. 443. Upon the death of one partner, or where the firm becomes bankrupt, or where the

partnership assets are being administered by a court, the rule of equitable distribution is applicable to its fullest extent. Where, however, the partners have the possession and control of their own property, they have the right to make any honest disposition of it they see fit. Each has the right to waive his equitable lien, and together they may sell, assign, or mortgage the property of the firm to pay or secure either an individual debt of one of the partners or the debts of the firm. The equity of the creditors is a derivative one, and arises out of the principles of subrogation, entitling them to enforce the equities subsisting between the partners, so long as the right of any of the partners has not been waived. But the partners may waive their rights either in the partnership property or that owned by them individually. *Dunham v. Hanna*, 18 Ind. 270; *Case v. Beuregard*, 99 U. S. 119, and cases cited. It being thus settled that partners, while they remain in the possession and control of partnership property, and before it is brought under the jurisdiction of a court for administration, may create liens upon the property, or appropriate it to pay or secure the individual debts of the partners, the correlative right of an individual partner, to deal in like manner with his own separate property, and appropriate it to pay or secure his own debts to the firm as a debt owing by the firm to a third person, would seem to follow as a matter of course. Thus, in *Jackson v. Cornell*, 1 Sandf. Ch. 348, speaking of a general assignment by an insolvent partner, in which the assignor gave preference to certain creditors of the firm, to the exclusion of his own, the vice-chancellor said: "Let the partner actually apply his own property as he thinks proper while he administers it himself, but when he avails himself of the lenient provisions of our law, which enables him to prefer such creditors as he pleases, on making an assignment and to select his own trustee, let us require him to avoid violating the plainest principles of equity." This decision, while holding that a court of equity will neither tolerate nor administer a general assignment by a partner of his separate property, in which he prefers partnership over individual creditors, nevertheless fully recognizes the right of a partner to "apply his own property as he thinks proper, while he administers it himself." The limitation upon the power of partners or of individuals to deal with or dispose of partnership or individual property, while it remains in the possession and under the dominion of the owners, must, in either case, be that the disposition or appropriation be honestly made, without any fraudulent intent to divert the property from the payment of their *bona fide* debts, as to injure their creditors, and with no purpose to secure some benefit to themselves, presumably, by the arrangement. That the disposition results in the payment of one *bona fide* debt to the exclusion of another creditor, whose demand is equally meritorious, is of no consequence. *Bedell v. Chase*, 34 N. Y. 386; *Gregory v. Harrington*, 33 Vt. 241, *Covanhovan v. Hart*, 21 Pa. St. 495; *Smith v. Selzer*, 114 Ind. 229, 16 N. E. Rep. 524. Whatever a partner may do with his individual property in respect to paying or securing debts of the firm, it cannot be doubted that he has the right, as was done in the present case, to appropriate it to the payment or security of his own debt to the firm of which he is a member. We are thus led to the conclusion that the conveyances by the individual members of their separate property to the firm of Fletcher & Sharpe, whether those conveyances be regarded as having been made in payment of or as security for debts due the firm, or whether they be considered as advancements made by the several partners to the capital stock of the firm, were valid and effectual as against individual creditors, to transfer a vested interest in the property thus conveyed to the firm as of the date on which the conveyances were executed. Having seen that the conveyances in question were executed while the several partners were in control of and administering their own property, long before the assets of the firm came under judicial administration, and that the conveyances constituted valid transfers of the property therein described

to the firm, it results that the individual property out of which the intervenors claim the right to be preferentially paid, was legitimately part of the assets of the firm of Fletcher & Sharpe when the receiver was appointed. The appointment of a receiver, the firm being insolvent, operated to all intents and purposes as an assignment of the firm assets, with all the securities incident thereto, for the benefit of the firm creditors. This being so, there is no principle of law or equity upon which it can now be said that the firm creditors shall be estopped to avail themselves of the benefit of property which the firm had the right to acquire, and which it had acquired (whether in payment or as security is immaterial) upon an adequate consideration paid. Whether, in case the controversy were between the intervenors and Fletcher & Sharpe, the latter could be estopped to assert their prior right to the property in question, we do not now decide. Fletcher & Sharpe having become insolvent, and having in effect assigned their partnership effects for the benefit of their creditors, the receiver representing an equal equity, and, having the legal title in dispute, cannot be postponed to the claims of an individual creditor. Where the equities are equal, he is in the situation of advantage who holds the prior legal right. It is only necessary to say, in conclusion, that we have fully considered what has been said in relation to the fraudulent character of the conveyances referred to, as to future creditors, and, without stating our reasons at large, our conclusion is that it does not appear, either in the facts found or in the evidence, that the contention of the intervenors in that respect is maintained. The conveyances seem to have been made in good faith for the benefit of the creditors, without any reservation or advantage to the grantor. The judgment is therefore affirmed, with costs.

(116 Ind. 188)

GRIMSLEY v. STATE ex rel. COHEN et al.

(Supreme Court of Indiana. September 22, 1888.)

TOWNS—TRUSTEES—BONDS—LIABILITIES—ILLEGAL TOWNSHIP NOTES.

Where notes of a township have been wrongfully and illegally issued by a township trustee, a *bona fide* holder of such notes has no right of action on the official bond of the trustee, under section 2 of act of March 5, 1883, (Acts Ind. 1883, p. 114,) providing for such liability only where the trustee contracts a debt in the name or in behalf of the township, contrary to certain provisions of the statute. Following *State v. Hawes*, 14 N. E. Rep. 87.

Appeal from circuit court, Daviess county; DAVID J. HEFFRON, Judge.

Section 2 of the act of March 5, 1883, (Acts Ind. 1883, p. 114,) provides that any township trustee, who shall contract any debt in the name or in behalf of any civil or school township of which he may be trustee, contrary to the provisions of sections 1 and 2 of an act to limit the powers of township trustees, etc., approved March 11, 1875, (Rev. St. Ind. 6006, 6007,) shall be personally liable, and liable on his official bond.

Baker & Padgett, for appellant. *Gardiner & Taylor*, for appellees.

ELLIOTT, J. The relators sought and received a recovery against the appellant, upon his official bond as township trustee. It was alleged, among other things, that he had wrongfully and illegally executed promissory notes of the township to R. B. Pollard. The relators base their claim to a recovery on the fact that they are good-faith purchasers of the notes, and were misled by the wrongful acts of the township trustee. The claim is without foundation. The notes were void in their inception, and this the relators were bound to know, as matter of law. They cannot, therefore, have any cause of action upon the official bond. Whether they may maintain a different action, we do not decide. The question is fully discussed in *State v. Hawes*, 112 Ind. 323, 14 N. E. Rep. 87, and it is unnecessary for us to again discuss it. Judgment reversed, for the reason that the complaint does not state a cause of action.

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